

Reference for a preliminary ruling by the Tribunale di Bologna — Sezione 1^a penale — by order of that Court of 22 September 2003 in the criminal proceedings against Mario Filimeno Miraglia

(Case C-469/03)

(2004/C 21/25)

Reference has been made to the Court of Justice of the European Communities by order of the Tribunale di Bologna — Sezione 1^a penale — (Bologna District Court, First Criminal Collegiate Chamber) of 22 September 2003, received at the Court Registry on 10 November 2003, for a preliminary ruling in the criminal proceedings against Mario Filimeno Miraglia on the following question:

Does Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 apply when the decision of the court in the first State appears to discontinue prosecution without adjudicating on the merits of the case and on the sole premise that proceedings are taking place in another State?

Appeal brought on 12 November 2003 (by fax of 10 November 2003) by the Diputación Foral de Bizkaia against the judgment delivered on 5 August 2003 by the First Chamber (Extended Composition) of the Court of First Instance of the European Communities in Joined Cases T-116/01 and T-118/01 between P. & O. European Ferries (Vizcaya) S.A. (T-116/01) and the Diputación Foral de Vizcaya (T-118/01) and the Commission of the European Communities

(Case C-471/03 P)

(2004/C 21/26)

An appeal against the judgment delivered on 5 August 2003 by the First Chamber (Extended Composition) of the Court of First Instance of the European Communities in Joined Cases T-116/01 and T-118/01 between P. & O. European Ferries (Vizcaya) S.A. (T-116/01) and the Diputación Foral de Vizcaya (T-118/01) and the Commission of the European Communities was brought before the Court of Justice of the European Communities on 12 November 2003 by the Diputación Foral de Bizkaia, represented by Marta Morales Isasi and Ignacio Sáenz-Cortabarría.

The appellant claims that the Court should:

- set aside the contested judgment;

- principally, if the state of the proceedings so permits, uphold the claims made at first instance by the appellant and, in consequence, annul the Commission's decision of 29 November 2000 on the aid scheme implemented by Spain in favour of the shipping company Ferries Golfo de Vizcaya or, secondarily, annul Article 2 of the Decision in so far as it orders repayment of ESP 985 500 000, together with interest;
- if the preceding claim is not allowed, refer the matter back to the Court of First Instance;
- in either case, order the Commission to pay the costs of both sets of proceedings.

Pleas in law and main arguments

- Error of law, in that the Court of First Instance interpreted the 'advantage' element of the concept of State aid in the light of the principle of a private investor operating in normal market economy conditions, so introducing as a criterion of analysis the criterion of assessing the need for public intervention;
- misinterpretation of Article 87 EC, inasmuch as the Court of First Instance inferred the existence of State aid because it considered that there was no need for the purchase of vouchers;
- error of law, in that the Court of First Instance did not penalise the lack of economic analysis in the Commission's decision, where it declared that all the sums paid constituted State aid;
- clear distortion by the Court of First Instance of the statement of reasons given for the decision, on the basis solely of lack of transparency in the selection of the shipping company, so as to exclude application of Article 87(2)(a) EC, which gave rise to infringement of the right to a fair hearing because no real answer was given to the arguments put forward in the application;
- obvious inaccuracy as regards matters taken by the Court of First Instance to be proven facts and incorrect classification of facts, in that the Court of First Instance considered that the aid contained in the 1995 agreement was 'instituted and implemented in 1992' and drew the legal inference therefrom that the aid was unlawful, which amounts to clear distortion of the facts, of the Decision itself and of the evidence, and breach of procedural rules, in that the Court of First Instance substituted the Commission's reasoning for its own in classifying the aid at issue as illegal;

- error of law, in that the Court of First Instance considered that the Commission was not required to determine the actual effect on competition and intra-Community trade in its examination of the aid at issue in the light of Article 87 EC;
- distortion of the sense of the claims in the application and error in law consisting of breach of the procedural rules concerning the right to a fair hearing, in that the Court of First Instance did not examine the claims relating to the existence of exceptional circumstances and the protection of legitimate expectations;
- distortion of the sense of the claims in the application and error in law consisting of infringement of the procedural rules concerning the right to a fair hearing, in that the Court of First Instance did not examine the claims relating to infringement of Article 10 EC and breach of the principle of good and proper administration by the Commission;
- error of law consisting of breach of the procedural rules concerning the right to a fair hearing, in that the Court of First Instance did not give a decision on the preparatory inquiry proposed in the application.

Reference for a preliminary ruling by the Hoge Raad der Nederlanden by judgment of that Court of 7 November 2003 in the case of Staatssecretaris van Financiën against the single taxable entity Arthur Andersen & Co Accountants c.s.

(Case C-472/03)

(2004/C 21/27)

Reference has been made to the Court of Justice of the European Communities by judgment of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) of 7 November 2003, received at the Court Registry on 12 November 2003, for a preliminary ruling in the case of Staatssecretaris van Financiën against the single taxable entity Arthur Andersen & Co Accountants c.s. on the following question:

Where a taxable person has concluded an agreement with a (life) assurance company, such as the agreement at issue between ACMC and UL, under which that taxable person undertakes, for a certain remuneration and with the aid of qualified personnel who are expert in the insurance field, most of the actual activities related to insurance — including, as a rule, the taking of decisions that bind the insurance company to enter into insurance contracts and maintaining contact with the agents and, as the occasion arises, with the insured — while the insurance contracts are concluded in the name of the

insurance company and the insurance risk is borne by the latter, are the activities undertaken by that taxable person in execution of the agreement ‘related services performed by insurance brokers and insurance agents’ within the meaning of Article 13B(a) of the Sixth Directive ⁽¹⁾?

⁽¹⁾ Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ L 145 of 13.06.1977, p. 1-40).

Reference for a preliminary ruling by the Tribunale Ordinario di Milano — Sezione X Penale — by order of that Court of 23 October 2003 in the criminal proceedings against Adelio Aggio, Paolo Berlusconi and Giovanni Butti

(Case C-473/03)

(2004/C 21/28)

Reference has been made to the Court of Justice of the European Communities by order of the Tribunale Ordinario di Milano - Sezione X Penale - (Milan District Court, Tenth Criminal Chamber) of 23 October 2003, received at the Court Registry on 13 November 2003, for a preliminary ruling in the criminal proceedings against Adelio Aggio, Paolo Berlusconi and Giovanni Butti on the following question:

- Is Article 6 of Directive 68/151/EEC ⁽¹⁾ to be understood as requiring the Member States to establish appropriate penalties not only for failing to disclose company balance sheets and profit and loss accounts but also for falsifying those documents, or other company documents addressed to the members or the public or any information on a company's assets and liabilities, and economic and financial situation which the company is required to provide in relation to the company or the group of which it forms a part?
- Do the requirements that the penalty be effective, proportionate and dissuasive, with which terms the Court defined the concept of ‘appropriate penalty’ in its judgment of 21 September 1989 in Case 68/88 [Commission v Hellenic Republic [1989] ECR I-2965], refer to the nature or type of penalty considered in the abstract, or rather also to its application in practice having regard to the structural characteristics of the legal system within which it takes effect? and finally