

JUDGMENT OF THE COURT
15 March 1994 ^{*}

In Case C-387/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Superior de Justicia de la Comunidad Valenciana (Spain) for a preliminary ruling in the proceedings pending before that court between

Banco de Crédito Industrial SA, now Banco Exterior de España SA,

and

Ayuntamiento de Valencia,

on the interpretation of Articles 86, 90 and 92 of the EEC Treaty and of certain provisions of the Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties of 12 June 1985 (Official Journal 1985 L 302, p. 23),

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida and M. Diez de Velasco (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler (Rapporteur), G. C. Rodríguez Iglesias, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

^{*} Language of the case: Spanish.

Advocate General: C. O. Lenz,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- the Ayuntamiento de Valencia, by Arturo Monfort, Abogado del Colegio de Abogados de Valencia,
- the Spanish Government, by Alberto José Navarro González, Director-General for Coordination in Matters involving Community Law and Institutions, and Miguel Bravo-Ferrer Delgado, Abogado del Estado, member of the State Legal Department for Contentious Community Matters, both acting as Agents,
- the Hellenic Government, by Vassilios Kontolaimos, Deputy Legal Adviser of the State Legal Service, and Ioannis Chalkias, Legal Agent of the State Legal Service, both acting as Agents,
- the Commission of the European Communities, by Francisco Enrique González Díaz and Daniel Calleja Crespo, members of its Legal Service, both acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Hellenic Government, the Spanish Government and the Commission at the hearing on 12 October 1993,

after hearing the Opinion of the Advocate General at the sitting on 11 January 1994,

gives the following

Judgment

- 1 By order of 24 June 1991, which was received at the Court on 29 October 1992, the Tribunal Superior de Justicia de la Comunidad Valenciana (Spain) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty questions on the interpretation of Articles 86, 90 and 92 of the EEC Treaty and of certain provisions of the Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and Amendments of the Treaties of 12 June 1985 (Official Journal 1985 L 302, p. 23, hereinafter referred to as 'the Act of Accession').
- 2 Those questions were raised in proceedings between Banco de Crédito Industrial SA, which in the meantime has become Banco Exterior de España SA (hereinafter referred to as 'Banco de Crédito Industrial') and the Ayuntamiento de Valencia (hereinafter referred to as 'the Ayuntamiento') concerning a notice of assessment to municipal establishment tax for the financial years 1983 to 1986. That tax is charged on the use or enjoyment of premises, whatever their nature, situated on the territory of local authorities, for industrial or commercial purposes or for the exercise of professional activities.
- 3 Before the Tribunal Superior de Justicia de la Comunidad Valenciana, in which it had brought proceedings against that notice of assessment, the Banco de Crédito Industrial contended that the notice was contrary to Article 29 of Law 13/71

of 19 June 1971 on the organization of and rules governing official credit (BOE of 21 June 1971, hereinafter referred to as 'Law 13/71'), which provides that 'public credit institutions shall be exempt from taxes payable to the State, province, municipality or any other entity of public law, provided that they possess the status of taxpayers'.

4 Considering that the outcome of the dispute depended on the interpretation of provisions of Community law, the national court decided to refer the following questions to the Court of Justice for a preliminary ruling:

'Should the exemption from taxes payable to the State, province, municipality and other entities of public law which Spanish law grants to public credit institutions provided that they possess the status of taxpayers (Article 29 of Law 13/71 of 19 June 1971 on the organization of and rules governing official credit) be regarded as incompatible with the principle of fair competition inasmuch as it permits abuse by one or more undertakings of a dominant position within the common market or a substantial part of it?

Should any kind of State aid granted from public funds which distorts or may distort competition by favouring certain undertakings or products be considered incompatible with the Treaty?

Is the exemption laid down by Article 29 of Law 13/71 of 19 June 1971 incompatible with Article 90 and, by extension, with Articles 7, 85 and 94 of the Treaty establishing the European Economic Community of 25 March 1957, signed in Rome, and with Articles 2, 9, 35 and 51 of the Acts of Accession to the Treaty, signed in Madrid and Lisbon on 12 June 1985?'

5 Before those questions are answered, it should be noted first of all that it is apparent from the order for reference that the Banco de Crédito Industrial is a commercial limited company in which the State has an indirect holding through the Insti-

tuto de Crédito Oficial (ICO). According to the national court, a public institution whose shares are held by the ICO and whose roles and duties are laid down in particular in Articles 6 and 87 of the Ley General Presupuestaria (General Budget Law), is a State company which is not subject to commercial law in the matters to which the Ley General Presupuestaria applies since, according to Article 6 (3) of that Law, public law bodies (and not companies) are subject to public-law as regards their annual performance, investments and financing.

- 6 Secondly, Articles 35 and 51 of the Act of Accession, which belong to the chapter of that act relating to transitional measures concerning Spain in the sphere of the free movement of goods, bear no relation to either the reasons stated in the order for reference or to the facts of the case before the national court.
- 7 Thirdly, Articles 2 and 9 of the Act of Accession, the provisions of the original Treaties and the acts adopted by the institutions of the Communities before accession are binding on the new Member States and apply in those States under the conditions laid down in those Treaties and in the Act itself (Article 2), subject to the derogations provided for on a transitional basis by the Act (Article 9).
- 8 As the Ayuntamiento, the Spanish Government and the Commission rightly observe, it follows that the preliminary questions are not relevant in an assessment of the legality of the contested notice of assessment in so far as it relates to the financial years 1983, 1984 and 1985, which preceded the accession of the Kingdom of Spain to the European Communities.

- 9 Fourthly, the factual and regulatory framework within which the questions submitted arise, as defined in the order for reference and in the observations submitted by the parties, shows that the circumstances forming the subject-matter of the main proceedings are covered by the rules of the Treaty relating to aid granted by the Member States rather than the rules relating to observance of fair competition by undertakings.
- 10 In those circumstances, it must be concluded that the preliminary questions submitted to this Court relate in substance to the issue whether Article 90 of the Treaty, in conjunction with Article 92 thereof, precludes the application of legislation of a Member State granting a tax exemption to public undertakings.
- 11 In this regard, it must be recalled that it follows from Article 90 of the Treaty that, save for the reservation in Article 90 (2), Article 92 covers all private and public undertakings and all their production (judgment in Case 78/76 *Steinike und Weinlig v Germany* [1977] ECR 595, at paragraph 18).
- 12 The aim of Article 92 of the Treaty is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products (judgment in Case 173/73 *Italy v Commission* [1974] ECR 709, at paragraph 26).
- 13 As the Court has already held in the context of the ECSC Treaty (judgment in Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* [1961] ECR 1), the concept of aid is thus wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect.

- 14 It follows that a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 92 (1) of the Treaty.
- 15 In so far as such aid is capable of affecting trade between Member States and distorting competition, it is, save where otherwise provided for by the Treaty, incompatible with the common market.
- 16 However, it is settled law (see, in particular, the judgment in Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 11) that 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.
- 17 That power of the Commission also covers State aid granted to the undertakings referred to in Article 90 (2), in particular those which the Member States have made responsible for the management of services of general economic interest.
- 18 It follows that the distinction which Article 93 of the Treaty draws between existing aid and new aid is equally applicable to State aid granted to the undertakings covered by Article 90 (2).

- 19 It must be observed in this regard that the aid in question in the main proceedings was introduced by a Law adopted prior to the accession of the Kingdom of Spain to the European Communities. It therefore constitutes existing aid in the same way as aid existing in the original Member States when the Treaty establishing the European Economic Community entered into force.
- 20 Existing aid may be implemented as long as the Commission has not found it to be incompatible with the common market (see the judgment in Case C-47/91 *Italy v Commission* [1992] ECR I-4145, paragraph 25).
- 21 It follows that as long as the Commission has not found existing aid to be incompatible with the common market it is not therefore necessary to examine whether and to what extent that aid is capable of falling outside the scope of the prohibition of Article 92 by virtue of Article 90 (2) of the Treaty.
- 22 The answer which must be given to the questions submitted must therefore be that a measure by which a Member State grants a tax exemption to public undertakings constitutes State aid within the meaning of Article 92 (1) of the Treaty. Where it constitutes existing aid, such aid may be implemented as long as the Commission has not found it to be incompatible with the common market.

Costs

- 23 The costs incurred by the Hellenic and Spanish Governments and by the Commission of the European Communities, which have submitted observations to the

Court, are not recoverable. Since the proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Tribunal Superior de Justicia de la Comunidad Valenciana (Spain), by order of 24 June 1991, hereby rules:

A measure by which a Member State grants a tax exemption to public undertakings constitutes State aid within the meaning of Article 92 (1) of the Treaty. Where it constitutes existing aid, such aid may be implemented as long as the Commission has not found it to be incompatible with the common market.

Due

Mancini

Moitinho de Almeida

Diez de Velasco

Kakouris

Joliet

Schockweiler

Rodríguez Iglesias

Zuleeg

Kapteyn

Murray

Delivered in open court in Luxembourg on 15 March 1994.

R. Grass

O. Due

Registrar

President