

OPINION OF ADVOCATE GENERAL  
LÉGER

delivered on 19 March 2002<sup>1</sup>

1. The present reference for a preliminary ruling seeks to determine the conditions under which Member States may allocate grants to undertakings which provide local public transport services.

I — The relevant provisions

A — *The Community provisions*

2. The relevant provisions for the consideration of the dispute are those governing State aid and transport by land.

The Bundesverwaltungsgericht (Federal Administrative Court) (Germany) raises several questions relating to the interpretation of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC), Article 77 of the EC Treaty (now Article 73 EC) and Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway,<sup>2</sup> as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991<sup>3</sup> (hereinafter ‘Regulation No 1191/69’ or ‘the Regulation’).

3. Article 92(1) of the Treaty forbids State aids which distort or threaten to distort competition. It provides:

‘Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market’.

<sup>1</sup> — Original language: French.

<sup>2</sup> — OJ, English Special Edition 1969 (I), p. 276.

<sup>3</sup> — OJ 1991 L 169, p. 1.

4. In the transport sector, Article 74 of the EC Treaty (now Article 70 EC) provides that the objectives of the Treaty are to be pursued in the framework of a common transport policy. Article 75 of the EC Treaty (now, after amendment, Article 71 EC) requires the Council to adopt the necessary provisions in order to implement that policy.

5. Article 77 of the Treaty concerns State aids which may be granted in the transport sector. It provides:

‘Aids shall be compatible with this Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.’

6. Regulation No 1191/69 seeks to eliminate disparities arising from public service obligations which are imposed on transport undertakings by Member States.<sup>4</sup> It requires Member States to terminate public service obligations<sup>5</sup> and lays down common rules for the maintenance of those obligations and for the granting of compensation in respect of any financial burdens which may thereby devolve on undertakings.<sup>6</sup>

7. Article 1(1) of Regulation No 1191/69 provides as follows:

‘This Regulation shall apply to transport undertakings which operate services in transport by rail, road and inland waterway.

Member States may exclude from the scope of this Regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services’.

8. According to Article 1(2) ‘urban and suburban’ services means transport services meeting the needs of an urban centre or conurbation, and transport needs between it and surrounding areas. ‘Regional services’ are defined as transport services operated to meet the transport needs of a region.

9. Article 1(3) of the Regulation lays down the principle whereby ‘[t]he competent authorities of the Member States shall terminate all obligations inherent in the concept of a public service... imposed on transport by rail, road and inland waterway’.

4 — First recital of Regulation No 1191/69.

5 — *Ibid.*, second recital.

6 — *Ibid.*, 10th and 13th recitals.

10. The provisions of Article 1(4) and (5) provide for a derogation from that principle in two situations.

On the one hand, the competent authorities may conclude public service contracts with an undertaking to ensure adequate transport services or offer particular fares to certain categories of passenger. In such cases, the public service contracts must comply with the procedures laid down in Section V of Regulation No 1191/69.

On the other hand, the competent authorities are authorised to maintain or impose public service obligations for urban, suburban and regional passenger transport services. In such cases, the administrative act must comply with the procedures laid down in Sections II to IV of Regulation No 1191/69.

11. Pursuant to Article 2 of the Regulation, 'public service obligations' means 'obligations which the transport undertaking in question, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions'. Those obligations consist of the obligation to operate, the obligation to carry and tariff obligations.<sup>7</sup>

<sup>7</sup> — These three categories of obligation are, in turn, defined in paragraphs 3 to 5 of Article 2 of Regulation No 1191/69.

12. Article 6(2) of the Regulation stipulates that decisions to maintain a public service obligation are to provide for compensation to be granted in respect of the financial burdens resulting therefrom. The amount of such compensation is determined in accordance with 'common compensation procedures' laid down in Articles 10 to 13 of Regulation No 1191/69.

13. At the procedural level, Article 17(2) of the Regulation provides that compensation paid pursuant to this Regulation is to be exempt from the preliminary information procedure laid down in Article 93(3) of the EC Treaty (now Article 88(3) EC).

## B — *The national provisions*

14. In Germany, the Personenbeförderungsgesetz (Law on Passenger Transport, hereinafter the 'PBefG') requires that a licence be obtained for the purpose of transporting passengers by regular service vehicles.<sup>8</sup> Such licence is issued to an undertaking for the purpose of guaranteeing a specific transport service.

15. The licence imposes certain obligations on the transport operator, such as that of

<sup>8</sup> — Paragraphs 1(1) and 2(1) of the PBefG.

charging the authorised tariff only, complying with the approved timetable and complying with the operating and transport conditions imposed on it by operation of law. On the other hand, it confers on the beneficiary a status bordering on exclusivity since no authorisation will be granted for a transport operation on the same line while the licence is valid.

services must be operated commercially.<sup>12</sup> That term denotes services the costs of which are covered by receipts from the carriage of passengers, moneys received pursuant to statutory provisions on compensation in respect of tariffs and the organisation of transport and from other revenue of the undertaking.<sup>13</sup>

16. It is apparent from the file that, until 31 December 1995, the German legislature expressly availed itself of Article 1(1) of Regulation No 1191/69 as regards urban, suburban and regional transport.<sup>9</sup> The Regulations of the Federal Minister for Transport of 31 July 1992<sup>10</sup> set aside the application of Regulation No 1191/69 for public transport.

Licences for commercial transport services are governed by Paragraph 13 of the PBefG. That provision lays down a number of conditions governing the granting of licences, such as the applicant's financial status and reliability, and requires that the application be rejected where the service applied for would affect the interests of the public. If there are several applicants for the same service, the competent authority must make its choice having regard to the interests of the public and, in particular, taking into account cost-effectiveness.

17. As from 1 January 1996, the German legislature introduced a distinction between transport services operated 'commercially' and transport services operated as a 'public service'.<sup>11</sup>

18. The PBefG lays down the principle that urban, suburban and regional transport

19. On the other hand, where an adequate transport service cannot be provided commercially, it may be operated as a social service.<sup>14</sup> In such cases, the third sentence of Paragraph 8(4) of the PBefG provides that 'the provisions in force of Regulation (EEC) No 1191/69 must apply'.

9 — Order for reference, p. 10.

10 — BGBl. I, 1992, p. 1442.

11 — Paragraph 6(116) of the Eisenbahnneuordnungsgesetz of 27 December 1993 (BGBl. I, 1993, p. 2378).

12 — First sentence of Paragraph 8(4) of the PBefG.

13 — Second sentence of Paragraph 8(4) of the PBefG.

14 — Third sentence of Paragraph 8(4) of the PBefG.

Transport licences operated in accordance with the public service conditions are governed by Paragraph 13a of the PBefG. Under that provision, a licence is to be issued provided it is necessary for the operation of a transport service by virtue of an administrative act or a public service contract within the meaning of Regulation No 1191/69. Further, the option chosen should be that which entails the least cost to the public. For the purpose of establishing the lowest cost, German law provides for a public tendering procedure in accordance with public procurement rules.

22. By decision of 27 October 1994, the Regierungspräsidium issued new licences to Altmark. On the same basis, it rejected the application for licences lodged by Nahverkehrsgesellschaft Altmark GmbH (hereinafter 'NVGA').

23. NVGA lodged an appeal against that decision on the grounds that Altmark was not a financially sound undertaking. It contended that the award of licences was unlawful because Altmark could not survive financially without the public subsidies it received.

## II — The facts and procedure

20. The case in the main proceedings concerns the granting of licences to operate regular bus services in the Landkreis (administrative district) of Stendal in Germany.

21. On 25 September 1990, the Regierungspräsidium Magdeburg (the competent local authority body)<sup>15</sup> issued 18 licences to the undertaking Altmark Trans GmbH ('Altmark') for passenger transport on regional lines. Those licences expired on 19 September 1994.

24. By decision of 29 June 1995, the Regierungspräsidium rejected that claim. Further, on 30 July 1996, it extended the validity of the licences granted to Altmark until 31 October 2002.

25. Accordingly, NVGA appealed to the Verwaltungsgericht Magdeburg (Administrative Court of first instance, Magdeburg) (Germany). The latter ruled that Altmark was financially sound since the foreseeable operational deficit would be covered by the subsidies paid by the administrative district of Stendal.

<sup>15</sup> — 'The Regierungspräsidium'.

26. By contrast, the Oberverwaltungsgericht (Higher Administrative Court) of Sachsen-Anhalt revoked the licences issued to Altmark. That court held that Altmark's financial soundness was no longer guaranteed since it required subsidies from the administrative district of Stendal to operate the contested licences and that those subsidies were incompatible with Community law.

The Oberverwaltungsgericht held that the German legislature had excluded the application of Regulation No 1191/69 to urban, suburban or regional transport only until 31 December 1995. After that date, therefore, the granting of subsidies had to comply with the conditions set out in Regulation No 1191/69 and, in particular, with the requirement that public service obligations should be imposed by an administrative act or public service agreement. However, that condition was not met in the instant case since the administrative district of Stendal had neither concluded any agreement with Altmark nor adopted any administrative act. The administrative district of Stendal was therefore no longer authorised to subsidise Altmark in respect of the licences issued to it.

The Oberverwaltungsgericht concluded therefore that Altmark was no longer able to operate commercially the transport services in dispute. Inasmuch as those services were dependent on public grants, they had

to be operated in accordance with public service rules and, for that reason, must fall within the scope of Regulation No 1191/69.

27. Altmark lodged an appeal against that decision on a point of law to the Bundesverwaltungsgericht. In its order for reference,<sup>16</sup> that court points out that the court hearing the appeal had failed to interpret the provisions of national law. It stated that, in German law, the fact that an undertaking required subsidies to provide a public transport service was not sufficient to preclude its commercial status as provided for in Paragraph 8(4) of the PBefG.

On the other hand, the Bundesverwaltungsgericht expresses doubt as to the interpretation to be given to Community law. Having regard to Articles 77 and 92 of the Treaty, and to the provisions of Regulation No 1191/69, it is uncertain whether the fact that an undertaking needs subsidies in order to operate a local public passenger service means that it must necessarily be defined as a 'social service' and that it must fall within the scope of application of Regulation No 1191/69.

<sup>16</sup> — English translation (pp. 11 to 13).

### III — The questions referred for a preliminary ruling

to their regional scope not to be liable a priori to affect trade between Member States?

28. In consequence, the Bundesverwaltungsgericht decided to stay the proceedings and refer the following question to the Court:

May the answer to that question depend on the specific location and importance of the relevant local transport area?

‘Do Articles 73 EC and 87 EC, read in conjunction with Regulation (EEC) No 1191/69, as amended by Regulation (EEC) No 1893/91, preclude the application of a provision of national law which permits licences to operate regular local public transport services to be granted in respect of services necessarily dependent on public subsidies without regard being had to Sections II, III and IV of the abovementioned regulation?’

2. Does Article 73 EC generally enable the national legislature to authorise public grants to make up for deficits in respect of urban, suburban or regional public transport without regard being had to Regulation (EEC) No 1191/69?

29. In its order for reference,<sup>17</sup> the Bundesverwaltungsgericht states that its question is subdivided into three parts as follows:

- ‘1. Are grants to make up a deficit in respect of local public transport services subject at all to the prohibition on aid laid down in Article 87(1) EC or must they be considered, having regard

3. Does Regulation (EEC) No 1191/69 enable the national legislature to authorise the operation of a regular urban, suburban or regional public passenger service which is completely dependent on public grants, without regard being had to Sections II, III and IV of the abovementioned regulation and to require application of these rules only where adequate transport provision is otherwise impossible?

<sup>17</sup> — English translation (p. 15).

Does that freedom allowed to the national legislature stem in particular from the fact that under the second subparagraph of Article 1(1) of Regulation (EEC) No 1191/69, as amended in 1991, it has the right to exclude urban, suburban or regional public transport undertakings completely from the scope of the regulation?’

32. The second set of questions concerns Regulation No 1191/69. They seek in essence to ascertain whether the authorities of a Member State may organise and finance a local public transport service without regard for the provisions of the Regulation regarding the maintenance of public service obligations and common compensation procedures.<sup>20</sup>

#### IV — Subject-matter of the questions referred for a preliminary ruling

30. The question referred by the Bundesverwaltungsgericht raises two sets of issues.

33. I think that the order of those questions must be reversed. Regulation No 1191/69 constitutes a *lex specialis* in relation to Articles 92 and 77 of the Treaty. It establishes a harmonised framework laying down the conditions under which the Member States may grant subsidies to offset the cost of public service obligations imposed on transport undertakings. Thus, the Regulation implements the Treaty rules governing State aid in the field of public transport services by land.

31. The first set of questions concerns the interpretation of Treaty provisions. It seeks to determine whether subsidies granted by the authorities of a Member State to offset the cost of public service obligations imposed on an undertaking operating a local passenger service constitute State aids caught by the prohibition laid down in Article 92(1) of the Treaty.<sup>18</sup> In addition, it is a matter of identifying the circumstances in which Article 77 of the Treaty may authorise the granting of such subsidies.<sup>19</sup>

34. Accordingly, the first question which arises is to determine whether Regulation No 1191/69 applies to commercially operated transport services. If it does, the German authorities will be able to grant subsidies to those services only if they satisfy the conditions laid down by that Regulation. On the other hand, if the Regulation does not apply, it will be necessary to examine the Treaty provisions relating to State aid.

<sup>18</sup> — First limb of the question for a preliminary ruling.

<sup>19</sup> — Second limb of the question for a preliminary ruling.

<sup>20</sup> — See the text of the question for a preliminary ruling and the third limb of that question.



# V — The question of the application of Regulation No 1191/69

35. By its first question, the Bundesverwaltungsgericht asks whether, on a proper construction of the second subparagraph of Article 1(1) of Regulation No 1191/69, a Member State is permitted not to apply that Regulation to a limited category of local public passenger services, such as those services operated commercially within the meaning of Paragraph 8(4) and Paragraph 13 of the PBefG.<sup>21</sup>

36. Thus, the national court seeks to establish whether the German authorities may grant subsidies to those services without complying with the conditions laid down by Regulation No 1191/69.

37. It is apparent from the file<sup>22</sup> that the German legislature has made particular use of the second subparagraph of Article 1(1) of the Regulation.

As from 1 January 1996, the German authorities have *partly* excluded the Regu-

lation. Contrary to the Regulations of 31 July 1992,<sup>23</sup> which quite simply excluded the application of the Regulation to public passenger transport, the current text of the PBefG precludes the application of the Regulation only in respect of commercial transport. Other transport, namely transport operated in accordance with public service rules, is subject to the provisions of Regulation No 1191/69.

38. The question which arises is, therefore, whether the second subparagraph of Article 1(1) permits the authorities of a Member State to exclude *in part* Regulation No 1191/69 for a limited category of local public transport services.<sup>24</sup>

23 — Cited above.

24 — During the oral procedure, the Commission contended that Regulation No 1191/69 provided for 'optional' harmonisation in the sector. Member States wishing to impose public service obligations were free to decide whether or not to apply the Regulation. The Commission did not state whether its contention was concerned solely with transport referred to in the second subparagraph of Article 1(1) of the Regulation or whether it covered all transport within the scope of application of the Regulation. In the latter case, I consider that the Commission's contention would be contrary to the objectives of Regulation No 1191/69. That Regulation seeks to eliminate the disparities arising out of public service obligations which the Member States impose on transport undertakings and which are capable of distorting competition (see the first recital of the Regulation and Council Decision 65/271/EEC of 13 May 1965 on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway (OJ, English Special Edition 1965-1966, p. 67)). The attainment of those objectives would be seriously compromised if, for transport coming within the scope of the Regulation, Member States were able to impose public service obligations without regard to the provisions of the Regulation. If that were the case, they would reintroduce the distortions in competition which the Regulation specifically seeks to eliminate. Moreover, it would be difficult to reconcile the Commission's contention with the 15th recital of the Regulation which provides: '[w]hereas the provisions of this Regulation should be applied to any new public obligation as defined in this Regulation imposed on a transport undertaking'. Finally, the Commission's contention would be contrary to Article 189 of the EC Treaty (now Article 249 EC) as that provides that regulations are *binding* in their entirety and are directly applicable in all Member States.

21 — It should be noted that under the second subparagraph of Article 1(1) of the Regulation 'Member States may exclude from the scope of this Regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services'.

22 — See, in particular, the reply of the German Government to the Court's written question. It should be noted that, with the exception of that reply, the German Government has not submitted any written or oral observations to the Court.

39. The parties to the main proceedings consider that the German authorities were entitled to exclude commercial transport from the Regulation. Referring to the principle '*in eo quod plus sit, semper inest et minus*', they contend that if the second subparagraph of Article 1(1) permits the application of the Regulation to be excluded for a complete category of transport (namely, urban, suburban and regional services), it must, *a fortiori*, permit a limited part of those services to be excluded.

41. The first judgment<sup>27</sup> concerns the interpretation of Article 28(3)(b) of the Sixth Directive.

That provision, read in conjunction with point 16 of Annex F, enables Member States to continue to exempt from VAT, for a transitional period, the supply of buildings and building land under the conditions obtaining at the time of the adoption of the Sixth Directive.

Further, Altmark refers to the Commission's reply to Mr Jarzembowski's written question.<sup>25</sup> In that reply, it is alleged that the Commission expressly indicated that the exclusion of commercially operated transport was compatible with Community law and, in particular, with Regulation No 1191/69.

At that time, property sales in the United Kingdom were exempt from VAT. Only the operations enumerated in Schedule 5 to the Finance Act 1972 were subject to VAT. Subsequent to the entry into force of the Sixth Directive, the United Kingdom amended its legislation so as to reduce the scope of the exemptions.

40. The Court has never had the opportunity to determine whether the Member States were able to provide for a part exemption from Regulation No 1191/69. In order to decide that question, I consider that the Court could draw a parallel with its case-law on the Sixth VAT Directive.<sup>26</sup> Two judgments appear to merit particular attention in that regard.

Norbury Developments Ltd considered that the contested amendment was contrary to the provisions of the Sixth Directive. It contended that the purpose of Article 28(3) was to 'freeze' the exemptions in Annex F as at the date on which the Sixth Directive

25 — Written Question P-381/95 (OJ 1995 C 270, p. 2).

26 — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1, hereinafter the 'Sixth Directive').

27 — Case C-136/97 *Norbury Developments* [1999] ECR I-2491.

was adopted. The Court rejected that interpretation for the following reasons:<sup>28</sup>

‘[T]he amendments [made to the United Kingdom’s legislation] have not widened the scope of the exemption; on the contrary, they have reduced it. Consequently, they were not adopted in disregard of the wording of Article 28(3)(b). Whilst that provision precludes the introduction of new exemptions or the extension of the scope of existing exemptions following the entry into force of the Sixth Directive, it does not prevent a reduction of those exemptions, since their abolition constitutes the objective pursued by Article 28(4) of the Sixth Directive.

It would be contrary to that objective to construe Article 28(3)(b) of the Sixth Directive narrowly, to the effect that a Member State may maintain an existing exemption but may not abolish it, even only partially, without thereby abolishing all the other exemptions. Moreover,... such an interpretation would have adverse effects for the uniform application of the Sixth Directive. A Member State might find itself compelled to maintain all the exemptions existing at the date of adoption of the Sixth Directive, even if it regarded it as possible, appropriate and desirable progressively to implement the system laid

down in the directive in the sphere under consideration’.<sup>29</sup>

42. The Court expounded identical reasoning in *Commission v France*.<sup>30</sup> In that case, the Commission alleged that France had, subsequent to the entry into force of the Sixth Directive, amended its legislation by making the right to deduct VAT on private vehicles subject to the condition that the vehicle be used for driving instruction.

The French Government contended that its legislation complied with Article 17(6) of the Sixth Directive which provides that ‘[u]ntil the above rules [adopted by the Council] come into force, Member States may retain all the exclusions provided for under their national laws when this directive comes into force’. The Court rejected the Commission’s appeal for the following reasons:

‘The same reasoning [as that employed in *Norbury Developments*, cited above] can be applied in the interpretation of Article 17(6) of the Sixth Directive. Thus,

<sup>29</sup> — Accordingly, the Court upheld the reasoning proposed by Advocate General Gulmann in Case C-74/91 *Commission v Germany* [1992] ECR I-5437, paragraph 21 and by Advocate General Fennelly in *Norbury Developments*, cited above, paragraph 32.

<sup>30</sup> — Case C-345/99 [2001] ECR I-4493.

<sup>28</sup> — Ibid., paragraphs 19 and 20.

where the legislation of a Member State, after the entry into force of the Sixth Directive, is amended so as to reduce the scope of existing exemptions and thereby brings itself into line with the objective of the Sixth Directive, that legislation must be considered to be covered by the derogation provided for by the second subparagraph of Article 17(6) of the Sixth Directive and is not in breach of Article 17(2).

In the present case, the national legislative amendment replaces a total exclusion of private cars from the right to deduct VAT with authorisation for partial deduction, that is to say in respect of vehicles and machines used exclusively for driving instruction.

It follows that the amendment so made to the French legislation has the effect of reducing the scope of existing exemptions and bringing that legislation into line with the general regime of deduction set out in Article 17(2) of the Sixth Directive'.<sup>31</sup>

43. In my opinion, the following principle can be deduced from the foregoing case-law. Where a directive seeks to introduce a harmonised regime in a specific area and

where it authorises Member States to provide for derogations therefrom, States availing themselves of that possibility may, following the entry into force of the directive, amend their legislation in order to reduce the scope of the exemptions and thereby comply with the objectives pursued by the directive. On the other hand, a Member State cannot, following the entry into force of the directive, extend the scope of the exemptions provided for by its national law<sup>32</sup> nor reintroduce a derogation which it had initially abolished.<sup>33</sup>

44. It seems to me that that principle can be applied in its entirety to the instant case.

45. First, we have seen that the objective of Regulation No 1191/69 is to introduce a harmonised framework into the sphere of the public service obligations imposed by Member States on undertakings which provide land transport services. It lays down the conditions under which Member States may impose public service obligations and grant subsidies to offset the charges arising from those obligations for undertakings.

46. Second, the Regulation authorises Member States to provide for derogations from the rules which it lays down. The

31 — *Ibid.*, paragraphs 22 to 24.

32 — Case C-40/00 *Commission v France* [2001] ECR I-4539, paragraph 17.

33 — *Ibid.*, paragraphs 18 and 19.

second subparagraph of Article 1(1) provides that Member States may exclude urban, suburban or regional services from the scope of the Regulation.

47. Third, the German authorities, following the entry into force of the Regulation,<sup>34</sup> amended their legislation with a view to reducing the scope of the exemptions provided for by national law.

We have seen that, until 31 December 1995, the German legislature expressly excluded all local public passenger services from the scope of the Regulation.<sup>35</sup> However, as from 1 January 1996, the German authorities have limited that exclusion to commercial transport services. It follows that transport services operated as a public service now come within the scope of the Regulation.

48. Fourth, that legislative amendment contributes to the attainment of the objectives pursued by Regulation No 1191/69.

49. At this point, I would note that the Regulation seeks to eliminate the disparities resulting from the public service obligations which the Member States impose on undertakings providing transport services by land and which are capable of substantially distorting competition. However, for local and regional public transport services, the Community legislature has brought about gradual harmonisation and liberalisation.

Initially, it quite simply excluded local and regional transport from Regulation No 1191/69. The first version of the Regulation, adopted in 1969, provided that that Regulation 'is at present to apply to... undertakings not mainly providing transport services of a local or regional character'.<sup>36</sup>

Subsequently, in 1991, the Council introduced the principle whereby local and regional transport came within the scope of application of Regulation No 1191/69. However, that principle is not absolute since the second subparagraph of Article 1(1) of the Regulation permits Member States to continue to exclude urban, suburban or regional services.<sup>37</sup>

36 — Twentieth recital of Regulation No 1191/69. It was envisaged that the Council would determine, within a time-limit of three years, the action to be taken in respect of public service obligations for local and regional transport services.

37 — The second subparagraph of Article 1(1) was inserted into Regulation No 1191/69 by Regulation No 1893/91, which entered into force on 1 July 1992.

34 — The second subparagraph of Article 1(1) of Regulation No 1191/69 entered into force on 1 July 1992, pursuant to Article 2 of Regulation No 1893/91.

35 — See paragraphs 16 to 19 of this Opinion.

Lastly, on 26 July 2000, the Commission presented a proposal for Regulation 2000/C 365 E/10 to the Council and the Parliament.<sup>38</sup> The proposal lays down the conditions under which Member States may compensate transport operators for the costs incurred in fulfilling public service requirements and under which they may grant exclusive rights for the operation of public passenger transport.<sup>39</sup> Contrary to the current version of Regulation No 1191/69, that proposal no longer permits Member States to exclude local and regional passenger transport services.

50. It follows that Regulation No 1191/69 seeks gradually to liberalise local and regional passenger services by land.

51. The amendment made by the German legislature to the PBefG contributes to the attainment of those various objectives.

First, that amendment enables distortions of competition in the German local passenger sector to be reduced. Since part of those transport services are subject to the provi-

sions of the Regulation regarding the maintenance of public service obligations and the methods of compensation, the contested amendment brings the German system in line with the objectives pursued by Regulation No 1191/69.

Second, it would seem that the contested amendment constitutes the first step towards complete liberalisation of local passenger transport services in the Federal Republic of Germany. At the hearing, the representative of Altmark stated that the Bundestag was in the process of examining proposals seeking to reduce — or even abolish — public authority involvement in the operation of local transport. If that information is correct, it would mean that the German authorities, like the Community legislature, are gradually making progress in the process of liberalising local passenger services.

52. Consequently, I consider that the German legislature was entitled to exclude commercial transport from the scope of Regulation No 1191/69. I therefore propose that the Court reply to the first question that the second subparagraph of Article 1(1) of Regulation No 1191/69 does not preclude, following its entry into force, a Member State from adopting a legislative measure for the purpose of limiting the exclusion of that Regulation to a specific

38 — Proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway [OJ 2000 C 365 E, p. 169].

39 — *Ibid.*, Article 1.

category of local passenger services by land, such as those services operated commercially within the meaning of Paragraphs 8(4) and 13 of the PBefG.

by the prohibition contained in that provision, it is necessary that:

- the measure should confer a selective advantage on certain undertakings or the production of certain goods;

53. In so far as Regulation No 1191/69 is not applicable to the transport services in question in the case in the main proceedings, the general provisions of the Treaty in respect of State aids must be examined.

- the advantage should be granted directly or indirectly through State resources;

- the advantage should distort or threaten to distort competition;

## VI — Article 92(1) of the Treaty

54. The second question concerns Article 92(1) of the Treaty. The national court asks whether subsidies granted by the authorities of a Member State 'to make up a deficit in respect of local public transport services'<sup>40</sup> come within the prohibition contained in the above provision.

- the measure should affect trade between Member States.

55. Article 92(1) of the Treaty stipulates four cumulative conditions. To be caught

56. In the instant case, the question posed by the Bundesverwaltungsgericht is concerned exclusively with the last condition. The national court asks whether contested subsidies are subject to the prohibition contained in Article 92(1) of the Treaty or whether they are to be considered, 'having regard to their regional scope, not to be liable a priori to affect trade between Member States'.<sup>41</sup>

<sup>40</sup> — First limb of the question for a preliminary ruling.

<sup>41</sup> — Ibid.

57. In principle, the Court could therefore limit itself to examining the question of the effect of the contested subsidies on intra-Community trade.

58. However, after the hearing held in the present case, the Sixth Chamber of the Court delivered its judgment in the *Ferring* case.<sup>42</sup>

59. In that judgment, the question which arose was to determine whether financial advantages granted by the authorities of a Member State in order to compensate for the cost of public service obligations imposed by them on certain undertakings constitute State ‘aid’ within the meaning of Article 92(1) of the Treaty.

On that point, the Sixth Chamber of the Court held that, where the value of the advantages granted by the public authorities does not exceed that of the costs incurred by the public service obligations, the contested measure cannot be regarded as aid within the meaning of Article 92(1). On the other hand, it ruled that, should the advantages exceed the cost of the public service obligations, those advantages do come within the scope of Article 92(1) of the Treaty in respect of the part which exceeds the stated cost of the public service obligations.

60. The *Ferring* judgment is of direct relevance to the reply that should be given to the question raised by the Bundesverwaltungsgericht.

If the reasoning expounded in that judgment is followed, the national court must first determine whether the subsidies paid by the administrative district of Stendal exceed the cost of the public service obligations arising out of the contested transport operations. The question of the effect of those subsidies on trade between Member States will arise only if — and in so far as — the value of those subsidies exceeds the cost of the public service obligations.

61. However, in the instant case, I propose that the Court should not apply *Ferring*. In my view, the interpretation given by the Sixth Chamber of the Court is such as to undermine the structure and logic of the Treaty provisions in respect of State aid.

62. Before explaining why I am inviting the Court to review the rule in *Ferring*, I shall briefly summarise the context of the case.

<sup>42</sup> — Case C-53/00 *Ferring* [2001] ECR I-9067 (hereinafter ‘the *Ferring* judgment’).



A — *The context of the Ferring judgment*

Article 90(2) of the EC Treaty (now Article 86(2) EC).<sup>46</sup>

63. The Commission's practice and the Community case-law provided different answers to the question at the centre of *Ferring*.

66. On 10 May 2000, the Court of First Instance confirmed its ruling in *SIC v Commission*<sup>47</sup> concerning the financing of Portuguese public television channels.

64. Initially, the Commission considered that subsidies designed to offset the cost of public service obligations did not constitute State aids within the meaning of Article 92(1) of the Treaty.<sup>43</sup>

The Court of First Instance held that 'the fact that a financial advantage is granted to an undertaking by the public authorities in order to offset the cost of public service obligations which that undertaking is claimed to have assumed has no bearing on the classification of that measure as aid within the meaning of Article 92(1) of the Treaty'.<sup>48</sup> The Court of First Instance pointed out that 'Article 92(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects'.<sup>49</sup> Accordingly 'the concept of aid is an objective one, the test being whether a State measure confers an advantage on one or more particular undertakings'.<sup>50</sup>

65. The Court of First Instance of the European Communities rejected that interpretation in a judgment of 27 February 1997.<sup>44</sup> The case concerned tax concessions granted by the French authorities to La Poste to compensate for costs linked to its performance of public-interest tasks. Unlike the Commission, the Court of First Instance considered that the contested measures did constitute State aids within the meaning of Article 92(1) of the Treaty.<sup>45</sup> However, it added that those measures could be justified under

67. *Ferring* is the first judgment in which the Court of Justice has ruled on the matter.

43 — See, in particular, *Droit de la concurrence dans les Communautés européennes, Volume IIB, Explication des règles applicables aux aides d'État*, 1997, p. 7, [http://www.europa.eu.int/comm/competition/state\\_aid/legislation/vol2b\\_fr.pdf](http://www.europa.eu.int/comm/competition/state_aid/legislation/vol2b_fr.pdf). See also the references cited by Advocate General Tizzano in his Opinion in the *Ferring* case, paragraph 56.

44 — Case T-106/95 *FFSA and Others v Commission* [1997] ECR II-229.

45 — Paragraphs 167, 168 and 172.

46 — Paragraphs 170 to 194.

47 — Case T-46/97 [2000] ECR II-2125.

48 — Paragraph 84.

49 — Paragraph 83.

50 — *Ibid.*

68. That case concerned a tax contribution introduced by the French authorities on the sale of medicinal preparations by pharmaceutical laboratories.

70. First, it examined ‘whether, leaving aside the public service obligations laid down by French law, exempting wholesale distributors from tax on direct sales may, in principle, amount to State aid for the purposes of Article 92(1) of the Treaty’.<sup>51</sup>

The French system of distributing medicinal preparations to pharmacies consists of two distinct channels: the first is through ‘wholesale distributors’ and the second is through pharmaceutical laboratories. French legislation imposes on wholesale distributors certain public service obligations which essentially require that they hold an adequate stock of medicinal preparations and are able to guarantee delivery within a given time-limit in a given territory. The contested operation was designed to restore balance to the conditions of competition between the two distribution channels in so far as the pharmaceutical laboratories were not subject to the same obligations as the wholesale distributors.

In that respect, the Court held that the contested tax ‘may’ meet the four conditions contained in Article 92(1).<sup>52</sup> The French authorities had conferred an economic advantage capable of strengthening the competitive position of wholesale distributors since, in the years following the introduction of the tax, ‘not only did the growth of direct sales recorded [by pharmaceutical laboratories] in the immediately preceding years cease, but the trend even reversed, with wholesale distributors recovering market share’.<sup>53</sup> Further, ‘there [could] be no doubt that a measure such as the tax on direct sales will influence trade patterns between the Member States’.<sup>54</sup>

The Tribunal des affaires de sécurité sociale de Créteil (Social Security Court) (France) had requested the Court to rule whether the contested contribution constituted a State aid within the meaning of Article 92(1) and, if so, whether it was justified under the provisions of Article 90(2) of the Treaty.

71. Second, the Court went on to examine ‘whether the specific public service obligations imposed on wholesale distributors by the French system for the supply of medicines to pharmacies precludes the tax from being State aid’.<sup>55</sup>

69. The Sixth Chamber of the Court replied to the first question by separating it into two parts.

<sup>51</sup> — *Ferring* judgment (paragraph 18).

<sup>52</sup> — *Ibid.*, paragraph 27.

<sup>53</sup> — *Ibid.*, paragraph 19.

<sup>54</sup> — *Ibid.*, paragraph 21.

<sup>55</sup> — *Ibid.*, paragraph 23.

On that point, it held that, ‘provided that the tax on direct sales imposed on pharmaceutical laboratories corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, not assessing wholesale distributors to the tax may be regarded as compensation for the services they provide and hence not State aid within the meaning of Article 92 of the Treaty. Moreover, provided there is the necessary equivalence between the exemption and the additional costs incurred, wholesale distributors will not be enjoying any real advantage for the purposes of Article 92(1) of the Treaty because the only effect of the tax will be to put distributors and laboratories on an equal competitive footing’.<sup>56</sup>

Accordingly, Article 90(2) of the Treaty cannot cover the contested tax in so far as the advantage it confers on wholesale distributors exceeds the cost of the public service obligations.<sup>58</sup>

## B — *Assessment of the rule in Ferring*

73. I do not concur with the reasoning expounded by the Sixth Chamber of the Court in *Ferring*. In my opinion, that reasoning is liable to undermine the structure and logic of the Treaty provisions in respect of State aid.

72. The Sixth Chamber of the Court then replied to the question concerning Article 90(2) of the Treaty. It held that ‘if it is the case that the advantage for wholesale distributors in not being assessed to the tax on direct sales of medicines exceeds the additional costs that they bear in discharging the public service obligations imposed on them by national law, that advantage, to the extent that it exceeds the additional costs mentioned, cannot, in any event, be regarded as necessary to enable them to carry out the particular tasks assigned to them’.<sup>57</sup>

74. The Treaty provisions in respect of State aid are laid down in accordance with a precise structure.

Article 92(1) lays down the principle of prohibiting State aid which is capable of distorting competition and affecting trade between Member States. However, the Treaty provides for several categories of exception to that principle.<sup>59</sup>

56 — Ibid., paragraph 27.

57 — Ibid., paragraph 32.

58 — Ibid., paragraph 33.

59 — Only those exceptions relevant to the present case are referred to here.

First, Article 77 of the Treaty provides, in the specific field of transport, that aid is to be compatible with the Treaty if it meets the needs of the coordination of transport or if it represents reimbursement for the discharge of certain obligations inherent in the concept of a public service.

Second, the provisions of Article 92(2) and (3) set out the categories of aid which shall be or may be considered to be compatible with the common market. Such is, in particular, the case of aid the purpose of which is cultural.

Finally, Article 90(2) of the Treaty establishes an exception in respect of undertakings entrusted with the operation of services of general economic interest. It provides that '[such] undertakings... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.

75. That said, I consider that *Ferring* essentially poses three areas of difficulty with respect to the Treaty provisions.

76. First, the grounds in *Ferring* confuse, in my opinion, two questions which are legally distinct: the question of characterising a measure as State aid and the question of justification for a State measure.

77. The objective of Article 92 of the Treaty is to prevent trade between Member States being affected by advantages granted by the public authorities which distort or threaten to distort competition.<sup>60</sup> Having regard to that objective, the Court has ruled that Article 92(1) does not distinguish between the measures of State intervention by reference to their causes or their aims but defines them in relation to their effects.<sup>61</sup> Accordingly, neither the fiscal character,<sup>62</sup> nor the social aim,<sup>63</sup> nor the general objectives<sup>64</sup> of a measure can enable it to avoid being characterised as aid within the meaning of Article 92(1) of the Treaty.

It follows that the concept of aid is an objective one. As the Court of First Instance pointed out in *SIC v Commission*,<sup>65</sup> the characterisation of a measure as

60 — See, *inter alia*, Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 26.

61 — See, in particular, *Italy v Commission*, cited above, paragraph 27; Case 310/85 *Deufil v Commission* [1987] ECR 901, paragraph 8; Case C-56/93 *Belgium v Commission* [1996] ECR I-723, paragraph 79 and Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 20.

62 — See, in particular, *Italy v Commission*, cited above, paragraph 28.

63 — See, in particular, Case C-241/94 *France v Commission*, cited above, paragraph 21 and Case C-251/97 *France v Commission* [1999] ECR I-6639, paragraph 37.

64 — See, in particular, *Deufil v Commission*, cited above, paragraph 8.

65 — Cited above, paragraph 83.

aid depends solely on the question of whether or not it confers an advantage on one or more undertakings. In any event, State intervention cannot be assessed in terms of the objective pursued by the public authorities.<sup>66</sup> Those objectives may be taken into consideration only at a later stage in the analysis to determine whether the State measure is justified under the derogations provided for in the Treaty.

79. Second, I consider that *Ferring* is liable to deprive Article 90(2) of the Treaty of a substantial part of its effect.

80. Article 90(2) of the Treaty constitutes the central Treaty provision for reconciling Community objectives.<sup>70</sup> As the Court has held, that provision seeks to reconcile the Member States' interest in using certain undertakings as an instrument of economic, fiscal or social policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the common market.<sup>71</sup>

78. In the instant case, it appears that *Ferring* has created confusion between those two questions. The fact that the reasoning in the judgment was separated into two parts would appear to be significant in that respect. The Court first held that the contested exemption was capable of constituting a State aid caught by the prohibition provided for in Article 92(1).<sup>67</sup> Subsequently, it excluded the characterisation of aid 'on account of the specific public service obligations imposed on wholesale distributors'.<sup>68</sup> Consequently, it was only in the light of Article 92(1) that the Court considered the question whether the contested measure was caught by the prohibition on aid and whether it could be justified with regard to the objectives pursued by the French authorities.<sup>69</sup>

81. Under the terms of the *Ferring* judgment, it must be considered that:

— where an advantage granted by the authorities of a Member State is *inferior or equal* to the costs of public service obligations, the advantage does not constitute aid within the meaning of Article 92(1) of the Treaty;<sup>72</sup>

66 — See, in that sense, Lehman, H., 'Les aides accordées par les États', *Union européenne, Communauté européenne, Commentaire article par article des traités UE et CE*, eds. Léger, P., Helbing & Lichtenhahn, Dalloz, Bruylant, Bâle, Paris, Bruxelles, 2000 (pp. 802 and 803).

67 — *Ferring* (paragraphs 18 to 22).

68 — *Ibid.*, paragraphs 23 to 27.

69 — See also the Opinion of Advocate General Tizzano in *Ferring*, who examined 'whether the contested measure is justified by the fact that it is intended to offset the inappropriate public service obligations imposed on wholesale distributors' (paragraph 50, emphasis added).

70 — Communication 2001/C 17/04 of the Commission on public interest service in Europe (OJ 2001 C 17, p. 4, paragraph 19).

71 — See, in particular, Cases C-202/88 *France v Commission* [1991] ECR I-1223, paragraph 12 and C-67/96 *Albany* [1999] ECR I-5751, paragraph 103.

72 — *Ferring*, paragraph 27.

— however, where the advantage granted by the authorities of a Member State is *greater* than the costs of the public service obligations, the portion which exceeds those costs ‘cannot, in any event, be regarded as necessary to enable them to carry out the particular tasks assigned to them’.<sup>73</sup>

82. That means that, in the first case, Article 90(2) of the Treaty will not apply because the contested measure is not caught by the prohibition provided for in Article 92(1). However, nor will Article 90(2) apply in the second case because the part of the aid which exceeds the costs of the public service obligations does not come within the scope of application of that derogation. Thus, the *Ferring* judgment would appear to have deprived Article 90(2) of the Treaty of its effect in the field of State aid.

83. The same considerations apply to the provisions of Article 77 of the Treaty and the regulations adopted for the application thereof.

84. Article 77 of the Treaty constitutes a provision derogating from Article 92(1) of

the Treaty.<sup>74</sup> It permits Member States to grant aid by way of reimbursement for the discharge of certain obligations inherent in the concept of a public service in the field of transport by land.<sup>75</sup> Furthermore, Regulation No 1191/69 defines the conditions under which Member States may grant aids to provide compensation for such obligations. One of the objectives pursued by that regulation is to ensure that States do not ‘overcompensate’ the charges arising out of public service obligations. That is why Articles 10 to 13 of the Regulation provide for common methods of compensation.

On 4 June 1970, the Council adopted Regulation (EEC) No 1107/70 on the granting of aids for transport by rail, road and inland waterway.<sup>76</sup> That regulation stipulates the conditions under which Member States may impose obligations inherent in the concept of a public service

74 — See also, in that sense, Aussant, J., Fornasier, R., Louis, J.-V., Séché, J.-C., Van Raepenbusch, S., *Commentaire J. Megret, Le droit de la CEE, volume 3, Libre circulation des personnes, des services et des capitaux, Transports*, éditions de l’université de Bruxelles, Bruxelles, 1990, 2nd ed. (p. 226), and Communication 2001/C 17/04, cited above, paragraph 26.

75 — Article 77 of the Treaty provides that ‘aids shall be compatible with this Treaty... if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service’. At this point, it may already be noted that the rule in *Ferring* is difficult to reconcile with the wording of that provision. Had the authors of the Treaty considered that the subsidies provided to offset the cost of public service obligations were not aid within the meaning of Article 92(1), they would probably not have deemed it appropriate to insert an express provision declaring them compatible with the Treaty. It therefore seems that, contrary to the principle raised in the *Ferring* judgment, the intention of the authors of the Treaty was to bring aid to offset the cost of public service obligations within the scope of the prohibition contained in Article 92(1) of the Treaty, even where that aid does not exceed the costs incurred by the performance of public service obligations.

76 — OJ, English Special Edition 1970 (II), p. 360.

73 — *Ibid.*, paragraph 32.

which involve the granting of aid under Article 77 of the Treaty not covered by Regulation No 1191/69.<sup>77</sup>

point, to compare briefly the conditions laid down in Article 90(2) with those established in *Ferring*.

85. If the reasoning expounded in *Ferring* is followed, subsidies which are limited to offsetting the cost of public service obligations must be deemed not to constitute aids within the meaning of Article 92(1). That means that, in the field of transport by land, it becomes in practice pointless to apply the provisions provided for in Article 77 of the Treaty and in Regulations Nos 1191/69 and 1107/70. The criteria established by *Ferring* would appear to be sufficient to assess the compatibility of aid granted to undertakings entrusted with operating a public transport service by land. In other words, it would appear that *Ferring* has rendered the provisions laid down in Article 77 of the Treaty and in Regulations Nos 1191/69 and 1107/70 inoperative.

87. Article 90(2) of the Treaty sets out six conditions for application.<sup>79</sup> Those conditions seek, in essence, to ensure that:

- the undertaking concerned has actually been entrusted with the task of operating a service of general economic interest by an express act of the public authority;<sup>80</sup>
- the activities carried out by the undertaking in fact constitute a public service task in the sense that it is 'of a general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities';<sup>81</sup>

86. It follows from the above considerations that the interpretation given in *Ferring* is capable of depriving Articles 90(2) and 77 of the Treaty of a substantial part of their effect.<sup>78</sup> It may be questioned whether *Ferring* has not introduced a much more flexible system in place of those provisions. It may be useful, at this

<sup>77</sup> — Fifth recital of Regulation No 1107/70.

<sup>78</sup> — The same argument applies, *mutatis mutandis*, to the derogations provided for in Article 92(3) of the Treaty.

<sup>79</sup> — For a more detailed description of the those conditions, see my Opinion in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, ECR I-1582, paragraphs 157 to 166.

<sup>80</sup> — Cases 127/73 *BRT and SABAM (BRT II)* [1974] ECR 313, paragraph 20 and 66/86 *Abmed Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803, paragraph 55. See also, on this point, Communication 2001/C 17/04, cited above, paragraph 22.

<sup>81</sup> — Cases C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 27; C-242/95 *GT-Lmk* [1997] ECR I-4449, paragraphs 52 and 53 and C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 45.

- application of the Treaty rules frustrates the performance of the particular task of the undertaking;<sup>82</sup>
- the specific task of the undertaking cannot be performed by measures which are less restrictive of competition;<sup>83</sup>
- the contested measure has no substantial effect on intra-Community trade.<sup>84</sup>

88. It follows from *Ferring* that a State measure may not be caught by Article 92(1) of the Treaty where it fulfils two conditions. It is necessary that (1) national legislation should impose public service obligations on the recipient undertakings<sup>85</sup> and that (2) the amount of the aid should not exceed the costs incurred by the public service obligations.<sup>86</sup>

82 — See my Opinion in *Wouters and Others*, cited above, paragraph 164.

83 — Cases C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 14 and C-393/92 *Ahmedo* [1994] ECR I-1477, paragraph 49.

