JUDGMENT OF THE COURT
24 July 2003 *

In Case C-280/00,

REFERENCE to the Court under Article 234 EC by the Bundesverwaltungsgericht (Germany) for a preliminary ruling in the proceedings pending before that court between

Altmark Trans GmbH,

Regierungspräsidium Magdeburg

and

Nahverkehrsgesellschaft Altmark GmbH,

third party:

Oberbundesanwalt beim Bundesverwaltungsgericht,

* Language of the case: German.

on the interpretation of Article 92 of the EC Treaty (now, after amendment, Article 87 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 (OJ, English Special Edition 1969 (I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet, R. Schintgen and C.W.A. Timmermans (Rapporteur) (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: P. Léger,

Registrar: D. Louterman-Hubeau, Head of Division, and subsequently H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Altmark Trans GmbH, by M. Ronellenfitsch, Rechtsanwalt,

— Regierungspräsidium Magdeburg, by L.-H. Rode, acting as Agent,

— Nahverkehrsgesellschaft Altmark GmbH, by C. Heinze, Rechtsanwalt,

— the Commission of the European Communities, by M. Wolfcarius and D. Triantafyllou, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Altmark Trans GmbH, represented by M. Ronellenfitsch; Regierungspräsidium Magdeburg, represented by L.-H. Rode; Nahverkehrsgesellschaft Altmark GmbH, represented by C. Heinze; and the Commission, represented by M. Wolfcarius and D. Triantafyllou, at the hearing on 6 November 2001,

after hearing the Opinion of the Advocate General at the sitting on 19 March 2002,

having regard to the order reopening the oral procedure of 18 June 2002,

after hearing the oral observations of Altmark Trans GmbH, represented by M. Ronellenfitsch; Regierungspräsidium Magdeburg, represented by S. Karnop, acting as Agent; Nahverkehrsgesellschaft Altmark GmbH, represented by C. Heinze; the German Government, represented by M. Lumma, acting as Agent; the Danish Government, represented by J. Molde, acting as Agent; the Spanish Government, represented by R. Silva de Lapuerta, acting as Agent; the French Government, represented by F. Million, acting as Agent; the Netherlands

Government, represented by N.A.J. Bel, acting as Agent; the United Kingdom Government, represented by J.E. Collins, acting as Agent, and E. Sharpston QC; and the Commission, represented by D. Triantafyllou, at the hearing on 15 October 2002,

after hearing the Opinion of the Advocate General at the sitting on 14 January 2003,

gives the following

Judgment

1 By order of 6 April 2000, received at the Court on 14 July 2000, the Bundesverwaltungsgericht (Federal Administrative Court) 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), 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 (OJ, English Special Edition 1969 (I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1).

2 The question arose in proceedings between Altmark Trans GmbH ('Altmark Trans') and Nahverkehrsgesellschaft Altmark GmbH ('Nahverkehrsgesellschaft') concerning the grant to the former by Regierungspräsidium Magdeburg (Magdeburg Regional Government, 'the Regierungspräsidium') of licences for scheduled bus transport services in the *Landkreis* of Stendal (Germany) and public subsidies for operating those services.

Legal context

Community law

3 Article 92(1) of the EC 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 74 of the EC Treaty (now Article 70 EC), which appears in Title IV of Part Three, on transport, provides that the objectives of the Treaty are, in matters governed by that Title, to be pursued by the Member States within the framework of a common transport policy.

5 Article 77 of the EC Treaty, which appears in the said Title IV, provides that aids which meet the needs of coordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty.

6 Regulation No 1191/69 is divided into six sections, the first of which contains general provisions (Articles 1 and 2), the second concerns common principles for

the termination or maintenance of public service obligations (Articles 3 to 8), the third deals with the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of persons (Article 9), the fourth concerns common compensation procedures (Articles 10 to 13), the fifth concerns public service contracts (Article 14), and the sixth contains final provisions (Articles 15 to 20).

7 Article 1 of the regulation provides:

'1. 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.

2. For the purposes of this Regulation:

— "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" means transport services operated to meet the transport needs of a region.

3. The competent authorities of the Member States shall terminate all obligations inherent in the concept of a public service as defined in this Regulation imposed on transport by rail, road and inland waterway.

4. In order to ensure adequate transport services which in particular take into account social and environmental factors and town and country planning, or with a view to offering particular fares to certain categories of passenger, the competent authorities of the Member States may conclude public service contracts with a transport undertaking. The conditions and details of operation of such contracts are laid down in Section V.

5. However, the competent authorities of the Member States may maintain or impose the public service obligations referred to in Article 2 for urban, suburban and regional passenger transport services. The conditions and details of operation, including methods of compensation, are laid down in Sections II, III and IV.

...

6. Furthermore, the competent authorities of a Member State may decide not to apply paragraphs 3 and 4 in the field of passenger transport to the transport rates and conditions imposed in the interests of one or more particular categories of person.'

8 Article 6(2) of Regulation No 1191/69 reads as follows:

'Decisions to maintain a public service obligation or part thereof, or to terminate it at the end of a specified period, shall provide for compensation to be granted in respect of the financial burdens resulting therefrom; the amount of such compensation shall be determined in accordance with the common procedures laid down in Articles 10 to 13.'

9 Article 9(1) of that regulation provides:

'The amount of compensation in respect of financial burdens devolving upon undertakings by reason of the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of person shall be determined in accordance with the common procedures laid down in Articles 11 to 13.'

10 Article 17(2) of the regulation provides:

'Compensation paid pursuant to this Regulation shall be exempt from the preliminary information procedure laid down in Article 93(3) of the Treaty establishing the European Economic Community.

Member States shall promptly forward to the Commission details, classified by category of obligation, of compensation payments made in respect of financial

burdens devolving upon transport undertakings by reason of the maintenance of the public service obligations set out in Article 2 or by reason of the application to passenger transport of transport rates and conditions imposed in the interests of one or more particular categories of person.'

National legislation

11 The Verordnung zur Festlegung des Anwendungsbereiches der Verordnung (EWG) Nr. 1191/69 in der Fassung der Verordnung (EWG) Nr. 1893/91 im Straßenpersonenverkehr (Regulation determining the scope of Regulation (EEC) No 1191/69 as amended by Regulation (EEC) No 1893/91 in passenger transport by road) of the Federal Minister for Transport of 31 July 1992 (BGBl. 1992 I, p. 1442), in the version as amended on 29 November 1994 (BGBl. 1994 I, p. 3630), excludes in general until 31 December 1995 the application of Regulation No 1191/69 to undertakings whose activity is confined exclusively to the operation of urban, suburban or regional services.

12 The provisions of Paragraph 2(1) in conjunction with Paragraph 1(1) of the Personenbeförderungsgesetz (Law on passenger transport, 'the PBefG') provide that the transport of passengers by road vehicles on scheduled services is subject in Germany to the grant of a licence. That licence requires the operator to charge only the fares authorised by the authority which issues the licence, to comply with the timetable which has been approved, and to observe his statutory obligations in respect of operation and transport.

13 Until 31 December 1995 the conditions for the grant of a licence for a scheduled bus transport service were determined solely by Paragraph 13 of the PBefG. That provision imposes conditions *inter alia* as to the financial solvency and the reliability of the transport undertaking and states that an application for a licence

is to be refused if the service in question would affect the public interest in transport. If several undertakings wish to provide the same transport services, the authorities must, under Paragraph 13(3), take reasonable account of the circumstance that those services have been operated properly for many years by one of those undertakings.

14 By Paragraph 6(116) of the Eisenbahnneuordnungsgesetz (Law on reorganisation of the railways) of 27 December 1993 (BGBl. 1993 I, p. 2378), the German legislature introduced with effect from 1 January 1996 a distinction between transport operated on a commercial basis and transport operated in the public interest for the purpose of granting licences for urban, suburban and regional scheduled public transport services.

15 The first sentence of Paragraph 8(4) of the PBefG lays down the principle that urban, suburban and regional public transport services must be provided commercially.

16 The second sentence of that subparagraph defines commercially operated transport services as those whose costs are covered by operating receipts, income under statutory rules on compensation and reimbursement in connection with fares and timetables, and other income of the undertaking as defined in commercial law. The conditions for granting licences for commercially operated services are defined in Paragraph 13 of the PBefG, as stated in paragraph 13 above.

17 The third sentence of Paragraph 8(4) of the PBefG provides that Regulation No 1191/69 in the version in force from time to time must be referred to where an

adequate transport service cannot be provided commercially. The conditions for granting licences for transport services provided in the public interest under that regulation are defined in Paragraph 13a of the PBefG.

18 According to that provision, a licence must be granted where this is necessary for the implementation of a transport service on the basis of an act of the authorities or a contract within the meaning of Regulation No 1191/69 and is the solution which entails the least cost to the community.

The main proceedings

19 The main proceedings concern the grant by the Regierungspräsidium to Altmark Trans of licences for scheduled bus transport services in the *Landkreis* of Stendal.

20 Licences had originally been granted to Altmark Trans for the period from 25 September 1990 to 19 September 1994. By decision of 27 October 1994, it was granted new licences to run to 31 October 1996.

21 According to the order for reference, the Regierungspräsidium at the same time rejected the applications by Nahverkehrsgesellschaft for licences to operate those services. As grounds for its decision, the Regierungspräsidium stated that Altmark Trans satisfied the conditions for grant of a licence in points 1 and 2 of Paragraph 13(1) of the PBefG. As a long-standing operator, Altmark Trans enjoyed the

protection of acquired status under Paragraph 13(3). That protection implies that the operation of a scheduled transport service by the existing operator may constitute a better offer of transport than an offer from a new applicant. In fact, there was no such new offer. With a shortfall of DEM 0.58 per timetabled kilometre, Altmark Trans required the lowest additional financing from the public authorities.

22 Following a complaint by Altmark Trans, the Regierungspräsidium extended the licences to 31 October 2002, by decision of 30 July 1996.

23 Nahverkehrsgesellschaft brought a complaint against the decision of 27 October 1994, submitting that Altmark Trans did not satisfy the requirements of Paragraph 13 of the PBefG. It was not an economically viable undertaking, since it was unable to survive without public subsidies. The licences granted to it were therefore unlawful. It was also not correct that Altmark Trans needed the least subsidy. By decision of 29 June 1995, the Regierungspräsidium rejected the complaint.

24 Nahverkehrsgesellschaft brought proceedings against the decisions of 27 October 1994 and 30 July 1996 before the Verwaltungsgericht Magdeburg (Administrative Court, Magdeburg) (Germany), which dismissed the action.

25 On appeal, the Oberverwaltungsgericht Sachsen-Anhalt (Higher Administrative Court of Saxony-Anhalt) (Germany) allowed Nahverkehrsgesellschaft's application and therefore set aside the issue of licences to Altmark Trans. It considered

in particular that at the time when the decision of 30 July 1996 was taken the financial solvency of Altmark Trans was no longer guaranteed, as it needed subsidies from the *Landkreis* of Stendal for operating the services licensed. It further held that those subsidies were not compatible with Community law on State aid, in particular Regulation No 1191/69.

26 On this point, the Oberverwaltungsgericht observed that the Federal Republic of Germany had made use of the possibility allowed by Regulation No 1191/69 of excluding undertakings whose activities are confined exclusively to the operation of urban, suburban or regional transport services from the scope of the regulation only up to 31 December 1995. It therefore held that after that date the public subsidies in question were authorised only if the conditions laid down by that regulation were satisfied. Among those conditions was the need to impose public service obligations either by contract or by an act of the competent authorities. Since the *Landkreis* of Stendal had neither concluded a contract with Altmark Trans nor adopted an administrative act in accordance with the provisions of the regulation, the Oberverwaltungsgericht considered that, from 1 January 1996, the *Landkreis* had no longer been authorised to subsidise Altmark Trans to operate the services covered by the licences granted.

27 Altmark Trans appealed on a point of law (*Revision*) to the Bundesverwaltungsgericht against the decision of the Oberverwaltungsgericht. The Bundesverwaltungsgericht considers that the provisions of Paragraph 8(4) of the PBefG raise the question whether the operation of urban, suburban or regional scheduled transport services which cannot be operated profitably on the basis of operating income and therefore necessarily depend on public subsidies may, in national law, be regarded as commercial, or whether it must be regarded as operation in the public interest.

28 In this respect, the Bundesverwaltungsgericht considers that the public subsidies in question may be covered by the expression 'other income of the undertaking as

defined in commercial law' in the second sentence of Paragraph 8(4) of the PBefG. Having recourse to the normal methods of interpreting national law, it reaches the conclusion that the fact that public subsidies are necessary does not exclude the possibility that the transport services are provided commercially.

29 However, that court expresses doubt as to whether Articles 77 and 92 of the Treaty and Regulation No 1191/69 necessarily lead to the interpretation of the second sentence of Paragraph 8(4) of the PBefG consistent with Community law followed by the Oberverwaltungsgericht. In view of the complexity of the system of prohibitions, exceptions and exceptions to the exceptions, it considers that the point needs to be clarified by the Court.

The question referred for a preliminary ruling

30 Since it considered that, in the case before it, the extent of the Community rules was uncertain and that a preliminary ruling was needed for it to give judgment in the main proceedings, the Bundesverwaltungsgericht decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Do Articles [77 and 92 of the EC Treaty], read in conjunction with Regulation (EEC) No 1191/69, as amended by Regulation (EEC) No 1893/91, preclude the application of a national provision which permits licences for scheduled services in local public transport to be granted in respect of services which are necessarily dependent on public subsidies without regard being had to Sections II, III and IV of that regulation?'

31 The Bundesverwaltungsgericht specified that the question was to be understood as comprising the following three parts:

'(1) Are subsidies to compensate for deficits in local public transport subject at all to the prohibition on aid contained in Article [92(1) of the EC Treaty] or are they incapable from the outset of affecting trade between Member States on account of their regional significance? Does this possibly depend on the specific location and significance of the relevant local transport area?

(2) Does Article [77 of the EC Treaty] generally enable the national legislature to permit public subsidies to compensate for deficits in local public transport without regard being had to Regulation (EEC) No 1191/69?

(3) Does Regulation (EEC) No 1191/69 enable the national legislature to permit the operation of a scheduled service in local public transport which is necessarily dependent on public subsidies without regard being had to Sections II, III and IV of that regulation, and to require application of those provisions only where adequate transport provision is otherwise impossible? Does the ability of the national legislature to do so derive 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 local public transport undertakings completely from the scope of the regulation?'

Preliminary observations

32 In the main proceedings, the grant of licences to Altmark Trans is challenged only to the extent that that company needed public subsidies to discharge the public service obligations deriving from those licences. The dispute thus relates essentially to the question whether the public subsidies thus received by Altmark Trans were lawfully granted.

33 Having found that the payment of subsidies to Altmark Trans for the commercial operation of the licences at issue in the main proceedings was not contrary to national law, the Bundesverwaltungsgericht considers the compatibility of those subsidies with Community law.

34 The main provisions of the Treaty governing public subsidies are those on State aid, namely Article 92 et seq. of the EC Treaty. Article 77 of the EC Treaty creates an exception in the field of transport to the general rules applicable to State aid, by providing that aids which meet the needs of coordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty.

35 Regulation No 1191/69 was adopted by the Council on the basis of Articles 75 of the EC Treaty (now, after amendment, Article 71 EC) and 94 of the EC Treaty (now Article 89 EC), that is, on the basis both of the Treaty provisions relating to the common transport policy and of those relating to State aid.

36 Regulation No 1191/69 establishes a system of Community rules applicable to public service obligations in the field of transport. However, under the second subparagraph of Article 1(1) of the regulation, Member States may exclude from its scope any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional services.

37 In those circumstances, the first point to examine is whether Regulation No 1191/69 is applicable to the transport services at issue in the main proceedings. Only if that is not the case will the application of the general provisions of the Treaty on State aid to the subsidies at issue in the main proceedings have to be considered. The third part of the national court's question should therefore be answered first.

The third part of the question referred for a preliminary ruling

38 By the third part of the question referred for a preliminary ruling, the national court essentially asks whether Regulation No 1191/69, and more particularly the second subparagraph of Article 1(1) thereof, may be interpreted as allowing a Member State not to apply the regulation to the operation of urban, suburban or regional scheduled transport services which necessarily depend on public subsidies, and to limit its application to cases where the provision of an adequate transport service is not otherwise possible.

Observations submitted to the Court

39 Altmark Trans, the Regierungspräsidium and Nahverkehrsgesellschaft submit that it cannot be deduced from Regulation No 1191/69 that public subsidies for

transport undertakings are consistent with Community law only if public service obligations within the meaning of that regulation have been imposed or a public service contract has been concluded in accordance with that regulation.

40 They observe in particular that the German legislature has drawn a distinction between transport services operated commercially and those operated in the public interest. By virtue of Paragraph 8(4) of the PBefG, Regulation No 1191/69 applies only to transport services operated in the public interest. Transport services operated on a commercial basis do not therefore fall within the scope of the regulation.

41 Although since 1 January 1996 the German legislature no longer makes general use of the power to derogate provided for in the second subparagraph of Article 1(1) of Regulation No 1191/69, it has indirectly made an exception to the application of that regulation for the benefit of urban, suburban and regional transport services which are provided commercially. Since that regulation authorises a general derogation, it was also open to the legislature to provide for a partial derogation. The principle that 'he who can do more, can do less' applies in this case.

42 The Commission submits that, where urban, suburban and regional transport services have not been excluded from the scope of Regulation No 1191/69 under the second subparagraph of Article 1(1), the national legislature must regulate the operation of a scheduled service either by imposing public service obligations, in accordance with Sections II to IV of the regulation, or by means of contracts providing for those obligations and complying with the provisions of Section V of the regulation.

Findings of the Court

43 To answer this part of the question, it must first be determined whether Regulation No 1191/69 imposes binding rules which the Member States must comply with when they consider imposing public service obligations in the land transport sector.

44 It is clear both from the preamble and from the body of that regulation that it does indeed impose binding rules on the Member States.

45 According to the first recital in the preamble to Regulation No 1191/69, one of the objectives of the common transport policy is to eliminate disparities resulting from obligations inherent in the concept of a public service imposed on transport undertakings by Member States which are liable to cause substantial distortion to conditions of competition. The second recital states that it is therefore necessary to terminate the public service obligations defined in the regulation, although in certain cases it may be essential to maintain them in order to ensure the provision of adequate transport services.

46 Article 1(3) of Regulation No 1191/69 states that the competent authorities of the Member States are to terminate all obligations inherent in the concept of a public service, as defined in the regulation, imposed on transport by rail, road and inland waterway. Under Article 1(4), in order to ensure adequate transport services, taking into account in particular social and environmental factors and town and country planning, or with a view to offering particular fares to certain categories of passenger, those authorities may conclude public service contracts with a transport undertaking, in accordance with the conditions and details of operation laid down in Section V of the regulation. Article 1(5) then states,

however, that the authorities may maintain or impose public service obligations for urban, suburban and regional passenger transport services, in accordance with the conditions and details of operation, including methods of compensation, laid down in Sections II to IV of the regulation.

47 Consequently, in so far as the licences at issue in the main proceedings impose public service obligations and are accompanied by subsidies to help finance the performance of those obligations, the grant of those licences and subsidies was subject in principle to the provisions of Regulation No 1191/69.

48 However, the second subparagraph of Article 1(1) of the regulation authorises Member States to exclude from the scope of the regulation any undertakings whose activities are confined exclusively to the operation of urban, suburban or regional transport services.

49 Originally, until 31 December 1995, the Federal Republic of Germany made use of the derogation in the second subparagraph of Article 1(1) of Regulation No 1191/69 by expressly excluding in national legislation the application of that regulation to urban, suburban and regional transport undertakings.

50 Since 1 January 1996, the German legislation no longer expressly provides for such a derogation. On the contrary, the regulation was declared applicable to the grant of licenses for bus transport in Germany operated in the public interest by the third sentence of Paragraph 8(4) and Paragraph 13a of the PBefG. However, the German legislation does not expressly determine whether the regulation also applies to the grant of licences for bus transport operated commercially.

51 It must be examined whether the fact that Regulation No 1191/69 does not apply to commercially operated services — assuming that to be the case — is contrary to that regulation.

52 Altmark Trans, the Regierungspräsidium and Nahverkehrsgesellschaft submit that, since the second subparagraph of Article 1(1) of Regulation No 1191/69 allows the application of that regulation to be excluded for an entire category of transport services, that provision must *a fortiori* allow a limited part of those services to be excluded from the application of the regulation.

53 It is to be remembered that, as explained in paragraphs 44 to 47 above, Regulation No 1191/69 establishes a system which the Member States must comply with when they consider imposing public service obligations on undertakings in the land transport sector.

54 However, Member States may, with respect to undertakings which operate urban, suburban or regional services, introduce a derogation from the provisions of Regulation No 1191/69, under the second paragraph of Article 1(1) of the regulation. The German legislature made general use of this derogation until 31 December 1995.

55 In those circumstances, it must be concluded that the amendment to the PBefG which took effect on 1 January 1996 contributes to the implementation of the objectives pursued by Regulation No 1191/69.

56 By that amendment, the German legislature introduced a distinction, as regards the grant of licences for passenger transport by bus, between commercial operation and operation in the public interest. By virtue of Paragraph 13a of the PBefG, Regulation No 1191/69 became applicable to the grant of licences for operation in the public interest. That amendment to the PBefG thus cut down the scope of the derogation provided for in the second subparagraph of Article 1(1) of the regulation. The German legislation thus came closer to the objectives pursued by that regulation.

57 It follows from those considerations that a Member State may legitimately, on the basis of the power to derogate provided for in the second subparagraph of Article 1(1) of Regulation No 1191/69, not only exclude urban, suburban or regional scheduled services completely from the scope of that regulation, but may also apply that derogation in a more limited way. In other words, that provision in principle allows the German legislature to provide that, for transport services provided on a commercial basis, public service obligations may be imposed and subsidies granted without complying with the conditions and details of operation laid down in that regulation.

58 The national legislation must, however, clearly delimit the use made of that option of derogation, so as to make it possible to determine the situations in which the derogation applies and those in which Regulation No 1191/69 applies.

59 As the Court has consistently held, it is particularly important, in order to satisfy the requirement of legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts (see Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23; Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraph 7; Case C-59/89

Commission v *Germany* [1991] ECR I-2607, paragraph 18; and Case C-236/95 *Commission* v *Greece* [1996] ECR I-4459, paragraph 13).

60 The order for reference contains a number of points which suggest that those requirements of clarity may not have been complied with in the present case.

61 Thus according to the order for reference, first, the commercial system of operation may apply also to undertakings which need public subsidies to operate licensed transport services. The national court stated, second, that 'this right to choose, which was conferred on the operator by the legislature, [is] removed in practice in the case of scheduled services in local public transport which are largely in deficit, the need for public subsidies automatically resulting in such services being classified as in the public interest'.

62 It appears to follow from the above that licences for transport services which need public subsidies for their operation may be subject to either the commercial or the public interest rules. If that were indeed the case, the provisions of the national legislation concerned would not determine clearly and precisely the situations in which such licences fall within one or other category. In so far as Regulation No 1191/69 does not apply to commercial operations, any uncertainty as to the dividing line between that and operations in the public interest would extend also to the scope of that regulation in Germany.

63 It is for the national court to ascertain whether the application by the German legislature of the derogation provided for in the second subparagraph of Article 1(1) of Regulation No 1191/69 satisfies the requirements of clarity and precision needed to comply with the principle of legal certainty.

64 The answer to the third part of the question referred for a preliminary ruling must therefore be that Regulation No 1191/69, and more particularly the second subparagraph of Article 1(1) thereof, must be interpreted as allowing a Member State not to apply the regulation to the operation of urban, suburban or regional scheduled transport services which necessarily depend on public subsidies, and to limit its application to cases where the provision of an adequate transport service is not otherwise possible, provided however that the principle of legal certainty is duly observed.

65 It must further be stated that, should the national court decide that the principle of legal certainty was not complied with in the main proceedings, it will have to consider that Regulation No 1191/69 is fully applicable in Germany, and thus applies also to commercial operations. In that event, it will have to be ascertained whether the licences at issue in the main proceedings were granted in conformity with that regulation and, if so, whether the subsidies at issue in the main proceedings were granted in conformity with it. Where those licences and subsidies do not satisfy the conditions laid down by the regulation, the national court will have to conclude that they are not compatible with Community law, without it being necessary to consider them from the point of view of the provisions of the Treaty.

66 Consequently, it is only to the extent that the national court concludes that Regulation No 1191/69 does not apply to commercial operations and that the use made by the German legislature of the option to derogate provided for by that regulation complies with the principle of legal certainty that it will have to consider whether the subsidies at issue in the main proceedings were granted in conformity with the provisions of the Treaty relating to State aid.

The first part of the question referred for a preliminary ruling

67 By the first part of the question referred for a preliminary ruling, the national court essentially asks whether subsidies intended to compensate for the deficit in

operating an urban, suburban or regional public transport service come under Article 92(1) of the Treaty in all circumstances, or whether, having regard to the local or regional character of the transport services provided and, if appropriate, to the significance of the field of activity concerned, such subsidies are not liable to affect trade between Member States.

Observations submitted to the Court

68 Altmark Trans, the Regierungspräsidium and Nahverkehrsgesellschaft submit that the subsidies at issue in the main proceedings have no effect on trade between Member States within the meaning of Article 92(1) of the Treaty, since they concern local services only and, in any event, the amount is so small that they have no perceptible effect on such trade.

69 The Commission, by contrast, submits that since 1995 eight Member States have voluntarily opened certain urban, suburban or regional transport markets to competition from undertakings from other Member States and that there are a number of examples of transport undertakings from one Member State pursuing activities in another Member State. That opening up of the market in certain Member States shows that intra-Community trade is not only a possibility but already a reality.

70 It should be recalled that the Court decided, by order of 18 June 2002, to reopen the oral procedure in the present case to give the parties to the main proceedings, the Member States, the Commission and the Council an opportunity to submit observations on the possible consequences of the judgment of 22 November 2001 in Case C-53/00 *Ferring* [2001] ECR I-9067 as regards the answer to be given to the national court's question in the present case.

71 At the second hearing, on 15 October 2002, Altmark Trans, the Regierungspräsidium and Nahverkehrsgesellschaft and the German and Spanish Governments proposed essentially that the Court should confirm the principles it stated in the *Ferring* judgment. They therefore consider that State financing of public services constitutes aid within the meaning of Article 92(1) of the Treaty only if the advantages conferred by the public authorities exceed the cost incurred in discharging the public service obligations.

72 On this point, they submit principally that the concept of aid in Article 92(1) of the Treaty applies only to measures which provide a financial advantage for one or more undertakings. A State subsidy which does no more than offset the cost of discharging public service obligations which have been imposed does not confer any real advantage on the recipient undertaking. Moreover, in such a case competition is not distorted, since any undertaking can benefit from the public subsidy if it provides the public transport services imposed by the State.

73 At the second hearing, the Danish, French, Netherlands and United Kingdom Governments submitted essentially that the Court should adopt the approach of Advocate General Jacobs in his Opinion of 30 April 2002 in Case C-126/01 *GEMO*, judgment of 20 November 2003, not yet published in the ECR. Under that approach, a distinction should be drawn between two categories of situation. Where there is a direct and manifest link between State financing and clearly defined public service obligations, the sums paid by the public authorities do not constitute aid within the meaning of Article 92(1) of the Treaty. On the other hand, where there is no such link or the public service obligations are not clearly defined, the sums paid by the authorities constitute aid.

Findings of the Court

74 To answer the first part of the question, 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-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; and Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 68).

75 Article 92(1) of the Treaty lays down the following conditions. 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.

76 The national court's question concerns more particularly the second of those conditions.

77 In this respect, it must be observed, first, that it is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States.

78 Where a Member State grants a public subsidy to an undertaking, the supply of transport services by that undertaking may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of providing their transport services in the market in that Member State (see, to that effect, Case 102/87 *France* v *Commission* [1988] ECR 4067, paragraph 19; Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 26; and *Spain* v *Commission*, paragraph 40).

79 In the present case, that finding is not merely hypothetical, since, as appears in particular from the observations of the Commission, several Member States have since 1995 started to open certain transport markets to competition from undertakings established in other Member States, so that a number of undertakings are already offering their urban, suburban or regional transport services in Member States other than their State of origin.

80 Next, the Commission notice of 6 March 1996 on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9), as its fourth paragraph states, does not concern transport. Similarly, 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), in accordance with the third recital in the preamble and Article 1(a), does not apply to that sector.

81 Finally, according to the Court's case-law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected (see *Tubemeuse*, paragraph 43, and *Spain* v *Commission*, paragraph 42).

82 The second condition for the application of Article 92(1) of the Treaty, namely that the aid must be capable of affecting trade between Member States, does not therefore depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned.

83 However, for a State measure to be able to come under Article 92(1) of the Treaty, it must also, as stated in paragraph 75 above, be capable of being regarded as an advantage conferred on the recipient undertaking.

84 Measures which, whatever their form, are likely directly or indirectly to favour certain undertakings (Case 6/64 *Costa* [1964] ECR 585, at p. 595) or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 60, and Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 41) are regarded as aid.

85 Mention should, however, be made of the Court's decision in a case concerning an indemnity provided for by Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (OJ 1975 L 194, p. 23). That indemnity was able to be granted to waste oil collection and/or disposal undertakings as compensation for the collection and/or disposal obligations imposed on them by the Member State, provided that it did not exceed the annual uncovered costs actually recorded by the undertakings taking into account a reasonable profit. The Court held that an indemnity of that type did not constitute aid within the meaning of Articles 92 et seq. of the Treaty, but rather consideration for the services performed by the collection or disposal undertakings (see Case 240/83 *ADBHU* [1985] ECR 531, paragraph 3, last sentence, and paragraph 18).

86 Similarly, the Court has held that, provided that a 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. The Court said that, provided there was the necessary equivalence between the exemption and the additional costs incurred, wholesale distributors would not be enjoying any real advantage for the purposes of Article 92(1) of the Treaty, because the only effect of the tax would be to put distributors and laboratories on an equal competitive footing (*Ferring*, paragraph 27).

87 It follows from those judgments that, where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 92(1) of the Treaty.

88 However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied.

89 First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. In the main proceedings, the national court will therefore have to examine whether the public service obligations which were imposed on Altmark Trans are clear from the national legislation and/or the licences at issue in the main proceedings.

90 Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings.

91 Payment by a Member State of compensation for the loss incurred by an undertaking without the parameters of such compensation having been established beforehand, where it turns out after the event that the operation of certain services in connection with the discharge of public service obligations was not economically viable, therefore constitutes a financial measure which falls within the concept of State aid within the meaning of Article 92(1) of the Treaty.

92 Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Compliance with such a condition is essential to ensure that the recipient undertaking is not given any advantage which distorts or threatens to distort competition by strengthening that undertaking's competitive position.

93 Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

94 It follows from the above considerations that, where public subsidies granted to undertakings expressly required to discharge public service obligations in order to compensate for the costs incurred in discharging those obligations comply with the conditions set out in paragraphs 89 to 93 above, such subsidies do not fall within Article 92(1) of the Treaty. Conversely, a State measure which does not comply with one or more of those conditions must be regarded as State aid within the meaning of that provision.

95 The answer to the first part of the question referred for a preliminary ruling must therefore be that the condition for the application of Article 92(1) of the Treaty that the aid must be such as to affect trade between Member States does not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned.

However, public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by that provision where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. For the purpose of applying that criterion, it is for the national court to ascertain that the following conditions are satisfied:

— first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;

— second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;

— third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

— fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

The second part of the question referred for a preliminary ruling

96 By the second part of the question referred for a preliminary ruling, the national court essentially asks whether Article 77 of the Treaty may be applied to public subsidies which compensate for the additional costs incurred in discharging public service obligations without taking into account Regulation No 1191/69.

Observations submitted to the Court

97 Altmark Trans submits that the option available to the national legislature to authorise public subsidies intended to compensate for deficits resulting from the

operation of urban, suburban or regional public transport without regard being had to Regulation No 1191/69 exists independently of Article 77 of the Treaty.

98 The Regierungspräsidium submits for its part that Article 77 of the Treaty does not confer power on the national legislature to authorise public subsidies without having regard to Regulation No 1191/69.

99 Nahverkehrsgesellschaft says that, in so far as the public subsidies at issue in the main proceedings fall under the prohibition in Article 92 of the Treaty, Article 77 excludes that application, since those subsidies meet the conditions laid down by the latter article. That being so, it submits that in this case Regulation No 1191/69 does not preclude the grant of such subsidies.

100 The Commission takes the view that, under Article 77 of the Treaty, the national legislature has power to grant public subsidies intended to compensate for deficits incurred in the field of urban, suburban or regional public transport without having regard to Regulation No 1191/69, but that those subsidies are then subject entirely to the prior notification procedure laid down in Article 93(3) of the EC Treaty (now Article 88(3) EC) concerning the examination of State aid.

Findings of the Court

101 Article 77 of the EC Treaty provides that aids which meet the needs of coordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service are compatible with the Treaty.

102 In paragraph 37 above, it was stated that, if there were no regulation applicable to the case in the main proceedings, it would have to be examined whether the subsidies at issue in the main proceedings fell within the provisions of the Treaty concerning State aid.

103 It follows from paragraphs 65 and 66 above that Regulation No 1191/69 could be applicable to the case in the main proceedings to the extent that the German legislature has not excluded the application of that regulation to commercial operations or has not done so in compliance with the principle of legal certainty. If that proves to be the case, the provisions of that regulation will apply to the subsidies at issue in the main proceedings, and the national court will not have to consider whether they are consistent with the provisions of primary law.

104 If, however, Regulation No 1191/69 were not applicable to the case in the main proceedings, it follows from the answer to the first part of the question that, in so far as the subsidies at issue in the main proceedings are to be regarded as compensation for the transport services provided in order to discharge public service obligations and satisfy the conditions set out in paragraphs 89 to 93 above, those subsidies would not come under Article 92 of the Treaty, so that there would be no need to rely on the exception to that provision under Article 77 of the Treaty.

105 Consequently, the provisions of primary law concerning State aid and the common transport policy would be applicable to the subsidies at issue in the main proceedings only in so far as, first, those subsidies did not come under the provisions of Regulation No 1191/69 and, second, where they were granted to compensate for the additional costs incurred in discharging public service obligations, the conditions set out in paragraphs 89 to 93 above were not all satisfied.

106 However, even if the subsidies at issue in the main proceedings were to be tested against the Treaty provisions on State aid, the exception provided for in Article 77 could not be applied as such.

107 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 (OJ, English Special Edition 1970 (II), p. 360). Article 3 of that regulation provides that '[w]ithout prejudice to the provisions of... Regulation (EEC) No 1192/69... and of... 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 cases or circumstances'. It follows that Member States are no longer authorised to rely on Article 77 of the Treaty outside the cases referred to in secondary Community legislation.

108 So, to the extent that Regulation No 1191/69 does not apply in the present case and the subsidies at issue in the main proceedings fall within Article 92(1) of the Treaty, Regulation No 1107/70 lists exhaustively the circumstances in which the authorities of the Member States may grant aids under Article 77 of the Treaty.

109 Accordingly, the answer to the second part of the question referred for a preliminary ruling must be that Article 77 of the Treaty cannot be applied to public subsidies which compensate for the additional costs incurred in discharging public service obligations without taking into account Regulation No 1191/69.

Costs

110 The costs incurred by the German, Danish, Spanish, French, Netherlands 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Bundesverwaltungsgericht by order of 6 April 2000, hereby rules:

1. **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, as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991, and more particularly the second subparagraph of Article 1(1) thereof, must be interpreted as allowing a Member State not to apply the regulation to the operation of urban, suburban or regional scheduled transport services which necessarily depend on public subsidies, and to limit its application to cases where the provision of an adequate transport service is not otherwise possible, provided however that the principle of legal certainty is duly observed.**

2. The condition for the application of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC) that the aid must be such as to affect trade between Member States does not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned.

However, public subsidies intended to enable the operation of urban, suburban or regional scheduled transport services are not caught by that provision where such subsidies are to be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations. For the purpose of applying that criterion, it is for the national court to ascertain that the following conditions are satisfied:

— first, the recipient undertaking is actually required to discharge public service obligations and those obligations have been clearly defined;

— second, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner;

— third, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations;

— fourth, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

3. Article 77 of the EC Treaty (now Article 73 EC) cannot be applied to public subsidies which compensate for the additional costs incurred in discharging public service obligations without taking into account Regulation No 1191/69, as amended by Regulation No 1893/91.

Rodríguez Iglesias	Puissochet	Wathelet
Schintgen	Timmermans	Gulmann
Edward	La Pergola	Jann
Skouris	Macken	Colneric
von Bahr	Cunha Rodrigues	Rosas

Delivered in open court in Luxembourg on 24 July 2003.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President