

JUDGMENT OF THE COURT (Sixth Chamber)  
29 June 1999 \*

In Case C-256/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunal de Commerce, Brussels, Belgium, for a preliminary ruling in the proceedings pending before that court relating to

**Déménagements-Manutention Transport SA (DMT),**

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

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, G. Hirsch (Rapporteur) and J.L. Murray, Judges,

Advocate General: F.G. Jacobs,

Registrar: D. Lousterman-Hubeau, Principal Administrator,

\* Language of the case: French.

after considering the written observations submitted on behalf of:

- Déménagements-Manutention Transport SA (DMT), by Gérald Kaisin, of the Brussels Bar,
  
- the French Government, by Kareen Rispal-Bellanger, Head of the Sub-directorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Gautier Mignot, Secretary for Foreign Affairs in that Directorate, acting as Agents,
  
- the Commission of the European Communities, by Gérard Rozet, Legal Adviser, and Dimitris Triantafyllou, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Belgian Government, represented by Jan Devadder, General Advisor at the Legal Service of the Ministry of Foreign Affairs, External Trade and Cooperation with Developing Countries, acting as Agent, of the Spanish Government, represented by Rosario Silva de Lapuerta, Abogado del Estado, acting as Agent, of the French Government, represented by Sujiro Seam, Secretary for Foreign Affairs in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent, and of the Commission, represented by Gérard Rozet and Dimitris Triantafyllou, at the hearing on 25 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 24 September 1998,

gives the following

### Judgment

- 1 By decision of 7 July 1997, received at the Court on 15 July 1997, the Tribunal de Commerce (Commercial Court), Brussels, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 92 of the EC Treaty (now, after amendment, Article 87 EC).
- 2 Those questions were raised in proceedings in which the Tribunal de Commerce was examining the question whether it should of its own motion declare Déménagements-Manutention Transport (hereinafter 'DMT'), established in Brussels, insolvent.
- 3 Under the version of Article 442, paragraph 1, of the Belgian Commercial Code which was applicable at the material time, insolvency is pronounced by judgment of the Tribunal de Commerce upon application by the insolvent trader, or on the application of one or several creditors, or of its own motion.
- 4 An investigation into the possible insolvency of an undertaking is initially carried out by the investigating judge who, once he has sufficient information to suggest that the undertaking may be insolvent, refers the matter to the Tribunal de Commerce. That is what happened in the main proceedings.
- 5 According to the decision of the national court, DMT's balance sheet as at 31 December 1996 shows that, at best, DMT has BEF 12.8 million available in

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

- 6 The contributions payable by a worker are withheld from each wage packet by the employer who must, within the time-limits set by the King, forward those contributions to the ONSS (Article 23 of the Law). Employers who do not comply with their obligations are liable to criminal sanctions. Furthermore, employers who do not pay the contributions within the time-limits are liable to pay the ONSS an additional contribution plus interest at a rate fixed by law (Article 28 of the Law). However, it is accepted that the ONSS may, on its own responsibility, grant periods of grace to employers and vary such periods.
  
- 7 The Tribunal de Commerce points out that the ONSS appears to have shown 'exceptional patience' towards DMT in exercising that power, *inter alia*, in authorising it, by letter of 17 December 1996, to pay off its debts at the rate of '[BEF] 600 000 per month from 25 December 1996' and 'to pay new contributions from the fourth quarter of 1996 within the periods laid down by law'; those periods of grace were confirmed by the ONSS in its letter to DMT of 24 February 1997.
  
- 8 The Tribunal de Commerce, Brussels, took the view that, by those payment facilities, the ONSS contributed to sustaining artificially the business of an

insolvent undertaking which was unable to obtain funding under normal market conditions. It accordingly decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

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

### Admissibility

- 9 First of all, it has been consistently held that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, *inter alia*, Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14). As the Advocate General has pointed out in points 15 to 17 of his Opinion, those requirements are met in the main proceedings because the Tribunal de Commerce, in its adjudicating capacity, once seised by the investigating judge, is required to deliver a judgment on the solvency of the undertaking concerned.

- 10 As regards the relevance of the questions referred to the Court, it is settled case-law that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, in particular, Case C-105/94 *Celestini* [1997] ECR I-2971, paragraph 21).
- 11 It appears from the order for reference that the national court considers it likely that, if the payment facilities granted by the ONSS constitute State aid, DMT would have to pay the debts it owes to the ONSS forthwith, as a result of which it would become insolvent and would have to be pronounced insolvent. It is not for the Court to evaluate that view in the context of these proceedings.
- 12 However, having regard to the division of competence in the area of State aid between national courts, the Commission and this Court, this Court has jurisdiction only to reply to the first question referred by the Tribunal de Commerce.
- 13 In that connection, it must be borne in mind that Article 92(1) of the Treaty provides that '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'.
- 14 Article 93 of the EC Treaty (now Article 88 EC) provides for a special procedure by which the Commission is to keep State aid under constant review. As regards proposed new grants of aid by the Member States, it establishes a procedure which must be followed before any aid can be regarded as lawfully granted.

Under the first sentence of Article 93(3) of the Treaty, as interpreted by the case-law of the Court, the Commission is to be notified of any plans to grant or alter aid before those plans are implemented.

- 15 According to the case-law of the Court, the Commission's powers in that regard do not preclude the national court from referring to the Court of Justice a question on the interpretation of the concept of aid (see Case C-189/91 *Kirsammer-Hack* [1993] ECR I-6185, paragraph 14). It is therefore appropriate to give a reply to the first question referred by the Tribunal de Commerce.
- 16 However, in providing through Article 93 for aid to be kept under constant review and supervised by the Commission, the intention of the Treaty is that the finding that an aid may be incompatible with the common market is to be made, subject to review by the Court, by means of an appropriate procedure which it is the Commission's responsibility to set in motion (see Case C-354/90 *Fédération National du Commerce Extérieur des Produits Alimentaires et Syndicat National des Négociants et Transformateurs de Saumon* [1991] ECR I-5505, paragraph 9). It follows that the Court has no jurisdiction to reply to the second question referred by the Tribunal de Commerce.

### The first question

- 17 In order to reply to the first question, it is necessary to determine whether the various components of the definition of State aid in Article 92(1) of the Treaty are present.
- 18 It is common ground that in the case in the main proceedings the payment facilities which the ONSS granted DMT were granted through State resources for the purposes of Article 92(1) of the Treaty, inasmuch as the ONSS is a public

body established by the Belgian State which has been made responsible, under State supervision, for collecting mandatory employers' and workers' social security contributions and managing the social security system (see, to that effect, Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 19).

- 19 As regards the concept of aid, it is settled case-law that that concept is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking (see Case C-387/92 *Banco Exterior de España v Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 13). Where a public body with responsibility for collecting social security contributions tolerates late payment of such contributions, its conduct undoubtedly gives the recipient undertaking a significant commercial advantage by mitigating, for that undertaking, the burden associated with normal application of the social security system.
- 20 However, DMT and the Belgian, French and Spanish Governments essentially argue that, where payment facilities are granted for a limited period, the advantage gained is offset in economic terms by the increase in the amounts payable in the form of interest and penalties for late payment, and it is therefore not possible to conclude that there is State aid.
- 21 However, it should be noted that any interest or penalties for late payment which an undertaking experiencing very serious financial difficulties might have to pay in return for generous payment facilities, such as those which, according to the order for reference, the ONSS granted to DMT over a period of eight years, cannot wholly undo the advantage gained by that undertaking.
- 22 Secondly, it is settled case-law that in order to determine whether a State measure constitutes aid for the purposes of Article 92 of the Treaty, it is necessary to

establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 41).

- 23 The Commission contends that the payment facilities accorded to DNT amount to a contributions credit and that, in the light of the economic information provided in the order for reference, it seems highly unlikely that, having regard to its situation, DMT would have been able to finance itself on the market by obtaining a loan from a private investor.
- 24 It should be noted in that connection that the ONSS did not, in granting the payment facilities in question, act as a public investor whose conduct must, in accordance with settled case-law (see, in particular, Case C-42/93 *Spain v Commission* [1994] ECR I-4175, paragraph 14), be compared to the conduct of a private investor pursuing a structural policy — whether general or sectoral — guided by the longer term prospects of profitability of the capital invested. Indeed, as the Advocate General has pointed out in points 34 to 36 of his Opinion, the ONSS must be held to have acted, *vis-à-vis* DMT, as a public creditor which, like a private creditor, is seeking to obtain payment of sums owed to it by a debtor in financial difficulties (see, to that effect, the judgment in *Spain v Commission*, cited above, paragraph 46).
- 25 It is for the national court to determine whether the payment facilities granted by the ONSS to DMT are manifestly more generous than those which a private creditor would have granted. To that end, the ONSS must be compared with a hypothetical private creditor which, so far as possible, is in the same position *vis-à-vis* its debtor as the ONSS and is seeking to recover the sums owed to it.

- 26 The French Government argues that payment facilities in relation to social security contributions do not constitute State aid if they are granted in identical circumstances to any undertaking experiencing financial difficulties. That would seem to be the case under the regime established by the Belgian legislation. The Commission, however, claims that the ONSS has a discretionary power in regard to the grant of payment facilities.
- 27 It follows from the wording of Article 92(1) of the Treaty that general measures which do not favour only certain undertakings or the production of only certain goods do not fall within that provision. By contrast, where the body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature (see, to that effect, Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraphs 23 and 24).
- 28 It is for the national court in the main proceedings to determine whether the ONSS's power to grant payment facilities is discretionary or not and, if it is not, to establish whether the payment facilities granted by the ONSS are general in nature or whether they favour certain undertakings.
- 29 It should also be pointed out that, if payment facilities such as those in the case in the main proceedings constitute aid, they may distort or threaten to distort competition under Article 92(1) of the Treaty by favouring certain undertakings and affecting trade between Member States, especially where the recipient undertaking will, as in DMT's case, be carrying on a cross-border activity.
- 30 Consequently, the answer to the first question must be that payment facilities in respect of social security contributions granted in a discretionary manner to an undertaking by the body responsible for collecting such contributions constitute State aid for the purposes of Article 92(1) of the Treaty if, having regard to the size of the economic advantage so conferred, the undertaking would manifestly

have been unable to obtain comparable facilities from a private creditor in the same situation *vis-à-vis* that undertaking as the collecting body.

## Costs

- 31 The costs incurred by the Belgian, French and Spanish Governments and 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 proceedings 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 questions referred to it by the Tribunal de Commerce, Brussels, by decision of 7 July 1997, hereby rules:

**Payment facilities in respect of social security contributions granted in a discretionary manner to an undertaking by the body responsible for collecting such contributions constitute State aid for the purposes of Article 92(1) of the EC**

Treaty (now, after amendment, Article 87(1) EC) if, having regard to the size of the economic advantage so conferred, the undertaking would manifestly have been unable to obtain comparable facilities from a private creditor in the same situation vis-à-vis that undertaking as the collecting body.

Kapteyn

Hirsch

Murray

Delivered in open court in Luxembourg on 29 June 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber