

JUDGMENT OF THE COURT (Sixth Chamber)

20 November 2003 *

In Case C-126/01,

REFERENCE to the Court under Article 234 EC by the Cour administrative d'appel de Lyon (France) for a preliminary ruling in the proceedings pending before that court between

Ministre de l'économie, des finances et de l'industrie

and

GEMO SA,

on the interpretation of Article 92 of the EC Treaty (now, after amendment, Article 87 EC),

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: V. Skouris, acting as President of the Sixth Chamber, J.N. Cunha Rodrigues (Rapporteur), R. Schintgen, F. Macken and N. Colneric, Judges,

Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- GEMO SA, by M. Jacquot and O. Prost, avocats,

- the French Government, by G. de Bergues and F. Million, acting as Agents,

- the Commission of the European Communities, by D. Triantafyllou, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of GEMO SA, represented by M. Jacquot and O. Prost, of the French Government, represented by F. Million, of the United

Kingdom Government, represented by J.E. Collins, acting as Agent, and of the Commission, represented by D. Triantafyllou, at the hearing on 17 January 2002,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2002,

gives the following

Judgment

- 1 By judgment of 13 March 2001, received at the Court on 19 March 2001, the Cour administrative d'appel de Lyon (Administrative Court of Appeal, Lyon) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 92 of the EC Treaty (now, after amendment, Article 87 EC).

- 2 That question was raised in proceedings brought by the *Ministre de l'économie, des finances et de l'industrie* (Minister for Economic Affairs, Finance and Industry), seeking annulment of a judgment of the *Tribunal administratif de Dijon* (Administrative Court, Dijon) (France) granting GEMO SA ('GEMO') a refund of the tax on meat purchases which it had paid between 1 January 1997 and 31 August 1998.

Legal background

The Community legislation

- 3 Article 92(1) of the Treaty 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, in so far as it affects trade between Member States, be incompatible with the common market.’

- 4 Article 93(3) of the EC Treaty (now Article 88(3) EC) provides:

‘The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.’

The national legislation

- 5 Article 1—A of Law No 96-1139 of 26 December 1996 on the collection and destruction of animal carcasses and slaughterhouse waste, amending the Rural Code (JORF of 27 December 1996, p. 19184), inserted Article 302 bis ZD into the Code général des impôts (French General Tax Code), which provided:

I. With effect from 1 January 1997, a tax shall be payable by any person who makes retail sales of the meat and products listed in II below.

II. The tax shall be based on the value, exclusive of value added tax, of purchases from any source of:

- the meat and offal, whether fresh or cooked, refrigerated or frozen, of poultry, rabbit, game, cattle, sheep, goats and pigs, and of horses, donkeys and their hybrids;

- cured meat, prepared pork products, lard, preserved meats and processed offal;

- animal feed made of meat and offal.

...'

- 6 Under Article 302 bis ZD, paragraph V, of that code, the rate of the meat purchase tax may not exceed 0.6% for the first tranche of purchases each month exclusive of value added tax up to FRF 125 000 and 1% for purchases over FRF 125 000.
- 7 Under Article 1—B of Law No 96-1139, the sums generated by the meat purchase tax are paid into a fund to finance the collection and disposal of animal carcasses and animal material seized in slaughterhouses found unfit for human or animal consumption, operated by the Centre national pour l'aménagement des structures des exploitations agricoles (National centre for the development of farm structures).
- 8 The first line of Article 264 of the Rural Code provides:

'The collection and disposal of animal carcasses and of meat and offal seized at slaughterhouses which are found unfit for human or animal consumption is a public service which falls within the authority of the State.'

- 9 By virtue of Article 265(I) of the Rural Code the use of the public carcass disposal service is obligatory for:
- owners and holders of carcasses of dead animals or batches of dead animals weighing more than 40 kilograms in total;

 - slaughterhouses, without weight limitation, in respect of carcasses of animals which died before slaughter and of meat and offal seized at the slaughterhouse found unfit for human or animal consumption.

- 10 Under that provision, it is prohibited to bury, to discard in any place or to incinerate carcasses of dead animals or batches of dead animals weighing more than 40 kilograms in total and carcasses of animals of any weight which died before slaughter and meat as well as offal seized at the slaughterhouse found unfit for human or animal consumption.