84 — See, in that sense, the Opinion of Advocate General Rozès in Case 78/82 *Commission v Italy* [1983] ECR 1955, point VI-C and of Advocate General Cosmas in Cases C-157/94 *Commission v Netherlands* [1997] ECR I-5699, C-158/94 *Commission v Italy* [1997] ECR I-5789; C-159/94 *Commission v France* [1997] ECR I-5815 and C-160/94 *Commission v Spain* [1997] ECR I-5851 (paragraph 126).

85 — *Ferring*, paragraph 23.

86 — *Ibid.*, paragraph 27.

89. In those circumstances, the system introduced by *Ferring* is characterised by considerable flexibility compared to the control provided for in Article 90(2) of the Treaty. In particular, that system does not permit it to be determined, in accordance with the Court's case-law,<sup>87</sup> whether the obligations imposed on undertakings have a sufficient link with the subject-matter of the service of general interest and whether they are designed to make a direct contribution to satisfying that interest. Similarly, it does not permit it to be ascertained whether the obligations are specific to the undertaking concerned and defined in a sufficiently precise manner.<sup>88</sup>

Moreover, it is not certain that the 'necessary equivalence' referred to in *Ferring*<sup>89</sup> is comparable to the requirement that the application of the Treaty rules must 'frustrate' the performance of the undertaking's task and to the proportionality test provided for in Article 90(2). In any event, *Ferring* does not contain any condition relating to the effect on trade between Member States. However, that condition is important since it may lead to a refusal to apply the benefit of Article 90(2) on the ground that the contested measure affects intra-Community trade in a manner contrary to the Community interest.<sup>90</sup>

87 — Case C-159/94 *Commission v France*, cited above, paragraph 68.

88 — *Ibid.*, paragraphs 69 and 70.

89 — Paragraph 27.

90 — See, for example, Commission Decision 2001/892/EC of 25 July 2001 relating to a proceeding under Article 82 of the EC Treaty (COMP/C-1/36.915 — Deutsche Post AG — Interception of cross-border mail) (OJ 2001 L 331, p. 40, paragraph 186).



90. Consequently, I consider that the criteria set out in *Ferring* do not establish an adequate framework for controlling aid granted by the Member States to undertakings entrusted with a task of general public importance. That control must be carried out within the framework of the provisions established for that purpose by the Treaty, namely Articles 77, 90(2) and 92(3) of the Treaty.

91. The final difficulty relates to the fact that the reasoning expounded in *Ferring* effectively removes measures for financing public services from the Commission's control.

92. The Commission occupies a 'central role'<sup>91</sup> in the implementation of the Treaty provisions concerning State aid. It carries out a preventive review of new aid and keeps existing aid under constant review. The Commission also enjoys exclusive competence for declaring aid compatible or incompatible with the common market with regard to Articles 92 and 93 of the Treaty.<sup>92</sup>

In *Banco Exterior de España*,<sup>93</sup> the Court held that the power of the Commission also

covered aid granted to undertakings responsible for the management of services of general economic interest within the meaning of Article 90(2). Further, in Case C-332/98 *France v Commission*,<sup>94</sup> the Court held that aid intended for undertakings entrusted with a public service task were subject to the obligation of prior notification provided for in Article 93(3) of the Treaty. The Court thus rejected the idea that aid of that nature could be implemented by the Member States without waiting for the Commission's decision on compatibility.<sup>95</sup>

It should also be recalled that, by virtue of Article 90(3) of the Treaty, the Commission must fulfil a 'duty of surveillance' over the Member States in their relations with public undertakings.<sup>96</sup> To that end, the Commission is empowered to adopt decisions and directives to specify the obligations arising from Article 90(1).<sup>97</sup> The Court held that the duty of surveillance was 'essential' so as to allow the Commission 'to ensure the application of the rules on competition and thus to contribute to

94 — Case C-332/98 *France v Commission* [2000] ECR I-4833.

95 — *Ibid.*, paragraphs 27 to 32.

96 — Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom v Commission* [1982] ECR 2545, paragraphs 12 and 13.

97 — The 'decisions' and 'directives' referred to in Article 90(3) of the Treaty belong to the general category of decisions and directives provided for in Article 189 of the Treaty. They are therefore binding on the Member States (Case 226/87 *Commission v Greece* [1988] ECR 3611, paragraphs 11 and 12).

91 — Cases C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* [1991] ECR I-5505, paragraph 14 and C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraph 17.

92 — Case 78/76 *Stemike & Wenlig* [1977] ECR 595, paragraph 9.

93 — Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 17.

the institution of a system of undistorted competition in the common market'.<sup>98</sup>

93. However, *Ferring* effectively removes measures for the financing of public services from the control exercised by the Commission by virtue of the abovementioned provisions.

Measures which offset the cost of public service obligations are no longer subject to the obligation of notification as provided for in Article 93(3) since they do not constitute aid within the meaning of Article 92(1). For the same reason, existing measures are no longer held under constant review by the Commission as provided for in Article 93(1) and (2). Further, those measures are not covered by the control established by Article 90(3) since they do not come within the scope of application of the Treaty rules in respect of competition.<sup>99</sup>

94. If that is the effect of *Ferring*, I consider that it will have considerable repercussions for the Commission's policy on State aid.

95. It should be recalled that, in recent years, the Commission has undertaken an extremely wide-ranging review of the policy to be adopted with regard to services of general interest.<sup>100</sup> In that context, in December 2000 the Nice European Council requested the Commission to draw up a report in response to certain concerns.

According to the European Council, '[a]pplication of internal market and competition rules should allow services of general economic interest to perform their tasks under conditions of legal certainty and economic viability...'. There is a need here especially for clarification of the relationship between methods of funding services of general interest and the application of the rules on State aid. In particular, the compatibility of aid designed to offset the extra costs incurred in performing tasks of general economic interest should be recognised, in full compliance with Article 86(2).<sup>101</sup>

96. The Commission presented its report to the Laeken European Council.<sup>102</sup> It stated that financial compensation granted to the provider of a service of general interest

98 — Joined Cases C-48/90 and C-66/90 *Netherlands and Others v Commission* [1992] ECR I-565, paragraph 29.

99 — It is true that, by virtue of *Ferring*, measures which 'overcompensate' the cost of public service obligations must be notified to the Commission. However, it seems that that obligation will rapidly become theoretical since, under the terms of the *Ferring* judgment (paragraph 32), the portion of aid which exceeds the cost of the public service obligations cannot, in any event, be justified with regard to Article 90(2) of the Treaty.

100 — See, for example, Commission Communication 96/C 281/03 on services of general interest in Europe (OJ 1996 C 281, p. 3) and Communication 2001/C 17/04, cited above.

101 — Report presented by the Commission to the Laeken European Council of 17 October 2001 on services of general interest [COM (2001) 598 final, paragraph 5]. It will be noted that, in the spirit of the Nice European Council, it is clear that State measures intended to offset the cost of public service obligations with regard to undertakings constitute State aids within the meaning of Article 92(1) of the Treaty, which may be justified under the provisions of Article 90(2) of the Treaty.

102 — Ibid.

constitutes an economic advantage within the meaning of Article 87(1) EC.<sup>103</sup> However, such compensation may qualify for an exemption under Article 87(2) and (3) EC or it may qualify for a derogation under Articles 73 and 86(2) EC.<sup>104</sup> As regards the latter provision, the Commission considers that the measure is justified if the amount of aid does not exceed the additional costs incurred by public service obligations.

In addition, the Commission committed itself to exploring ways in which it could increase legal certainty in the sphere of services of public interest.<sup>105</sup> To that end, it has begun studying, in close cooperation with the Member States, the possibility of adopting a regulation for the block exemption of certain State aids in the area of services of general public importance. It also committed itself to adopting a number of other measures to increase transparency.

dered pointless the efforts taken by the competent authorities to define Community policy in the area of public sector financing.

98. I would therefore ask the Court to review the interpretation given in *Ferring*. I would suggest that the Court follow the reasoning expounded by the Court of First Instance in *SIC v Commission*, cited above, and rule that financial compensation granted to an undertaking to offset the cost of public service obligations constitutes aid within the meaning of Article 92(1) of the Treaty, without prejudice to the possibility of that measure being exempted under the derogations provided in the Treaty and, particularly, under Articles 77 and 90(2).

### C — *The facts of the case in the main proceedings*

97. However, the reasoning expounded in *Ferring* is likely to call into question the measures which the Commission and Member States are seeking to implement in the sector. By ruling that aid intended to offset the cost of public service obligations does not come within the Treaty rules governing State aids, the Sixth Chamber of the Court would appear to have ren-

99. Since I am proposing that the interpretation given in *Ferring* should be set aside, it falls to consider whether the subsidies granted by the administrative district of Stendal are caught by the prohibition provided for in Article 92(1) of the Treaty. To that end, it must be determined whether the contested subsidies fulfil the four conditions laid down by that article.

103 — *Ibid.*, paragraph 14.

104 — *Ibid.*, paragraph 15.

105 — *Ibid.*, paragraph 27.

100. First, I would point out that, in accordance with settled case-law, the concept of aid covers the advantages granted by public authorities which, in various forms, mitigate the charges normally included in the budget of an undertaking.<sup>106</sup> In order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions.<sup>107</sup>

101. In the instant case, it is apparent from the file<sup>108</sup> that the contested subsidies amount to DEM 0.75 per kilometre travelled on routes in the region of Stendal. It is also apparent from the file that Altmark receives those subsidies in addition to its revenue and receipts stemming from the statutory provisions on compensation in respect of tariffs and the organisation of transport.<sup>109</sup>

Accordingly, the contested subsidies constitute an advantage which Altmark would not have obtained under normal market conditions and which mitigate the charges included in its budget. Moreover, the

parties to the main proceedings considered that: '[i]t is manifest that the subsidies granted by the administrative district of Stendal are aids within the meaning of Community law and there is no need to examine this aspect of the question in any depth'.<sup>110</sup>

Further, the contested subsidies constitute a 'selective' advantage within the meaning of Article 92(1) of the Treaty<sup>111</sup> since only the holder of a licence to operate the services concerned receives such subsidies.

102. Second, the contested subsidies are granted through State resources within the meaning of Article 92(1) of the Treaty.<sup>112</sup> The Court has held that 'aid granted by regional and local bodies of the Member States, whatever their status and description' was aid financed from public resources.<sup>113</sup> That is the situation in the present case since the administrative district of Stendal is a local authority of the Federal Republic of Germany.

106 — See, in particular, Cases 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR I, paragraph 39; *Banco Exterior de España*, cited above, paragraph 13; Case C-241/94 *France v Commission*, cited above, paragraph 34 and C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 19.

107 — Cases C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60; C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 41 and *DM Transport*, cited above, paragraph 22.

108 — Written observations of NVGA.

109 — *Ibid.*

110 — See the written observations of the Regierungspräsidium (p. 3) and the written observations of Altmark (paragraph 35).

111 — As regards that requirement, see in particular Case C-241/94 *France v Commission*, cited above, paragraph 24; Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraphs 40 and 41 and Case C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 26.

112 — On the concept of 'State' aid, see in particular Case 82/77 *Van Tiggele* [1978] ECR 25, paragraphs 23 to 25; Joined Cases 213/81 to 215/81 *Norddeutsches Vieh- und Fleischkontor Will and Others* [1982] ECR 3583, paragraph 22; Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraphs 19 and 21; Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paragraph 16 and Joined Cases C-52/97 to C-54/97 *Viscido and Others* [1998] ECR I-2629, paragraph 13.

113 — Case 248/84 *Germany v Commission* [1987] ECR 4013, paragraph 17.

103. Third, I consider that the subsidies are liable to distort competition in the market of local passenger services.

trative district of Stendal effectively prevent competing undertakings from placing their services on the market.

The concept of the distortion of competition is given an extremely broad interpretation in Article 92(1).<sup>114</sup> The Court considers that competition is distorted when financial aid granted by the State strengthens the competitive position of the recipient undertaking compared with other undertakings with which it is in competition.<sup>115</sup> As a general rule, it may be assumed that all public aid distorts or threatens to distort competition.<sup>116</sup>

104. The final condition in Article 92(1) is the subject of a specific question by the Bundesverwaltungsgericht. That court asks whether, in view of the regional character of the transport services concerned, the subsidies granted by the administrative district of Stendal are capable of affecting trade between Member States.<sup>118</sup> Further, it asks whether the reply to that question depends on the specific location and importance of the relevant local transport area.<sup>119</sup>

In the instant case, the subsidies granted by the administrative district of Stendal strengthen the competitive position of Altmarm compared with other undertakings which wish to offer passenger services in the region of Stendal. The facts giving rise to the case in the main proceedings indicate that, without public subsidies, Altmarm would probably not be able to continue to operate the contested services.<sup>117</sup> Accordingly, the subsidies granted by the adminis-

105. In their written observations, Altmarm<sup>120</sup> and the Regierungspräsidium<sup>121</sup> maintained that the contested aid had no effect on trade between Member States. They explained that, in accordance with the provisions of German law, licensed undertakings are not authorised to offer transport services outside the territory covered by the licence. Consequently, subsidies granted to an undertaking operating services in the region of Stendal would not affect, in any way whatsoever, the position of undertakings located in neighbouring countries or regions. In any event, the parties to the main proceedings consider

114 — Keppenne, J.-P., *Guide des aides d'État en droit communautaire*, Bruylant, Bruxelles, 1999, paragraph 150.

115 — Cases 730/79 *Phillip Morris Holland v Commission* [1980] ECR 2671, paragraph 11 and 259/85 *France v Commission* [1987] ECR 4393, paragraph 24.

116 — Opinion of Advocate General Capotorti in *Phillip Morris Holland v Commission*, cited above, p. 2698.

117 — See the order for reference (English translation pp. 4 and 5).

118 — First sentence of the first limb of the question for a preliminary ruling.

119 — Second sentence of the first limb of the question for a preliminary ruling.

120 — Paragraphs 36 and 37.

121 — Pp. 5 to 7.

that the aid has no significant effect on trade between the Member States.

Community trade if the prospect of such trade is foreseeable.<sup>125</sup>

106. It is apparent from the case-law that the requirement of an effect on trade between Member States is easily satisfied.<sup>122</sup> The Court considers that when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid.<sup>123</sup>

107. However, in the instant case, it is apparent from the file that trade between Member States is not only foreseeable but also, to a certain extent, already exists.

In that respect, the fact that the recipient undertaking is not involved in exporting services does not preclude an effect on trade. Where a State grants aid to an undertaking, domestic production may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State.<sup>124</sup> Further, the simple fact that no trade exists between Member States at the time the aid is granted does not mean that such aid is not covered by Article 92(1). Aid is liable to affect intra-

In its written observations,<sup>126</sup> the Commission stated that, even though the sector of passenger transport by land was still not liberalised at the legal level, several Member States had begun, from 1995, to open their markets to undertakings established in other Member States. Such is the case in the Kingdom of Belgium, the Kingdom of Denmark, the Kingdom of Spain, the Republic of Finland, the French Republic, the Portuguese Republic, the United Kingdom of Great Britain and Northern Ireland and the Kingdom of Sweden. Such is also the case in the Federal Republic of Germany for transport operated as a public service given that, since 1996, those services have been covered by Regulation No 1191/69. Thus, the Commission cites several examples of undertakings which offer local or regional passenger

122 — Opinion of Advocate General Jacobs in Joined Cases C-278/92 to C-280/92 *Spain v Commission* [1994] ECR I-4103, paragraph 33.

123 — *Phillip Morris Holland v Commission*, cited above, paragraph 11.

124 — Cases 102/87 *France v Commission* [1988] ECR 4067, paragraph 19; C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 27, and Joined Cases C-278/92 to C-280/92 *Spain v Commission*, cited above, paragraph 40.

125 — Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others v Commission* [1995] ECR II-1971, paragraphs 139 to 141.

126 — Paragraphs 4 to 9.

transport services in Member States other than their country of origin.<sup>127</sup>

might be affected'.<sup>129</sup> Further, there does not exist in the Court's case-law any threshold or percentage below which it may be considered that trade between Member States is not affected.<sup>130</sup>

108. Accordingly, I consider that the local or regional character of the transport in question in the case in the main proceedings is not such as to exclude the contested subsidies from the field of application of Article 92(1).

Second, it should be pointed out that Commission Notice 96/C 68/06 on the *de minimis* rule for State aids<sup>131</sup> does not apply to the transport sector.<sup>132</sup> That is also the case in the new regulation on *de minimis* aid.<sup>133</sup> The Commission considered that: 'In view of the special rules which apply in the sectors of... transport, and of the risk that even small amounts of aid could fulfil the criteria of Article 87(1) of the Treaty in those sectors, it is appropriate that this Regulation should not apply to those sectors'.<sup>134</sup>

109. The argument of the parties that the aid granted by the administrative district of Stendal has no significant effect on trade must also be rejected.

First, it should be recalled that, since *Tubemeuse*,<sup>128</sup> the Court has consistently held that 'the relatively small amount of aid or the relatively small size of the undertaking which receives it does not... exclude the possibility that intra-Community trade

110. Accordingly, I propose that the Court should reply to the second question referred for a preliminary ruling that the subsidies granted by the authorities of a Member State to offset the cost of public service obligations imposed on an undertaking entrusted with operating a local or regional

127 — That aspect is confirmed by the preamble to the proposal for a Regulation 2000/C 365 E/10, cited above. Paragraph 5 of the statement of reasons given for that document states: 'In light of... the application of Community rules on the freedom of establishment, and the application of Community public procurement rules, significant progress had been made towards Community... -wide market access in public transport. As a result, trade between Member States has substantially developed and several public transport operators are now providing services in more than one Member State'.

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

129 — See also, *inter alia*, Joined Cases C-278/92 to C-280/92 *Spain v Commission*, cited above, paragraph 42 and Case T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717, paragraph 48.

130 — *Tubemeuse*, cited above, paragraphs 42 and 43.

131 — OJ 1996 C 68, p. 9.

132 — *Ibid.*, fourth paragraph.

133 — Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ 2001 L 10, p. 30).

134 — *Ibid.*, paragraph 3 of the explanatory memorandum.

passenger service by land constitute State aid liable to be caught by the prohibition provided for in Article 92(1) of the Treaty.

in secondary Community legislation. In such a case, the Member States would be required to give notification as provided for in Article 93(3) of the Treaty.<sup>136</sup>

## VII — Article 77 of the Treaty

114. In my opinion, the Commission's argument cannot be accepted.

111. The final question referred for a preliminary ruling concerns the provisions of Article 77 of the Treaty. The national court asks whether that article permits the authorities of a Member State to grant subsidies to offset the cost of public service obligations imposed on an undertaking operating a regional road passenger service without having regard to the provisions of Regulation No 1191/69.

115. In the preamble to Regulation No 1107/70, the Council recalled that common rules for compensation payments arising from the normalisation of the accounts of railway undertakings, and compensation in respect of financial burdens resulting from public service obligations in transport by land had been adopted respectively by Regulation (EEC) No 1192/69<sup>137</sup> and Regulation No 1191/69.<sup>138</sup>

112. As we have seen,<sup>135</sup> Article 77 of the Treaty has been implemented by specific regulations, including Regulations Nos 1191/69 and 1107/70.

It considered that 'it is therefore necessary to specify the cases and the circumstances in which Member States may take coordination measures or impose obligations inherent in the concept of a public service which involve the granting of aids under

113. At the hearing, the Commission claimed that Article 77 of the Treaty was sufficiently precise for it to be applied independently. It considers that, like Article 95 of the ECSC Treaty, that provision permits Member States to grant aid outside of those cases expressly referred to

136 — Conversely, the parties to the main proceedings consider that Article 77 of the Treaty is too vague to be applied outside those cases referred to in the secondary legislation. In that respect, they base their argument on the majority opinion obtaining in German legal theory (see the written observations of the Regierungspräsidentium and the written observations of Altmark, paragraph 54).

137 — Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings (OJ, English Special Edition 1969 (I), p. 0283).

138 — Fourth recital of Regulation No 1107/70.

135 — See paragraph 84 of the present Opinion.



Article 77 of the Treaty not covered by the aforesaid Regulation'.<sup>139</sup>

regard to secondary Community legislation and, in particular, Regulations Nos 1191/69 and 1107/70.

Moreover, Article 3 of Regulation No 1107/70 provides that: '[w]ithout prejudice to the provisions of Council Regulation (EEC) No 1192/69... and of Council Regulation (EEC) No 1191/69... , Member states shall neither take coordination measures nor impose obligations inherent in the concept of a public service which involve the granting of aids pursuant to Article 77 of the Treaty *except in the following circumstances...*'.<sup>140</sup>

116. It follows that, contrary to the Commission's contention, Member States are no longer authorised to rely on Article 77 of the Treaty outside those cases referred to by secondary Community law. Regulation No 1107/70 sets out an exhaustive list of the conditions under which the authorities of the Member States may grant aid under Article 77 of the Treaty outside those situations provided for in Regulations Nos 1191/69 and 1192/69.

118. It is apparent from the order for reference and the questions referred for a preliminary ruling that, in the instant case, the Bundesverwaltungsgericht wishes to know whether Community law permits the German authorities to grant aid to an undertaking operating a regional public passenger service without complying with the conditions laid down by Regulation No 1191/69. In order to give a helpful reply to the national court, it is therefore appropriate for me to continue my reasoning and examine whether Regulation No 1107/70 authorises the granting of such subsidies.

119. In that respect, the relevant provisions are those set out in Article 3(2) of Regulation No 1107/70. That article provides:

117. In those circumstances, I propose that the Court reply to the final question referred that Article 77 of the Treaty does not permit the authorities of a Member State to grant aid in order to offset the cost of public service obligations in the field of passenger transport by land without having

'Without prejudice to... Regulation (EEC) No 1191/69,... Member States shall... [not] impose obligations inherent in the concept of a public service which involve the funding of aids pursuant to Article 77 of the Treaty except... until the entry into

<sup>139</sup> — Ibid., fifth recital.

<sup>140</sup> — Emphasis added.

force of relevant Community rules, where payments are made to rail, road or inland waterway transport undertakings as compensation for public service obligations imposed on them by the State or public authorities and covering either:

- tariff obligations not falling within the definition given in Article 2(5) of Regulation (EEC) No 1191/69; or
- transport undertakings or activities to which that Regulation does not apply.’

120. Article 3(2) of Regulation No 1107/70 therefore authorises Member States to grant aid under Article 77 of the Treaty where, on the one hand, the recipient undertakings or the transport activities concerned are excluded from the scope of application of Regulation No 1191/69 and where, on the other hand, no Community regulation specifically concerning the sector in question yet exists.

121. In my opinion, both those conditions are satisfied in the instant case. On the one hand, it has been shown that in Germany regional passenger transport services oper-

ated commercially are excluded from the scope of Regulation No 1191/69. On the other hand, with the exception of that Regulation, there does not currently exist any Community regulation specifically concerning public road passenger services.

122. Accordingly, I consider that Regulation No 1107/70 permits the authorities of Member States to grant, under Article 77 of the Treaty, aid to offset the cost of public service obligations which they impose on undertakings operating a regional road passenger service.

123. However, the attention of the national court should be drawn to the requirements laid down in Article 5 of Regulation No 1107/70 and in the Court’s case-law.

Article 5 of Regulation No 1107/70 provides that Member States, in accordance with Article 93(3) of the Treaty, are required to inform the Commission of any plans to grant or alter aid and shall forward to the Commission ‘all information necessary to [enable it to] establish that such aid complies with the provisions of this Regulation’.

Moreover, the Court has held that ‘the effect of Article 77 of the Treaty, which acknowledges that aid to transport is compatible with the Treaty only in well-defined cases which do not jeopardise the general interests of the Community, cannot be to exempt aid to transport from the general system of the Treaty concerning aid granted by the States and from the controls and procedures laid down therein’.<sup>141</sup>

guarantee that all the appropriate inferences will be drawn from the infringement in accordance with its national law.<sup>143</sup> Those inferences imply that the national court will, where necessary;

— order the recovery of the contested aid;<sup>144</sup>

124. It follows that the authorities of the Member States can grant aid under Regulation No 1107/70 only if they have given prior notification of their plan to the Commission and obtained from the Commission a decision declaring the aid to be compatible with the common market.

— declare unlawful the act instituting the contested aid and the measures implementing it;<sup>145</sup>

125. In the present case, it is for the Bundesverwaltungsgericht to establish whether the subsidies granted by the competent authorities fulfil the conditions of Article 92(1) of the Treaty. If so, the national court must also ensure that the aid has been notified to the Commission in accordance with Article 93(3) of the Treaty and has not been implemented without prior authorisation.

— order the competent public authorities to compensate for the damage that the payment of aid may possibly have caused<sup>146</sup> to its recipient<sup>147</sup> and to the recipient’s competitors.<sup>148</sup>

If that is not the case, the national court must, pursuant to the Court’s case-law,<sup>142</sup>

141 — Case 156/77 *Commission v Belgium* [1978] ECR 1881, paragraph 10.

142 — *Fédération nationale du commerce extérieur des produits alimentaires* and *Syndicat national des négociants et transformateurs de saumon*, cited above, paragraph 12 and *SFEI and Others*, cited above, paragraph 40.

143 — For a more detailed description of those inferences, see my Opinion delivered on 6 December 2001 in Case C-197/99 P *Belgium v Commission* (case pending before the Court (paragraph 74)).

144 — *Fédération nationale du commerce extérieur des produits alimentaires* and *Syndicat national des négociants et transformateurs de saumon*, cited above, paragraphs 12 and 13 and *SFEI and Others*, cited above, paragraphs 40 and 43.

145 — *Ibid.*

146 — See, in that sense, Keppenne, J.-P., cited above, paragraph 408, and Frignani, A., *Commentaire J. Megret, Le droit de la CE, volume 4, Concurrence*, éditions de l’université de Bruxelles, Bruxelles, 1997, 2nd ed., paragraph 319.

147 — See the Opinion of Advocate General Tesaro in *Tubemeuse*, cited above, ECR I-985.

148 — See the Opinion of Advocate General Jacobs in *SFEI and Others*, cited above, paragraph 77.

126. In consequence, the reply to be given to the Bundesverwaltungsgericht must be that Article 77 of the Treaty does not permit the authorities of a Member State to grant subsidies to offset the cost of the public service obligations which they impose on an undertaking operating a regional road passenger service without complying with the conditions laid down by Regulation No 1191/69 *or*, failing that, the conditions laid down by Regulation No 1107/70.

## VII — Conclusion

127. In light of the preceding considerations, I therefore propose that the Court answer the three questions referred by the Bundesverwaltungsgericht as follows:

- (1) Article 1(1) of Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by the Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 does not preclude, following its entry into force, a Member State adopting a legislative measure for the purpose of limiting the exclusion of that regulation to a specific category of regional passenger services by land, such as those services operated commercially within the meaning of Paragraphs 8(4) and 13 of the Personenbeförderungsgesetz (Law on Passenger Transport by land).

- (2) Subsidies granted by the authorities of a Member State to offset the cost of public service obligations imposed on an undertaking entrusted with operating a local or regional passenger service by land constitute State aid liable to be caught by the prohibition provided for in Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC). In that respect, the relatively small amount of aid or the relatively small size of the undertaking which receives it does not, a priori, exclude the possibility that intra-Community trade might be affected within the meaning of that provision.
- (3) Article 77 of the EC Treaty (now Article 73 EC) does not permit the authorities of a Member State to adopt measures authorising the granting of subsidies to offset the cost of the public service obligations which they impose on an undertaking operating a regional road passenger service without complying with the provisions of Regulation No 1191/69 or, failing that, the provisions of Council Regulation No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway.