JUDGMENT OF THE COURT (Second Chamber)

23 March 2006 *

In Case C-237/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale di Cagliari (Italy), made by decision of 14 May 2004, received at the Court on 7 June 2004, in the proceedings

Enirisorse SpA

v

Sotacarbo SpA,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen (Rapporteur), R. Silva de Lapuerta, P. Kūris and G. Arestis, Judges,

* Language of the case: Italian.

Advocate General: M. Poiares Maduro,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 27 October 2005,

after considering the observations submitted on behalf of:

— Enirisorse SpA, by G. Dore and C. Dore, avvocati,

— Sotacarbo SpA, by F. Angioni, D. Scano, G.M. Roberti and I. Perego, avvocati,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

— the Commission of the European Communities, by V. Di Bucci and E. Righini, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2006,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 43 EC, 44 EC, 48 EC, 49 EC et seq. on freedom of establishment and freedom to provide services, and Article 87 EC.

2 This reference was made in proceedings between Enirisorse SpA ('Enirisorse') and Sotacarbo SpA ('Sotacarbo') concerning the refusal of that latter to reimburse Enirisorse for the value of the shares which that company held in Sotacarbo when it withdrew the capital from Sotacarbo.

National legal context

3 Article 2437 of the Italian Civil Code provides:

'Members opposing a resolution to change the company's objects or legal form or to transfer its headquarters abroad shall have the right to withdraw from the company and to have their shares redeemed at the average price ruling over the previous six months, in the case of quoted shares, or, otherwise, in proportion to the company's assets as per the accounts for the previous financial period.

The statement of withdrawal must be communicated by recorded delivery, by members who took part in the meeting within not more than three days of the end of that meeting, and by members who were not present at the meeting within not more than 15 days of the date when the decision was entered on the register of undertakings' decisions.

Any clause is void which excludes the right to withdraw or makes doing so more onerous.'

4 Under Article 5 of Law No 351 of 27 June 1985 (GURI No 166 of 16 July 1985, p. 5019; 'Law No 351/1985'):

'1. The ENI, the ENEL and the ENEA are authorised to form a public limited company for the purpose of developing innovative and advanced technologies in the use of coal (enrichment, combustion techniques, liquefaction, gasification, carbon chemistry, etc.) through:

(a) the construction, in Sardinia, of the research centre referred to in Article 1(m) of Law No 110 of 9 March 1985;

(b) the planning and completion of facilities enabling technological innovations in the use of coal;

(c) the completion of industrial plants for the purpose of using coal for purposes other than combustion.

2. The cost of forming the public limited company referred to in this article is set against the credits envisaged in Article 6 of this law.

...

4. The bodies referred to in the first paragraph of this article are authorised to contribute, either from their own funds, or from the resources which will be attributed to them by State legislation, to the investment necessary to complete the industrial stage of the plan to develop advanced technologies for the use of coal.

...'

5 Article 6 of Law No 351/1985 provides that the 'costs following from the application of this law will be, at the rate of ITL 80 000 million for 1985, ITL 90 000 million for 1986 and ITL 100 000 million for 1987, accounted for by a corresponding reduction in the budget envisaged, for the purposes of the 1985-87 triennial budget, in Chapter 9001 of the Treasury estimate for the 1985 financial year, by using for that purpose the reserve fund "Intervention for the benefit of the Sardinian Region in the mineral energy sector in place of that of the comprehensive scheme for methanisation"'.

6 Article 7(4) and (5) of Law No 140 of 11 May 1999 (GURI No 117 of 21 May 1999, p. 4; 'Law No 140/1999') provides:

'4. The ENI and the ENEL are authorised to withdraw from the public limited company referred to in Article 5(1) of Law No 351 of 27 June 1985, formed to develop innovative and advanced technologies in the use of coal extracted from the Sulcis coalfield, after paying up the unpaid balance on their shares.

5. The company referred to in paragraph 4 is required to submit, within 90 days from the entry into force of this law, a new business plan for the continuation of its activity.'

7 Article 33 of Law No 273 of 12 December 2002 (Ordinary Supplement to GURI No 293 of 14 December 2002; 'Law No 273/2002') reads as follows:

'In order to ensure that Sotacarbo has the financial resources necessary to carry out the programme of work referred to in Article 7(5) of Law No 140 of 11 May 1999, the members of the company shall pay up the unpaid balance on their shares within 60 days after the entry into force of this law and shall have the right to withdraw from the company subject to relinquishing all claims over its assets and paying up the unpaid balance on their shares. Notices of withdrawal already given to Sotacarbo SpA under Article 7(4) of Law No 140 of 11 May 1999 may be retracted up to 30 days after the entry into force of this law. Thereafter, withdrawal shall be deemed final and the withdrawing member shall be deemed to have fully agreed to the above conditions.'

The main proceedings and the questions referred for a preliminary ruling

8 The company referred to in Article 5 of Law No 351/1985 was formed under the name 'Sotacarbo'. The three members were public bodies (Ente nazionale idrocarburi, 'ENI', and Ente nazionale per l'energia elettrica, 'ENEL') and a public agency (Comitato nazionale per la ricerca e lo sviluppo dell'energia nucleare e delle energie alternative, 'ENEA') respectively. As appears from Article 6 of that law, the financing of the process of forming Sotacarbo was borne by the State.

9 In 1987, ENI paid Sotacarbo a capital contribution of ITL 12 708 900 033 for the purpose of constructing a coal research centre in Sardinia.

10 In 1992, ENI and ENEL were privatised and converted into public limited companies. ENI, which was no longer interested in holding shares in Sotacarbo, transferred its shareholding to its subsidiary, Enirisorse. That company, pursuant to Article 7(4) of Law No 140/1999, exercised its right to withdraw from Sotacarbo and then paid it a sum equivalent to the unpaid balance on its shares. At the same time, it asked Sotacarbo to reimburse its shares in proportion to the latter's assets.

11 Sotacarbo did not respond to that request and, on 12 March 2001, it informed Enirisorse that at the extraordinary general meeting on 12 February of the same year a decision had been taken to cancel the shares held by Enirisorse without reimbursing their value.

12 Enirisorse brought proceedings before the Tribunale di Cagliari for reimbursement of the value of the shares in dispute. In support of its action, it argued that Article 7 (4) of Law No 140/1999 afforded it the right to withdraw from Sotacarbo and that, in accordance with Article 2437 of the Civil Code, the latter was required to reimburse it the value of the shares at issue.

13 The entry into force of Law No 273/2002, adopted after Enirisorse had instituted the proceedings, and Article 33 of that law specifically, led Enirisorse to ask that court to refer a question to the Court of Justice as to whether, inter alia, a measure such as that prescribed by Article 33 of the law in question constitutes State aid for the purposes of Article 87 EC.

14 Considering, on the one hand, that Article 33 of Law No 273/2002 allows Sotacarbo to benefit from a grant which must be assessed in the light of the EC Treaty provisions on State aid and having doubts, on the other hand, as to the compatibility of that article with the principle of equal treatment 'in a market economy', the Tribunale di Cagliari decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 33 of Law No [273/2002] constitute State aid to Sotacarbo SpA that is incompatible with Article 87 EC and also unlawful, not having been notified in accordance with Article 88(3) EC?

(2) Is Article 33 of Law No 273/2002 contrary to Articles 43 EC, 44 EC, 48 EC, 49 EC et seq. on freedom of establishment and the freedom to provide services?'

The admissibility of the questions referred for a preliminary ruling

Observations submitted to the Court

15 As a As a preliminary point, Sotacarbo submits that, in the light of the criteria identified by the Court as to admissibility of questions referred for a preliminary ruling, the questions submitted in this instance by the national court must be declared inadmissible. In the first place, the order for reference does not give any description of the specific legal status of the company Sotacarbo, of the public interest task entrusted to that latter or of the specific body of rules to which that company is subject. In the second place, the national court has not described in enough detail the national legal context of which Article 33 of Law No 273/2002 is

part. Lastly, the order for reference does not provide any explanation as to the link which exists between the Treaty articles which are the subject of the first question and those referred to in the second question. Furthermore, the second question is not relevant at all to the outcome of the main proceedings.

16 The Italian Government and the Commission of the European Communities, for their parts, point out that, as is apparent from the judgment in Case C-295/97*Piaggio* [1999] ECR I-3735, paragraphs 29 to 33, in the context of a reference for a preliminary ruling it is not for the Court to rule on the compatibility of any potential State aid with the common market. Thus, the Court can only assess whether the national provision in question falls within the definition of 'State aid' or not. In those circumstances, the Italian Government considers that the part of the first question referred for a preliminary ruling, which seeks determination of whether the measure in the main proceedings constitutes State aid incompatible with the common market, is inadmissible. The Commission, for its part, suggests reformulating the first question so that the Court may give an answer which is of use to the national court. Concerning the second question referred for a preliminary ruling, the Italian Government and the Commission consider that, in so far as the national court has not stated which specific grounds moved it to refer that question, it is inadmissible.

The Court's reply

17 It must first be recalled that, according to settled case-law, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (see, inter alia, Joined Cases C-115/97 to C-117/97 *Brentjens'* [1999] ECR I-6025, paragraph 38; Case C-207/01 *Altair Chimica* [2003] ECR I-8875, paragraph 24; and Case C-72/03 *Carbonati Apuani* [2004] ECR I-8027, paragraph 10).

18 Thus, the information provided in the order for reference must not only enable the Court to reply usefully but must also give the governments of the Member States and the other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice. It is the Court's duty to ensure that that opportunity is safeguarded, bearing in mind that under that provision only the orders for reference are notified to the interested parties (see, inter alia, order in Joined Cases C-128/97 and C-137/97 *Testa and Modesti* [1998] ECR I-2181, paragraph 6; order in Case C-325/98 *Anssens* [1999] I-2969, paragraph 8; and *Altair Chimica*, paragraph 25).

19 In the present case, the decision to refer sets out briefly but precisely the relevant national legal context and the origin and nature of the dispute. It follows that the national court has defined the factual and legal context of its request for an interpretation of Community law sufficiently and that it has provided the Court with all the information necessary to enable it to reply usefully to that request.

20 Therefore, Sotacarbo's argument seeking to have the reference for a preliminary ruling declared inadmissible in its entirety must be rejected.

21 Next, as regards specifically the second question referred for a preliminary ruling, the Court has held that it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute (order in Case C-116/00 *Laguillaumie* [2000] ECR I-4979, paragraph 16, and *Carbonati Apuani*, paragraph 11).

22 However, it is clear that, in this instance, the national court has provided no information at all on the reasons for its choice of the Community provisions referred to in the second question. That question must therefore be rejected as inadmissible.

23 Lastly, as regards the first question referred, it is settled case-law that the assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, subject to review by the Court (Case C-354/90 *FNCE* [1991] ECR I-5505, paragraph 14; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 42; and *Piaggio*, paragraph 31). Consequently, a national court or tribunal may not, in a reference for a preliminary ruling under Article 234 EC, ask the Court for guidance as to the compatibility with the common market of a given State aid or an aid scheme (order in Case C-297/01 *Sicilcassa and Others* [2003] ECR I-7849, paragraph 47).

24 However, the Court has also repeatedly ruled that, although it is not its task, in proceedings brought under Article 234 EC, to rule upon the compatibility of provisions of domestic law with Community law or to interpret domestic legislation or regulations, it may nevertheless provide the national court with an interpretation of Community law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it (see, inter alia, Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 8; Case C-28/99 *Verdonck and Others* [2001] ECR I-3399, paragraph 28; Case C-399/98 *Ordine degli Architetti and Others* [2001] ECR I-5409, paragraph 48; and Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 27).

25 In those circumstances, it must be held that the first question referred for a preliminary ruling is admissible only in so far as the national court seeks the determination of whether a national measure such as that in dispute in the main proceedings, which grants members of a company controlled by the State the right, in derogation from the general law, to withdraw from that company on condition that they relinquish all claims over that company's assets, must be considered to be State aid for the purpose of Article 87(1) EC.

The first question

26 At the outset, it should be recalled that the question thus reformulated concerns only the interpretation of Article 87(1) EC. It is therefore necessary to examine whether the conditions for application of that provision are fulfilled.

27 In the first place, it is appropriate to establish whether Sotacarbo constitutes an undertaking for the purpose of that provision.

28 In that regard, it must be observed that, according to settled case-law, in the field of competition law the concept of an 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see, in particular, Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21; Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 77; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 74; and Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 107).

29 Any activity consisting in offering goods and services on a given market is an economic activity (Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36; *Pavlov and Others*, paragraph 75; and *Cassa di Risparmio di Firenze and Others*, paragraph 108).

30 In this instance, although it is for the national court to make the final assessment in this respect, various aspects of the documents available to the Court indicate that Sotacarbo's activity is liable to be of an economic nature.

31 As the Advocate General observes in point 25 of his Opinion, Sotacarbo's objects include developing new technologies for the use of coal and providing specialist support services for authorities, public bodies and companies interested in the development of those technologies. An undertaking's economic activity generally consists in precisely that kind of activity. Moreover, it is not disputed that Sotacarbo is run for profit.

32 Contrary to what the Italian Government submits, that assessment is not affected by the fact that Sotacarbo was formed by public institutions and financed by means of resources from the Italian State for the purpose of carrying out certain research activities.

33 In the first place, it is apparent from settled case-law that the mode of funding is not relevant for the purpose of ascertaining whether a body carries out an economic activity (see paragraph 28 of this judgment).

34 Secondly, the Court has already held that the fact that a body is entrusted with some public interest tasks does not prevent the activities at issue from being regarded as economic activities (see, to that effect, Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 21).

35 Therefore, the fact that Sotacarbo was created in order to carry out certain research operations is not conclusive in this respect, in contrast to what that company maintains.

36 In those circumstances, it is possible that Sotacarbo does carry out an economic activity, and, consequently, it is liable to be regarded as an undertaking for the purpose of Article 87(1) EC.

37 In the second place, it is appropriate to examine the different constituent elements of the concept of State aid referred to in that provision.

38 The Court has repeatedly held that classification as aid requires that all the conditions set out in Article 87(1) EC are fulfilled (see Case C-142/87 *Belgium* v *Commission*, *'Tubemeuse'*, [1990] ECR I-959, paragraph 25; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 20; Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 68; and Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 74).

39 Thus, first, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition (see *Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 75, and Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 27).

40 In the present case, given that the parties' observations relate primarily to the third condition, that condition should be considered first.

41 Thus, although the claimant in the main proceedings maintains that Article 33 of Law No 273/2002 constitutes an advantage for the purposes of Article 87(1) EC for Sotacarbo, the latter, supported by the Commission, is of the view that such is not the case.

42 In that context, it is settled case-law that the concept of aid embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (see, in particular, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 38, and *Heiser*, paragraph 36).

43 In this instance, Laws Nos 140/1999 and 273/2002, which, as the Advocate General notes in point 32 of his Opinion, cannot be considered in isolation, establish a derogation to the provisions of general law governing the right to withdraw of members of public limited companies and stemming, inter alia, from Article 2437 of the Civil Code. That article, in fact, grants a right to withdraw only to members opposing resolutions to change the company's objects or legal form, or else to transfer its headquarters abroad.

44 Thus, Law No 140/1999 offers members of Sotacarbo an exceptional right to withdraw, in return for paying up the unpaid balance on their shares, which they would not have been eligible for had that law not been adopted, the conditions for application of Article 2437 of the Civil Code not being fulfilled in the circumstances of the main proceedings.

45 In addition, Article 33 of Law No 273/2002 precludes reimbursement for members only where they have made use of that right, in derogation from the general law regime.

46 As it is, that right cannot be considered to be an advantage for Sotacarbo for the purposes of Article 87(1) EC.

47 As the Commission rightly observes, the national provisions at issue in the main proceedings offer an advantage neither to members, who may exceptionally withdraw from Sotacarbo without obtaining the reimbursement of their shares, nor to that company, the shareholders being authorised but not obliged to withdraw from the company even though the conditions laid down in that regard by general law are not fulfilled.

48 It stems from the above that Law No 273/2002 merely prevents Sotacarbo's budget from being burdened with a charge which, in a normal situation, would not have existed. Consequently, that law merely regulates the exceptional right to withdraw granted to members of that company by Law No 140/1999, and does not seek to reduce a charge which that company would normally have had to bear.

49 It is appropriate to add in that connection that if Article 33 of Law No 273/2002 had also precluded the right to reimbursement in the case of a withdrawal carried out under Article 2437 of the Civil Code, that provision might have constituted an advantage for the purposes of Article 87(1) EC. However, the file submitted to the Court does not show that such is the case.

50 Given that the conditions referred to in Article 87(1) EC must be applied concurrently (see paragraph 38 of this judgment), there is no further need to consider whether the other aspects of the concept of State aid are met in this instance.

51 The answer to the first question must therefore be that national provisions such as those at issue in the main proceedings, whereby members of a company controlled by the State may, in derogation from the general law, withdraw from that company on condition that they relinquish all claims over that company's assets, are not liable to be considered to be State aid for the purposes of Article 87 EC.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

National provisions such as those at issue in the main proceedings, whereby members of a company controlled by the State may, in derogation from the general law, withdraw from that company on condition that they relinquish all claims over that company's assets, are not liable to be considered to be State aid for the purposes of Article 87 EC.

[Signatures]