- 11 Decree No 96-1229, of 27 December 1996, on the public carcass disposal service, amending the Rural Code (JORF of 31 December 1996, p. 19697), inserted clauses into that code providing, on the one hand, that, in order to fulfil the public carcass disposal service and in accordance with general public procurement rules, the Prefect awards public service contracts of a maximum duration of 5 years (Article 264-1 of the Rural Code) and, on the other, that the schedule of special administrative clauses relating to those contracts defines inter alia the method of remuneration for the operations to be carried out by the holder of the contract, remuneration which is exclusive of any payment collected from the users of the public service (Article 264-2 of the Rural Code).

The main proceedings and the question referred

- 12 GEMO is a medium-sized supermarket which markets meat and meat-based products in France. In that capacity, it is liable to the meat purchase tax created by Law No 96-1139.

- 13 Claiming that that tax is contrary to Community law, and Article 93(3) of the Treaty in particular, GEMO applied to the French tax authorities for reimbursement of the sums paid by way of that tax.

- 14 That application having been refused by the administration, GEMO appealed against that refusal before the Tribunal administratif de Dijon (Administrative Court, Dijon), which, in its judgment of 25 May 2000, held that the arrangement established by Law No 96-1139 constituted illegal State aid within the meaning of Article 93(3) of the Treaty. That court therefore granted GEMO a refund of the tax on meat purchases which it had paid between 1 January 1997 and 31 August 1998 in the amount of FRF 106 178.
- 15 On appeal the *Ministre de l'économie, des finances et de l'industrie* requested the *Cour administrative d'appel de Lyon* to annul the judgment of the *Tribunal administratif de Dijon* and to reimpose the tax at issue on GEMO.
- 16 In its judgment referring the question, the *Cour administrative d'appel* expresses the view that the arrangement established by Law No 96-1139 cannot be regarded as aid in favour of carcass disposal undertakings since the remuneration paid to them by the State represents the price of the services which they perform. However, given that the public carcass disposal service provides farmers and slaughterhouses with the free collection and disposal of the animal carcasses and waste which they produce, it might be regarded as relieving an economic sector of a burden which it would normally have to bear, thus constituting State aid within the meaning of Article 92 of the Treaty.
- 17 In those circumstances, the *Cour administrative d'appel de Lyon* decided to suspend the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Does the tax on meat purchases provided for under Article 302 bis ZD of the *Code général des impôts* form part of an arrangement which may be regarded as aid within the meaning of Article 92 of the Treaty of 25 March 1957 establishing the European Community?'

The question referred

- 18 In the light of the referring judgment, the question should be understood as asking essentially whether Article 92(1) of the Treaty must be interpreted as meaning that a system such as that at issue in the main proceedings, which provides farmers and slaughterhouses with the free collection and disposal of animal carcasses and slaughterhouse waste, must be considered to be State aid.
- 19 In fact, the intention of the French authorities in setting up the public carcass collection service was to ensure that the collection and disposal of animal carcasses and slaughterhouse waste found unfit for human and animal consumption was mandatory and free of charge to users of the service.
- 20 First, users, that is to say, owners and holders of carcasses of dead animals or batches of dead animals weighing more than 40 kilograms in total and slaughterhouses, are obliged to use carcass disposal services because they are prohibited from burying or discarding in any place or incinerating carcasses or slaughterhouse waste. Second, under the second indent of the second subparagraph of Article 264-2 of the Rural Code, the undertakings responsible for operating the public carcass disposal service may not receive any payment from users.
- 21 To answer the question referred, the various elements of the concept of State aid in Article 92(1) of the Treaty must be considered. It is settled case-law that classification as aid requires that all the conditions set out in that provision are fulfilled (see 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).

- 22 Article 92(1) of the Treaty defines State aid which is in principle incompatible with the common market as 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, in so far as it affects trade between Member States.
- 23 First, according to settled case-law, it is not appropriate to distinguish between cases in which aid is granted directly by the State and those in which it is granted by a public or private body designated or established by that State (see Case 57/86 *Greece v Commission* [1988] ECR 2855, paragraph 12, and Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 58).
- 24 However, for advantages to be capable of being categorised as aid within the meaning of Article 92(1) of the Treaty, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State (*France v Commission*, cited above, paragraph 24).
- 25 In the main proceedings, under Article 264-1 of the Rural Code, the public carcass disposal service is entrusted to the undertakings holding the contracts concluded with the Prefects of each département.
- 26 The fact that the service for the collection and disposal of animal carcasses and waste available to farmers and slaughterhouses is carried out by private undertakings cannot call into question any classification as State aid as the organisation of that service originates with the public authorities. That service can be imputed to the State.

- 27 Moreover, the French Government does not dispute that the resources used for the financing of that public service are State resources.
- 28 Second, the notion of aid can thus encompass not only positive benefits such as subsidies, loans or direct investment in the capital of enterprises, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect (see inter alia Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 25, and Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission* [2003] ECR I-4035, paragraph 35).
- 29 The supply of goods or services on preferential terms is one of the indirect advantages which have the same effects as subsidies (see Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy v Commission* [1988] ECR 219, paragraphs 28 and 29; Case C-56/93 *Belgium v Commission* [1996] ECR I-723, paragraph 10, and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 62).
- 30 Given that, in this case, the service for the collection and disposal of animal carcasses and slaughterhouse waste is provided free of charge, it must be ascertained whether that benefit may be considered to relieve undertakings of an expense which should properly be covered by their budget.
- 31 In that regard, it must be held that the financial cost incurred in the disposal of animal carcasses and slaughterhouse waste must be considered to be an inherent cost of the economic activities of farmers and slaughterhouses.

- 32 The activities of such undertakings result in products and residues which cannot be used and are, moreover, harmful to the environment, and it is for those responsible for their production to arrange for their disposal.
- 33 Therefore, intervention by the public authorities intended to relieve farmers and slaughterhouses of that financial burden appears to be an economic advantage liable to distort competition.
- 34 As to the argument of the French Government that the measure in question is part of a health and safety policy which supersedes individual interests, suffice it to observe that, according to settled case-law, 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 (Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 20, and Case C-382/99 *Netherlands v Commission* [2002] ECR I-5163, paragraph 61).
- 35 Third, Article 92(1) of the Treaty only requires the determination of whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' over others. If so, the measure satisfies the condition of selectivity which defines State aid as laid down by that provision (Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 34, and Case C-409/00 *Spain v Commission* [2003] ECR I-1487, paragraph 47).
- 36 Under Article 265(I) of the Rural Code the public carcass disposal service is for owners and holders of carcasses of dead animals or batches of dead animals weighing more than 40 kilograms in total and slaughterhouses.

- 37 In the view of the French Government, it is a general measure as farmers and slaughterhouses are not the only ones to use the services of the carcass disposal undertakings. Their activities could also include the collection and disposal of carcasses of domestic animals and the carcasses of wild animals in public places.
- 38 However, even if the regime in question also applies to the owners of domestic animals and certain undertakings such as zoos or if certain public authorities may occasionally benefit from the measure, the fact remains that Law No 96-1139 essentially benefits farmers and slaughterhouses.
- 39 The fact that the undertakings able to claim entitlement under that measure belong to different sectors of activity is not sufficient to call into question its selective nature and therefore, to rule out its classification as State aid (*Spain v Commission*, cited above, paragraph 48).
- 40 Finally, for the State measure at issue to be considered as aid, it must be liable to affect trade between Member States.
- 41 In that regard, the Court has held that when aid granted by the State strengthens the position of an undertaking vis-à-vis other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11, and Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 84).

- 42 In the present case, the fact that, in France, the costs of carcass disposal are borne neither by farmers nor by slaughterhouses necessarily has a positive impact on meat prices, thus making that product more competitive on the markets of the Member States where such costs are normally paid out of the budgets of competing traders.
- 43 Against that background, it is clear that a measure of this sort constitutes an advantage for French exports and affects intra-Community trade.
- 44 The answer to the question referred must therefore be that Article 92(1) of the Treaty must be interpreted as meaning that a system such as that at issue in the main proceedings, which provides farmers and slaughterhouses with the free collection and disposal of animal carcasses and slaughterhouse waste, must be classified as State aid.

Costs

- 45 The costs incurred by the French and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Cour administrative d'appel de Lyon by judgment of 13 March 2001, hereby rules:

Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC), must be interpreted as meaning that a system such as that at issue in the main proceedings, which provides farmers and slaughterhouses with the free collection and disposal of animal carcasses and slaughterhouse waste, must be classified as State aid.

Skouris

Cunha Rodrigues

Schintgen

Macken

Colneric

Delivered in open court in Luxembourg on 20 November 2003.

R. Grass

V. Skouris

Registrar

President