OPINION OF ADVOCATE GENERAL JACOBS

delivered on 26 May 2005 [1]

1. In this case the Tribunal Supremo of Spain has referred to the Court a question concerning the scope of the obligation of prior notification under Article 88(3) EC, in conjunction with Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (the 'seventh Directive'). [2] The Tribunal Supremo asks the Court to clarify whether aid to the building or conversion of vessels or tugs which falls outside the scope of the seventh Directive by reason of the fact that the vessels' tonnage or power is below the thresholds laid down therein is subject to prior notification to the Commission pursuant to Article 88(3) EC.

The Treaty provisions

2. According to Article 87(1) EC, '[s]ave 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.

3. Article 87(3) states: 'The following may be considered to be compatible with the common market: ...

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

...

1 — Original language: English.

2 — OJ 1990 L 380 p. 27.

(e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.'

4. Article 88(3) EC reads: 'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. ... The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

5. Article 89 EC states: 'The Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 87 and 88 and may in particular determine the conditions in which Article 88 (3) shall apply and the categories of aid exempted from this procedure.'

The Directive

6. The seventh Directive is one of a series of directives on aid to shipbuilding, dating back to 1969.[3] It contained the applicable provisions of Community law at the material time and was adopted on the basis of Articles 92 (3)(d) and 113 of the EC Treaty (now Articles 87(3)(e) and 133). It provides for the possibility that State aid to shipbuilding undertakings for operating, investment, closure, and research and development may be declared compatible with the common market, provided the criteria laid down therein are complied with.

7. According to Article 1 of the Directive, 'for the purpose of this Directive the following definitions shall apply:

(a) "shipbuilding": means the building in the Community of the following metal-hulled sea-going vessels:

— merchant ships for the carriage of passengers and/or cargo, of not less than 100 gross registered tonnage (GRT),

3 — For an overview of these measures up to and including Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding (OJ 1998 L 202, p. 1), see L. Hancher, T. Ottervanger and P.J. Slot, *EC State Aids*, London 1999. Since the expiry of that regulation on 31 December 2003, the Commission's practice in the area is governed by the Framework on State aid to shipbuilding (2003/C 317/06) (OJ 2003 C 317, p. 11).

— fishing vessels of not less than 100 GRT,

— dredgers or ships for other work at sea of not less then 100 GRT excluding drilling platforms,

— tugs of not less than 365 kW;

(b) "ship conversion": means the conversion in the Community of metal-hulled sea-going vessels, as defined in (a), of not less than 1 000 GRT, on condition that conversion operations entail radical alterations to the cargo plan, the hull or the propulsion system or the passenger accommodation;

(c) "ship repair": means the repair of the vessels referred to in (a);

(d) "aid": means State aid within the meaning of Articles [87 and 88] of the Treaty, including not only aid granted by the State itself but also that granted by regional or local authorities and any aid elements contained in the financing measures taken by Member States in respect of the shipbuilding or ship repair undertakings which they directly or indirectly control and which do not count as the provision of risk capital according to standard company practice in a market economy. Such aid may be considered compatible with the common market provided that it complies with the criteria for derogation contained in this Directive.

...'

8. Articles 2 to 10 of the seventh Directive lay down the criteria under which State aid granted to shipbuilding and ship conversion of the vessels covered under Article 1 may be considered compatible with the common market.

9. Article 11 requires that in addition to the provisions of Articles 87 and 88 EC, aid to shipbuilding, ship conversion and ship repair undertakings covered by the seventh Directive is to be subject to the notification rules provided for in its paragraph 2. In essence that paragraph requires Member States to notify in advance to the Commission all aid covered by the seventh Directive.

The national proceedings and the questions referred

10. According to the order for reference, the Xunta de Galicia, the government of the autonomous community of Galicia, adopted, in the exercise of its powers under national constitutional law, Decree No 217/1994 of 23 June 1994 ('the Galician Decree') establishing 'a new system of aid' to the shipbuilding and ship conversion sector in Galicia. As stated in the preamble to the Galician Decree, the aid scheme targets shipbuilding and conversion of vessels which, 'by virtue of their gross tonnage, their power, in the case of tugs, or the material of their hull, their size and dimensions and/or the characteristics of the building or conversion work' fall outside the scope of the seventh Directive, as implemented in domestic law by the Spanish State. The Galician Decree concerns, basically, aid to vessels of less than 100 GRT and tugs of a power rating of less than 365 kW.

11. The Spanish State contested the Galician Decree at first instance before the competent national court, the Tribunal Superior de Justicia de Galicia, on grounds that, inter alia, it was contrary to Community law. The Tribunal Superior de Justicia de Galicia dismissed the Spanish State's action in its judgment of 16 December 1996.

12. The Spanish State appealed against that judgment to the Tribunal Supremo. It argued, inter alia, that the aid scheme qualified as State aid under Article 87 EC but had been implemented without prior notification in contravention of Article 88(3) EC. Accordingly, the lower national court had erred in law in that it should have declared the Galician Decree in breach of Community law and therefore void. That interpretation was opposed by counsel for the Xunta de Galicia.

13. In its order for reference the Tribunal Supremo considers that the issue under Community law is not clear since in its view two opposing interpretations appear possible.

14. On the one hand, the seventh Directive could be interpreted as meaning that the general duty of notification does not apply to aid to the building or conversion of vessels which fall below the minimum thresholds of the seventh Directive. The rationale for that interpretation is, according to the Tribunal

Supremo, that if the Community legislature considered that aid concerning the larger vessels covered by the seventh Directive may be deemed compatible with the common market, it may be concluded that the silence of the seventh Directive as regards aid concerning smaller vessels amounts to a declaration that measures of that kind do not affect trade between Member States and therefore fail to qualify as State aid for the purposes of Article 87(1) EC.

15. On the other hand, it may also be argued that the purpose of the seventh Directive was not to exempt Member States from the duty under Article 88(3) EC to notify aid relating to smaller or less powerful vessels not falling within its scope.

16. Accordingly, the Tribunal Supremo seeks a preliminary ruling on the following question:

'Do Article 87(1) and (3)(c) and (e)[4]... and Article 88(3) ... of the EC Treaty, in conjunction with Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding, permit the adoption, without prior notification to the Commission of the European Communities, of national rules — of the kind contained in Decree 217/1994 of 23 June 1994 of the Xunta de Galicia — which establish a "new system of aid" for a specific shipbuilding and ship conversion sector, being precisely that sector which, by virtue of the gross tonnage, power and other characteristics of the vessels concerned, does not fall within the scope of the said Directive 90/684.'

17. The Xunta de Galicia, Spain, the Netherlands and the Commission have submitted written observations. No hearing was held.

Assessment

18. It is settled case-law that classification as State aid requires that all the conditions set out in Article 87(1) EC are fulfilled, namely, that there is intervention by the State or through State resources, that the intervention must be liable to affect trade between Member States, that it must confer an advantage on the recipient and that it must distort or threaten to distort competition.[5]

4 — The Tribunal Supremo cited Article 87(3)(d) in its order for reference, whereas it is clear from the context that it meant to refer to Article 87(3)(e) as the relevant provision. I shall therefore refer to the latter provision throughout.

5 — See, inter alia, Case C-280/00 *Altmark Trans* [2003] ECR I-7747 at paragraphs 74 and 75 and the case-law cited therein.

19. When all those elements are present, the aid scheme should, in principle, be notified before implementation under Article 88(3) EC, unless it is otherwise exempted from notification under either the automatic derogations of Article 87(2) EC or any other relevant provision of Community legislation.

20. In the instant case, the national court asks in essence whether the seventh Directive implicitly provides for such a derogation for a 'new system of aid' such as the one established by the Galician Decree, intended for vessels which fall outside the scope of the seventh Directive.

21. The Xunta de Galicia contends that, since under the seventh Directive certain aid concerning vessels of a larger size and greater power may be considered compatible with the common market, it follows that aid to smaller and less powerful vessels does not affect trade between Member States. That aid is implicitly declared compatible with the common market by the seventh Directive, which has established an implied *de minimis* rule in that respect.

22. I do not agree with that interpretation for several reasons.

23. The seventh Directive was adopted, inter alia, on the basis of what is now Article 87(3)(e) EC, which empowers the Council, on a proposal from the Commission, to specify any category of aid that may be declared compatible with the common market. As an exception to the general prohibition contained in Article 87(1) EC, the provisions of the seventh Directive must be interpreted strictly and, therefore, no implicit intention to exclude a whole category from the prohibition can be presumed.[6]

24. As the Commission and the Netherlands point out, nothing in the wording of the seventh Directive indicates that the intention of the legislature was to exempt from the duty of prior notification aid that fell outside its scope by reason of the smaller size of the vessels targeted. The seventh Directive does not contain a *de minimis* rule or any provision remotely to that effect, nor could it do so in view of its legal basis, as I shall discuss below. Moreover, the seventh Directive does not even exempt the aid falling within its scope from notification. Article 11(1) thereof requires that all the aid covered

6 — See the Opinion of Advocate General Capotorti in Case 730/79 *Philip Morris* [1980] ECR 2671, at p. 2701.

by it be notified to the Commission, in addition to being subject to the requirements of Articles 87 and 88 EC.

25. The fact that the seventh Directive provides that aid concerning a specific category of vessels and tugs may be declared compatible represents a policy choice by the Community legislature. It follows from its preamble that the seventh Directive, in line with its predecessors, aims to consolidate and enhance the efficiency and competitiveness of the European Union shipbuilding industry in the context of global competition through, inter alia, elimination of the structural overcapacity of shipyards in the European Community. [7] In view of that aim, it is perhaps not suprising that the Community legislature focused on those categories of vessels within the EU shipbuilding industry which, on account of their characteristics, are subject to global competition. [8]

26. That does not imply, however, that, as the Xunta de Galicia argues, builders and repairers of smaller vessels and less powerful tugs do not operate in a Community-wide competitive market and that trade between Member States cannot be affected by aid to those categories of vessels. Pursuant to the case-law of the Court, '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 prima facie exclude the possibility that intra-Community trade may be affected or competition distorted'. [9] Even where the aid in question benefits undertakings operating only at a local or regional level which do not supply services or goods outside their State of origin, intra-Community trade could still be affected. [10] In addition, as noted by Spain in its observations, the preamble to the Galician Decree itself appears to assume the

7 — The third recital refers to 'significant improvements in the world market for shipbuilding', which however had not yet materialised in 'a satisfactory equilibrium between supply and demand' or in the restoration of a 'normal market situation'. The fourth recital mentions the 'positive international trends'; the fifth and sixth recitals refer to the international efforts being deployed within the OECD to reach a multilateral agreement between the world's most important shipbuilding nations on a phasing-out of public support measures to the sector, and to ensure fair competition at an international level through 'a balanced and equitable elimination of all existing impediments to normal competition conditions'; the eighth recital states that a competitive shipbuilding industry is of vital interest to the Community ...; the ninth recital justifies the maintenance of aid to the sector in order to ensure 'a sufficient level of activity in European shipyards and, thereby, the survival of an efficient and competitive European shipbuilding industry'. See also Joined Cases T-227/99 and T-134/00 *Kvaerner Warnow Werft* v *Commission* [2002] ECR II-1205, at paragraph 96.

8 — The same is true for its immediate predecessor: see the preamble to Council Directive 87/167/EEC of 26 January 1987 on aid to shipbuilding, OJ 1987 L 69, p. 55.

9 — Case C-278/00 *Greece* v *Commission* [2004] ECR I-3997, at paragraph 69 and the case-law cited therein.

10 — *Altmark*, cited in footnote 5 above, at paragraph 77 and the case-law cited therein; Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, at paragraph 47.

existence of foreign competition to the targeted Galician shipyards.

27. In my view, the Commission is right in arguing that the fact that the aid scheme approved by the Galician Decree falls outside the scope of the seventh Directive means simply that that aid scheme cannot benefit from the provisions of the directive and that, in the absence of any rule to the contrary, it is subject to the general State aid regime provided by the EC Treaty.

28. Furthermore, as the Commission notes, the legal basis of the seventh Directive, Article 87(3)(e) EC, allows the Council to define which categories of measure already found to constitute State aid may be declared compatible with the common market, but does not entitle the Community legislature to qualify the concept of State aid itself. Accordingly, the seventh Directive could not, as the Xunta de Galicia seeks to suggest, implicitly (or indeed explicitly) declare aid compatible with the common market on the ground that it does not affect trade between Member States; nor could the directive exempt an aid from notification on that ground. Such an exemption may be effected only on the basis of Article 89 EC, which gives the Council the power to regulate the application of Articles 87 and 88 EC and, in particular, to determine the categories of aid exempted from the prior notification procedure under Article 88(3) EC. [11]

29. I therefore conclude that Article 87(1) and (3)(c) and (e) and Article 88(3) EC, read in conjunction with the seventh Directive, do not exempt national rules of the kind contained in the Galician Decree from the general provisions of the EC Treaty on State aid, including the duty of notification under Article 88(3) EC.

30. If, in view of the foregoing, the national court finds that the aid established by the Galician Decree was implemented in breach of the duty of prior notification under Article 88(3) EC, it must, in accordance with settled case-law, apply the directly effective prohibition laid down in the last sentence of Article 88(3) EC, which extends to all aid which has been implemented without being notified. The case-law requires national courts to draw 'all the appropriate conclusions ... from

11 — The Council has exercised its power under Article 89 EC by adopting, inter alia, Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles [87] and [88] of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ 1998 L 142, p. 1). Articles 1 and 2 thereof respectively grant the Commission the power to decide, by means of regulations, that certain categories of aid should be compatible with the common market and that certain categories of aid do not meet all the criteria of Article 87(1) EC, in which case they are exempted from the notification procedure under Article 88(3) EC. On that basis the Commission adopted Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ 2001 L 10, p. 33) and 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), both of 12 January 2001. Aid that complies with the provisions of those regulations need not be notified under Article 88(3) EC. Those regulations however were not in force at the material time.

an infringement of the last sentence of Article [88(3)] of the Treaty, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures'. [12]

31. Before concluding, I should mention an aspect of the case which might have raised some interesting issues.

32. Under Spanish constitutional law, autonomous communities enjoy exclusive competence in certain areas which fall within the scope of Community law. Since all autonomous communities are treated as emanations of the Member State for the purposes of Community law, the Spanish State is responsible, vis-à-vis the Community, for ensuring compliance in areas which, under national law, are beyond its sphere of competence and where, as in the instant case, its interests and those of the autonomous communities do not coincide.

33. Indeed, in the field of the State aid provisions of the EC Treaty, in so far as Community law is concerned, it is the responsibility of the Spanish State to comply with the obligation of prior notification of any new aid falling under the provisions of the Treaty. That obligation may however be at odds with the internal division of powers, as the present case shows, which could give rise to interesting questions of Community law.

34. By asking national courts to declare the contested aid void on the basis of the absence of notification to the Commission, the Spanish State might be thought to be relying, in a national judicial context, on its own failure to fulfil its obligation under the Treaty in order to have an act adopted by a sub-state entity quashed as contrary to Community law.

35. Since however such issues have not been referred to by the Tribunal Supremo in its order for reference or discussed by any of the parties involved in the case, and since, in any event, they have no bearing on the answer to be given to the national court, I shall not examine them in more detail.

12 — Case C-39/94 *SFEI* [1996] ECR I-3547, at paragraphs 39 and 40 and the case-law cited therein.

Conclusion

36. In view of the foregoing, I consider that the Court should answer the national court's question in the following terms:

— Article 87(1) and (3)(c) and (e) and Article 88(3) EC, read in conjunction with Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding, do not exempt from the general application of the State aid provisions of the EC Treaty an aid scheme of the kind contained in Decree No 217/1994 of 23 June 1994 of the Xunta de Galicia which establishes a 'new system of aid' for a specific shipbuilding and ship conversion sector, which, by virtue of the gross tonnage, power and other characteristics of the vessels concerned, does not fall within the scope of that directive.

— If the national court finds that the aid in question was implemented in breach of the duty of prior notification pursuant to Article 88(3) EC, it must draw all the appropriate conclusions from that infringement, in accordance with its national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures.