

JUDGMENT OF THE COURT (Third Chamber)

21 July 2005^{*}

In Case C-71/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunal Supremo (Spain), made by decision of 22 December 2003, received at the Court on 16 February 2004, in the proceedings

Administración del Estado

v

Xunta de Galicia,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissechot, S. von Bahr, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

^{*} Language of the case: Spanish.

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Xunta de Galicia, by J. Rodríguez González, abogado,
- the Spanish Government, by M. Muñoz Pérez, acting as Agent,
- the Netherlands Government, by C.M. Wissels and H.G. Sevenster, acting as Agents,
- the Commission of the European Communities, by V. Kreuschitz and J.L. Buendía Sierra, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 May 2005,

gives the following

Judgment

- 1 The request for a preliminary ruling relates to the interpretation of Article 93(3) of the EC Treaty (now Article 88(3) EC) with a view to clarifying the scope of the obligation of prior notification laid down by the first sentence of that provision with regard to aid to shipbuilding and ship conversion falling outside the scope of Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27).

- 2 The request has been made in proceedings between the Administración del Estado (State Administration) and the Xunta de Galicia regarding Decree No 217/1994 of 23 June 1994 (*Diario Oficial de Galicia* No 133 of 12 July 1994, p. 4663; hereinafter 'Decree No 217/1994'), by which the Consejo de Gobierno de la Comunidad Autónoma de Galicia (the Governing Council of the Autonomous Community of Galicia) adopted an aid scheme for the shipbuilding and ship conversion sector in Galicia. The Administración del Estado seeks the annulment of that decree on the ground, inter alia, that it was adopted in breach of the obligation of prior notification laid down in Article 93(3) of the Treaty.

Legal context

Community legislation

Provisions of the Treaty

- 3 Pursuant to Article 92 of the EC Treaty (now, after amendment, Article 87 EC):

‘1. 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.

...

3. 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. ...;

...

- (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 93(3) of the Treaty provides:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

- 5 Pursuant to Article 94 of the EC Treaty (now Article 89 EC):

'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 92 and 93 and may in particular determine the conditions in which Article 93(3) shall apply and the categories of aid exempted from this procedure.'

Directive 90/684

- 6 Directive 90/684, the application of which was extended by Council Regulation (EC) No 3094/95 of 22 December 1995 on aid to shipbuilding (OJ 1995 L 332, p. 1), lays down, on the basis, in particular, of Article 92(3)(e) of the Treaty, specific rules applicable to aid to that sector, which constitute an exception to the general prohibition set out in Article 92(1) of the Treaty.

- 7 Article 1(a) and (b) of Directive 90/684 provides:

‘For the purpose of this Directive the following definitions shall apply:

(a) “shipbuilding”:

means the building in the Community of the following metal-hulled seagoing vessels:

— merchant ships for the carriage of passengers and/or cargo, of not less than 100 GRT;

— fishing vessels of not less than 100 GRT;

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

— tugs of not less than 365 kW;

(b) “ship conversion”:

means the conversion in the Community of metal-hulled seagoing 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’.

8 The first subparagraph of Article 3(1) of that directive provides that all forms of aid to shipowners or to third parties which are available as aid for the building or conversion of ships are to be subject to the notification rules in Article 11 of the directive.

9 Articles 4 to 10 of Directive 90/684 lay down the derogation criteria which the operating and restructuring aid in favour of shipbuilding and ship conversion must satisfy in order to be considered compatible with the common market.

10 Article 11 of Directive 90/684 provides:

‘1. In addition to the provisions of Articles 92 and 93 of the Treaty, aid to shipbuilding, ship conversion and ship repair undertakings covered by this Directive shall be subject to the special notification rules provided for in paragraph 2.

2. The following shall be notified to the Commission in advance by the Member States and authorised by the Commission before they are put into effect:

- (a) any aid scheme — new or existing — or any amendment of an existing scheme covered by this Directive;
- (b) any decision to apply any general or regional aid scheme to the undertakings covered by this Directive;
- (c) any individual application of aid schemes in the cases referred to in the second subparagraph of Article 4(5) and paragraph 7 or when specifically provided for by the Commission in its approval of the aid scheme concerned.’

National legislation

- 11 It is clear from the order for reference that Decree No 217/1994 was adopted, according to its preamble, to govern 'the aid scheme designed to stimulate and encourage the shipbuilding sector in Galicia by providing aid for shipbuilding and ship conversion in Galicia when the vessels concerned are those which, by virtue of their gross tonnage, their power, in the case of tugs, or the material of their hull, the type, the size and/or the characteristics of the building or conversion work, do not qualify for the aid provided for in ... Directive [90/684] ...'.

- 12 Article 2 of that decree provides:

'For the purposes of this decree, the shipbuilding sector comprises Galician shipbuilding undertakings authorised to build metal-hulled vessels of less than 100 GRT.'

- 13 Article 3 of that decree specifies:

'Building encompasses the following metal-hulled seagoing vessels, built entirely by the undertakings referred to in Article 2.

- (a) Merchant ships for the carriage of passengers and/or cargo, of less than 100 GRT;

- (b) Fishing vessels of less than 100 GRT;
- (c) Dredgers or other vessels for work at sea, of less than 100 GRT, excluding drilling platforms;
- (d) Tugs of less than 365 kW.'

14 According to Article 4 of Decree No 217/1994:

'Ship conversion means the conversion of vessels referred to in Article 39, of less than 1 000 GRT after conversion, on condition that the conversion operations carried out entail radical alterations to the hull, and/or the propulsion system, the cargo plan and the passenger accommodation in passenger transport vessels, or are intended to improve the working conditions and safety in fish handling bays, both forward and aft.'

The main proceedings and the question referred for a preliminary ruling

15 In 1994, the Administración del Estado brought an action before the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia) for annulment of Decree No 217/1994 on the ground, inter alia, that the adoption of that decree infringed the Community rules on State aid.

- 16 By judgment of 16 December 1996, that court dismissed the action, holding essentially that Article 93(3) of the Treaty does not impose an obligation of prior notification to the Commission of schemes of aid which, like that laid down by Decree No 217/1994, do not fall within the scope of Directive 90/684 and which, therefore, must be considered compatible with the common market.
- 17 The Administración del Estado appealed against that judgment before the Tribunal Supremo (Supreme Court). In support of that appeal, it submits, *inter alia*, that Decree No 217/1994 was adopted in breach of, firstly, the obligation of prior notification laid down in Article 93(3) of the Treaty and, secondly, the special notification rules laid down in Article 11 of Directive 90/684.
- 18 In the order for reference, the Tribunal Supremo states, on the one hand, that the wording of Directive 90/684 appears to suggest that only aid to shipbuilding and ship conversion falling within the scope of the directive is subject to the obligation of prior notification laid down in Article 93(3) of the Treaty, from which it could be deduced by contrary inference that that duty of notification does not apply to aid to shipbuilding and ship conversion which does not fall within the scope of the directive. On the premiss that the latter aid does not affect trade between Member States within the meaning of Article 92(1) of the Treaty, the national court takes the view that that aid might therefore be considered compatible with the common market. On the other hand, the Tribunal Supremo states that it could, conversely, be claimed that Directive 90/684 is not intended to release Member States from the obligation of prior notification laid down in Article 93(3) of the Treaty, so that the obligation also applies to aid which does not fall within the scope of that directive.

- 19 In those circumstances, the Tribunal Supremo decided to refer the following question to the Court for a preliminary ruling:

‘Do Article 87(1) and (3)(c) and ([e]) EC ... and Article 88(3) EC ..., in conjunction with ... Directive 90/684 ..., permit the adoption, without prior notification to the Commission of the European Communities, of national rules — of the kind contained in Decree No 217/1994 ... — 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?’

Consideration of the question referred for a preliminary ruling

- 20 It is clear from the file that, although the question referred for a preliminary ruling refers to Article 92 of the EC Treaty (now Article 87 EC), the national court seeks an interpretation from the Court of the scope of the obligation of prior notification laid down in Article 93(3) of the EC Treaty (now Article 88(3) EC). By its question, the court essentially asks whether a new aid scheme in favour of shipbuilding and ship conversion activities which do not fall within the scope of Directive 90/684 is subject to that obligation.
- 21 Article 93 of the EC Treaty lays down a special procedure by which State aid is to be kept under constant review by the Commission. In relation to new aid, Article 93(3) lays down a preliminary procedure without which no aid can be considered properly granted. In particular, in accordance with that provision, the Commission is to be

informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid and the Member State concerned is not to put its proposed measures into effect until this procedure has resulted in a final decision.

22 As the Court has already held, it follows that, pursuant to the first sentence of Article 93(3) of the Treaty, plans to grant or alter aid must be notified to the Commission before they are implemented (see, *inter alia*, Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 35; Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 44; and Case C-278/00 *Greece v Commission* [2004] ECR I-3997, paragraph 30).

23 Pursuant to Article 94 of the Treaty, the Council may, however, by regulation, specify categories of aid exempted from this notification procedure.

24 In the present case, the Xunta de Galicia submits, essentially, that the Commission did not have to be notified under Article 93(3) of the Treaty of the aid scheme instituted by Decree No 217/1994, since it is intended specifically to grant aid for shipbuilding and ship conversion activities which do not fall within the scope of Directive 90/684.

25 In that regard, it must be stated that, at the time of adoption of Decree No 217/1994, no regulation made pursuant to Article 94 of the Treaty exempted aid to

shipbuilding and ship conversion from the notification procedure laid down in Article 93(3) of the Treaty.

²⁶ In particular, as the Commission points out, not only does Directive 90/684 not contain provisions laying down such an exemption, but also it could not contain such provisions, since that directive is not based on Article 94 of the Treaty but on Article 92(3)(e) of the Treaty, which only allows the Council to specify that certain categories of aid may be considered compatible with the common market. Far from exempting from the notification procedure aid to shipbuilding which falls within its scope, Directive 90/684 prescribes, on the contrary, as stated in Article 11(1), 'special notification rules' which apply 'in addition to the provisions of Articles 92 and 93 of the Treaty'.

²⁷ Admittedly, inasmuch as aid covered by Decree No 217/1994 does not fall within the scope of Directive 90/684, that decree was not subject to the special notification rules laid down by it.

²⁸ However, this cannot in any way call into question the fact that, in the absence of a regulation adopted on the basis of Article 94 of the Treaty with a view to an exemption from the notification procedure laid down in Article 93(3) of the Treaty, that procedure continues to apply to aid to shipbuilding and ship conversion, including such aid which does not fall within the scope of the directive.

- 29 Moreover, since, according to Article 11(1) of Directive 90/684, aid to shipbuilding and ship conversion which falls within the scope of that directive is subject to notification rules additional to those laid down in Article 93(3) of the Treaty, it follows a fortiori that aid to that sector which does not fall within the directive's scope remains subject only to the notification procedure laid down by the latter provision.
- 30 The Xunta de Galicia nevertheless takes the view that, inasmuch as certain aid in respect of large vessels is recognised by Directive 90/684 to be compatible with the common market, the absence of provisions in the directive concerning possible aid in respect of vessels of a smaller size may mean that that type of measure does not affect trade between Member States. The directive must therefore be interpreted as implicitly recognising the compatibility with the common market of aid to shipbuilding and ship conversion in respect of vessels whose tonnage or power is less than that referred to in Article 1 of the directive, which, in effect, has instituted in their regard a specific *de minimis* rule.
- 31 However, contrary to what is suggested by the Xunta de Galicia, the fact that State aid might be compatible with the common market cannot, as such, affect the obligation of prior notification of that aid to the Commission under Article 93(3) of the Treaty. It is established case-law that the subsequent adoption by the Commission of a final decision declaring aid compatible with the common market does not have the effect of regularising *ex post facto* the implementation of aid measures which, in breach of Article 93(3) of the Treaty, were not notified (Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* [1991] ECR I-5505, paragraphs 16 and 17, and Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, paragraphs 62 and 63).

- 32 On the other hand, only State aid within the meaning of Article 92(1) of the Treaty is subject to the notification procedure laid down in Article 93(3) of the Treaty (Joined Cases 91/83 and 127/83 *Heineken Brouwerijen* [1984] ECR 3435, paragraph 11). Pursuant to Article 92(1) of the Treaty, for a measure to be classified as State aid it must, inter alia, be liable to affect trade between Member States (see, to that effect, Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraphs 74 and 75, and Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 27).
- 33 It is for the national courts to interpret and apply the concept of State aid contained in Article 92(1) of the Treaty in order to determine whether a State measure introduced without observance of the preliminary examination procedure provided for in Article 92(3) ought to have been subject to that procedure (Case C-44/93 *Namur-Les assurances du credit* [1994] ECR I-3829, paragraph 16).
- 34 In that regard, firstly it should be noted that aid to shipbuilding which is covered by the scope of Directive 90/684 does indeed affect trade between Member States within the meaning of Article 92(1) of the Treaty. Directive 90/684 was adopted on the basis of Article 92(3)(e) of the Treaty, pursuant to which categories of aid specified by decision of the Council may be considered compatible with the common market. Where aid is covered by derogating rules adopted under that provision, the aid is, as a matter of principle, at the outset incompatible with the common market and is considered to be compatible with the common market only on condition that it complies with the criteria for derogation contained in the decision approving those rules (Joined Cases C-356/90 and C-180/91 *Belgium v Commission* [1993] ECR I-2323, paragraphs 30 and 33; Case C-400/92 *Germany v Commission* [1994] ECR I-4701, paragraph 15; and Case C-36/00 *Spain v Commission* [2002] ECR I-3243, paragraph 47).

35 It follows that, being incompatible at the outset, that aid amounts to State aid within the meaning of Article 92(1) of the Treaty, which means that it of necessity affects trade between Member States (see, to that effect, Case C-36/00 *Spain v Commission*, cited above, paragraph 48). Thus, in the present case, it is apparent, inter alia, from the third, sixth, ninth and fourteenth recitals in the preamble to Directive 90/684 that the latter is intended to ensure, on a world market, fair competition at international level between shipyards by encouraging the production of more technologically advanced ships in order to ensure the survival of an efficient and competitive European shipbuilding industry.

36 However, as the Spanish and Netherlands Governments and the Commission rightly point out, that finding in no way implies that aid to shipbuilding which does not fall within the scope of Directive 90/684 constitutes aid which does not affect trade between Member States.

37 While Article 92(3)(e) of the Treaty empowers the Council to decide what categories of aid may be considered to be compatible with the common market, it does not confer on the Commission any power to interpret Article 92(1) of the Treaty (see, to that effect, Case C-110/03 *Belgium v Commission* [2005] ECR I-2801, paragraph 58).

38 Therefore, in adopting Directive 90/684, the Council did not have the power, as the Advocate General has correctly observed in point 28 of his Opinion, to authorise the Commission to declare that certain aid to shipbuilding does not affect trade between Member States, with the consequence that that aid would not be covered by the notification procedure laid down in Article 93(3) of the Treaty.

- 39 In the present case, it is quite possible that aid granted by the decentralised authorities in question to undertakings supplying, at a local or regional level, shipbuilding or ship conversion services falling below the tonnage or power thresholds laid down by Directive 90/684 may nevertheless have an effect on trade between Member States.
- 40 As the Court has held, the condition for Article 92(1) of the Treaty to apply, by which the aid must be capable of affecting trade between Member States, does not depend on the local or regional character of the services supplied or on the scale of the field of activity concerned (*Altmark Trans and Regierungspräsidium Magdeburg*, cited above, paragraph 82).
- 41 Moreover, 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 the 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 *Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 81; Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, paragraph 28; and *Heiser*, cited above, paragraph 32).
- 42 In particular, a relatively small amount of aid may affect such trade where there is strong competition in the sector in which the undertakings that receive it operate (see Case C-351/98 *Spain v Commission* [2002] ECR I-8031, paragraph 63, and Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, paragraph 54).
- 43 Thus, where a sector has a large number of small companies, aid potentially available to all or a very large number of undertakings in that sector can, even if individual amounts are small, have an impact on trade between Member States (see

Case C-351/98 *Spain v Commission*, cited above, paragraph 64, and Case C-372/97 *Italy v Commission* [2004] ECR I-3679, paragraph 57).

44 Finally, when aid granted by the State or through State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid (Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paragraph 11, and Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 33).

45 Where a public subsidy is granted to shipbuilding or ship conversion undertakings, the supply of those services by the undertakings may for that reason be maintained or increased with the result that undertakings established in other Member States have less chance of providing their services in that sector in the market of that Member State (see, to this effect, *Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 78).

46 Here, furthermore, it is apparent from the preamble to Decree No 217/1994 that the aim thereof is to permit the Galician shipyards, whose clients are 'owners of fishing and merchant vessels and of other seagoing vessels, both national and foreign' to offer 'guarantees and financing conditions similar to those of their competitors'.

47 Consequently, inasmuch as it is conceivable that the Galician shipyards which benefit from the aid scheme at issue are in competition with shipyards established in another Member State, the condition for Article 92(1) of the Treaty to apply, regarding effects on trade between Member States, must be considered fulfilled.

- 48 It follows that, if a scheme of aid to shipbuilding and ship conversion such as that set up by Decree No 217/1994, which does not fall within the scope of Directive 90/684, is capable of itself of giving rise to the grant of State aid within the meaning of Article 92(1) of the Treaty, prior notification of that scheme must be given to the Commission pursuant to Article 93(3) of the Treaty.
- 49 It is for the national courts, in cases of infringement of the latter provision, to draw the necessary consequences, in accordance with their national law, with regard to both the validity of the acts giving effect to the aid and the recovery of financial support granted in disregard of that provision (see, to that effect, *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon*, cited above, paragraphs 11 and 12; *van Calster and Others*, cited above, paragraph 53; and Case C-345/02 *Pearle and Others* [2004] ECR I-7139, paragraph 31). In particular, the finding that aid has been granted in breach of the last sentence of Article 93(3) of the Treaty must in principle lead to its repayment in accordance with the procedural rules of domestic law (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 68).
- 50 In the light of the foregoing, the answer to the question referred for a preliminary ruling must be that the Commission must be given prior notification, pursuant to Article 93(3) of the Treaty, of a scheme of aid to shipbuilding and ship conversion such as that set up by Decree No 217/1994, which does not fall within the scope of Directive 90/684, if it is established that the scheme is capable of itself of giving rise to the grant of State aid within the meaning of Article 92(1) of the Treaty. It is for the national court, in cases of infringement of Article 93(3) of the Treaty, to draw the necessary consequences, in accordance with its national law, with regard to both the validity of the acts giving effect to the aid and the recovery of financial support granted in disregard of that provision.

Costs

- 51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

The Commission of the European Communities must be given prior notification, pursuant to Article 93(3) of the EC Treaty (now Article 88(3) EC), of a scheme of aid to shipbuilding and ship conversion such as that set up by Decree No 217/1994 of 23 June 1994, which does not fall within the scope of Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding, if it is established that the scheme is capable of itself of giving rise to the grant of State aid within the meaning of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC). It is for the national court, in cases of infringement of Article 93(3) of the EC Treaty, to draw the necessary consequences, in accordance with its national law, with regard to both the validity of the acts giving effect to the aid and the recovery of financial support granted in disregard of that provision.

[Signatures]