Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

29 July 2019*

(Reference for a preliminary ruling — State aid — Employment aid — Exemption from social security contributions in connection with training and work experience contracts — Decision 2000/128/EC — Aid granted by Italy to promote employment — Aid incompatible in part with the internal market — Applicability of Decision 2000/128/EC to an undertaking exclusively providing local public transport services which were directly awarded to it by a municipality — Article 107(1) TFEU — Concept of 'distortion of competition' — Concept of 'effect on trade' between Member States)

In Case C-659/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decision of 4 July 2017, received at the Court on 24 November 2017, in the proceedings

Istituto nazionale della previdenza sociale (INPS)

v

Azienda Napoletana Mobilità SpA,

THE COURT (Second Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, T. von Danwitz and P.G. Xuereb, Judges,

Advocate General: G. Hogan,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 3 April 2019,

after considering the observations submitted on behalf of:

– the Istituto nazionale della previdenza sociale (INPS), by A. Sgroi, L. Maritato and C. D'Aloisio, avvocati,

– Azienda Napoletana Mobilità SpA, by M. Malena and S. Miccoli, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and S. Fiorentino, avvocato dello Stato,

– the European Commission, by D. Recchia and F. Tomat, acting as Agents,

* Language of the case: Italian.

after hearing the Opinion of the Advocate General at the sitting on 6 June 2019,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 107(1) TFEU and of Commission Decision 2000/128/EC of 11 May 1999 concerning aid granted by Italy to promote employment (OJ 2000 L 42, p. 1).

2 The request has been made in proceedings between the Istituto nazionale della previdenza sociale (INPS) and Azienda Napoletana Mobilità SpA ('ANM') concerning the issue of whether or not ANM is obliged to pay social security contributions to the INPS in connection with training and work experience contracts concluded by ANM between 1997 and 2001.

Legal context

Decision 2000/128

3 Recitals 62 to 67 of Decision 2000/128 state, as regards the Italian rules on training and work experience contracts:

'(62) Training and work experience contracts governed by [legge n. 863 — Conversione in legge, con modificazioni, del decreto-legge 30 ottobre 1984, n. 726, recante misure urgenti a sostegno e ad incremento dei livelli occupazionali (Law No 863 converting into law, with amendments, Decree-Law No 726 of 30 October 1984 on urgent measures for supporting and increasing levels of employment) of 19 December 1984 (*GURI* No 351 of 22 December 1984, p. 10691)] did not constitute aid within the meaning of Article 87(1) [of the EC Treaty], but a general measure. The aid was applicable to all firms in a uniform, automatic and non-discretionary manner and on the basis of objective criteria.

(63) The amendments made in 1990 by [legge n. 407 — Disposizioni diverse per l'attuazione della manovra di finanza pubblica 1991-1993 (Law No 407 laying down various provisions for the implementation of public finance policy 1991-1993) of 29 December 1990 (*GURI* No 303 of 31 December 1990, p. 3)] modified the nature of the measures. The new provisions varied the reductions according to the location of the recipient firm and the sector to which it belonged. This meant that some firms received greater reductions than those granted to [their] competitors.

(64) Selective reductions which favour certain firms in a particular Member State, whether the selectivity operates at individual, regional or sectoral level, constitute, for the differential part of the reduction, State aid within the meaning of Article 87(1) of the [EC] Treaty, i.e. aid which distorts competition and could affect trade between Member States.

This differential benefits firms which operate in particular areas of Italy as the aid was not granted to firms in other areas.

(65) The aid distorts competition in so far as it strengthens the financial position and opportunities of the recipient firms with respect to competitors who do not receive the aid. Whenever this effect extends to intra-Community trade, the latter is impaired by the aid.

(66) In particular, such aid distorts competition and affects trade between Member States where the recipient firms export some of their products to other Member States; equally, even where such firms do not export their goods, national production is favoured because firms established in other Member States have less chance of exporting their products to the Italian market.

(67) For the above reasons, the measures under examination are normally prohibited under Article 87(1) of the EC Treaty and Article 62(1) of the [Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA Agreement')] and may be deemed compatible with the common market only if they qualify for one of the derogations provided for by those instruments.'

4 As regards the Italian legislation on the conversion of training and work experience contracts into open-ended contracts, recitals 97 and 98 of that decision are worded as follows:

'(97) Since the measures concern a one-year extension of the same aid provided for training and work experience contracts and since the aid is even more selective, being limited to Objective 1 areas only, the aid assessment contained in point V.1.(a) is even more relevant to these measures.

(98) Accordingly, it is clear that the measures in question are liable to affect trade between Member States. In view of the aid contained in the measures, it must be concluded that they are caught by Article 87(1) of the EC Treaty and Article 62(1) of the EEA Agreement inasmuch as they constitute State aid which distorts competition to an extent liable to affect intra-Community trade and can be regarded as being compatible with the common market only if they qualify for one of the derogations laid down.'

5 Article 1 of that Decision provides:

'1. The aid granted unlawfully by Italy since November 1995 for employment under the training and work experience contracts provided for in [Law No 863 of 19 December 1984, Law No 407 of 29 December 1990, legge n. 169 — Conversione in legge, con modificazioni, del decreto-legge 29 marzo 1991, n. 108, recante disposizioni urgenti in materia di sostegno dell'occupazione (Law No 169, converting into law, with amendments, Decree-Law No 108 of 29 March 1991, laying down urgent provisions in support of employment), of 1 June 1991 (*GURI* No 129 of 4 June 1991, p. 4), and legge n. 451 — Conversione in legge, con modificazioni, del decreto-legge 16 maggio 1994, n. 299, recante disposizioni urgenti in materia di occupazione e di fiscalizzazione degli oneri sociali (Law No 451, converting into law, with amendments, Decree-Law No 299 of 16 May 1994 laying down urgent provisions concerning employment and exemption from payment of social security contributions) of 19 July 1994 (*GURI* No 167 of 19 July 1994, p. 3)] is compatible with the common market and the EEA Agreement provided that it concerns:

– the creation of jobs in the recipient firm for persons who have not yet found employment or who have lost their previous employment within the meaning of the guidelines on aid to employment [(OJ 1995 C 334, p. 4)],

– the employment of workers experiencing particular difficulties in entering or re-entering the labour market. For the purposes of this Decision, workers experiencing particular difficulties in entering or re-entering the labour market shall mean young persons under the age of 25, [graduates] up to the age of 29 and the long-term unemployed, i.e. out of employment for more than one year.

2. Aid for training and work experience contracts which does not satisfy the conditions set out in paragraph 1 is incompatible with the common market.'

6 Article 2 of that decision provides:

'1. The aid granted by Italy under Article 15 of [legge n. 196 — Norme in materia di promozione dell'occupazione (Law No 196 on the promotion of employment) of 24 June 1997 (Ordinary Supplement to *GURI* No 154 of 4 July 1997)] for the conversion of training and work experience contracts into open-ended contracts is compatible with the common market and the EEA Agreement provided that it complies with the net job creation requirement as defined in the Community guidelines on aid to employment.

The workforce employed by a firm shall be calculated without taking account of jobs resulting from the conversion and jobs created through fixed-term contracts or not guaranteeing sufficiently stable employment.

2. Aid for the conversion of training and work experience contracts into open-ended contracts which does not satisfy the requirement laid down in paragraph 1 is incompatible with the common market.'

7 Article 3 of Decision 2000/128 provides:

'Italy shall take all necessary measures to recover from the recipients the aid which does not satisfy the conditions of Articles 1 and 2 and has already been unlawfully paid.

Repayment shall be made in accordance with the procedures of Italian law. The amounts to be repaid shall bear interest from the date on which the aid was paid until the date on which it is effectively recovered. The interest shall be calculated on the basis of the reference rate used to calculate the net grant equivalent of regional aid.'

Italian law

8 By Law No 863 of 19 December 1984, the Italian Republic introduced the 'training and work experience contract'. This was, initially, a fixed-term contract including a period of training, designed for the employment of unemployed persons up to 29 years of age. As a result of hiring individuals under this type of contract, employers benefited from an exemption from paying social security contributions for a period of 2 years. That exemption was applied in a uniform, automatic and non-discretionary manner throughout the national territory.

9 The rules applicable to training and work experience contracts were amended, successively, by Law No 407 of 29 December 1990 ('Law No 407/1990'), which introduced a regional modulation of the social security exemptions; by Law No 169 of 1 June 1991, which extended to 32 years the maximum age of workers who could be taken on under that type of contract; and by Law No 451 of 19 July 1994 ('Law No 451/1994'), which introduced the 1-year training and work experience contract and set a compulsory minimum number of training hours.

10 Those amending laws made possible the employment under training and work experience contracts of young persons aged between 16 and 32 years, with the competent regional authorities having the possibility of raising that age limit at their discretion. They also provided for undertakings operating in areas where the unemployment rate was higher than the Italian national average to benefit from a total exemption from social security contributions, inter alia, during a 2-year training period, with the possibility of extending that period by 1 year in the event of the conversion of such contracts into open-ended contracts (employment contracts for an indefinite period).

The dispute in the main proceedings and the question referred for a preliminary ruling

11 ANM was formed in 1995, following the conversion of a company established as a consortium governed by public law, for the integrated management of the local public transport services of the municipality of Naples (Italy). In 2001 it was converted into a company limited by shares, with that municipality as the sole shareholder. The purpose of the company is to manage the public transport of persons and goods by any mode within the territory of that municipality.

12 In the course of that business, between November 1995 and May 2001, ANM recruited individuals with the objective of providing them with vocational training and subsequently integrating them into the undertaking. Those individuals were engaged under training and work experience contracts, within the meaning of Law No 863 of 19 December 1984, as amended by Laws No 407/1990, No 169 of 1 June 1991 and No 451/1994. The conversion of those contracts into open-ended contracts was carried out in accordance with Law No 451/1994. In respect of those training and work contracts and their subsequent conversion, ANM benefited from the exemptions from social security contributions provided for by the Italian legislation at issue in the main proceedings.

13 After the European Commission had declared that legislation to be, in part, incompatible with the prohibition laid down in Article 107(1) TFEU, the INPS, as the national authority entrusted with the implementation of Decision 2000/128, sent ANM two payment notices — one for EUR 7 429 436.76 in respect of training and work contracts for the period from 1997 to 2001 and the other for EUR 2 266 014.05 in respect of the subsequent transformation of such contracts into open-ended contracts relating to the period from 1999 to 2001.

14 ANM applied to the Tribunale di Napoli (District Court, Naples, Italy) for declarations that it was under no obligation to pay those amounts. That court upheld ANM's applications on the ground that Decision 2000/128 did not have direct effect in the Italian legal system, since it did not impose on the Italian Republic a sufficiently precise and unconditional obligation.

15 The INPS appealed against the judgment of the Tribunale di Napoli (District Court, Naples) to the Corte d'appello di Napoli (Court of Appeal, Naples, Italy), which upheld that judgment while altering its reasoning. According to that court, Decision 2000/128 does indeed form part of the Italian legal system, but it is not applicable to ANM. It found that the economic advantage conferred by the social security exemptions is not capable of affecting trade between Member States or of adversely affecting competition, since those exemptions relate to local public transport activities carried out on a non-competitive basis as a result of their direct award to ANM.

16 The INPS brought an appeal on a point of law before the Corte suprema di cassazione (Supreme Court of Cassation, Italy), arguing that the judgment of the Corte d'appello di Napoli (Court of Appeal, Naples) was vitiated by errors in the interpretation of Article 107 TFEU and Decision 2000/128, as the latter was fully applicable to ANM.

17 In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is [Decision 2000/128] applicable also to employers operating local public transport services — on a substantially non-competitive basis, given the exclusive nature of the service carried out — which have benefited from reductions in contributions after entering into training and work experience contracts since Law [No 407/1990] came into force, with reference, in the present case, to the period from [May] 1997 to May 2001?'

Consideration of the question referred

18 By its question, the referring court asks, in essence, whether Decision 2000/128 must be interpreted as applying to an undertaking, such as that at issue in the main proceedings, which, on the basis of a direct and exclusive award by a municipality, provided local public transport services and benefited from reductions in social security contributions under national legislation which was declared by that decision to be incompatible, in part, with the prohibition laid down in Article 107(1) TFEU.

19 In particular, the referring court asks whether that decision applies to the local public transport sector and whether, in circumstances such as those at issue in the main proceedings, the conditions that competition and trade between Member States must be affected, set out in that provision, are satisfied.

20 According to settled case-law, classification of a measure as 'State aid', within the meaning of Article 107(1) TFEU, requires that all of the following conditions be fulfilled. First, there must be an intervention by the State or through State resources. Second, that intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see judgment of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraph 43 and the case-law cited).

21 In the present case, it should be noted, first of all, that the Commission found, in recitals 63, 64 and 97 of Decision 2000/128, that the Italian legislation at issue in the main proceedings satisfies the first and third conditions set out paragraph 20 above.

22 Next, in recitals 65 and 97 of that decision, the Commission took the view that the second and fourth conditions are also satisfied; the second because the aid strengthens the financial position and freedom of action of the recipient firms and the fourth 'in so far as' that effect arises in the context of trade within the internal market.

23 In recitals 66 and 97 of that decision, it is stated that, 'in particular', competition is distorted and trade between Member States is affected 'in so far as' the recipient undertakings export some of their products to other Member States or, where those undertakings do not export their goods, national production is favoured by the fact that the opportunities for undertakings established in other Member States to export their products to the Italian market are reduced.

24 First, contrary to what is claimed by ANM, it cannot be inferred from the wording of recital 66 of Decision 2000/128 that the Commission restricted the scope of that decision to the sectors directly involved in trade in goods or services within the internal market, to the exclusion of local services sectors, such as that of local public transport.

25 As the Court has already had occasion to confirm, the Commission explained in recital 65 of that decision that, in general terms, the selective reductions of social security contributions provided for by the Italian legislation at issue in the main proceedings distort competition and, in so far as that effect extends to trade between Member States, that trade is affected; recital 66 of that decision merely illustrates that assessment using the example of the production sector (judgment of 7 March 2002, *Italy* v *Commission*, C-310/99, EU:C:2002:143, paragraph 88).

26 Second, it is apparent from recitals 65, 66 and 97 of Decision 2000/128 that the second and fourth conditions laid down in Article 107(1) TFEU are satisfied only in so far as the undertakings benefiting from the reductions in social security contributions are exposed, even in part, to competition in a liberalised market.

27 It is settled case-law that, in the case of an aid scheme such as that at issue in the main proceedings, the Commission may confine itself to an examination of the characteristics of the scheme at issue in order to assess, in the grounds for its decision, whether, by reason of the arrangements provided for under the scheme, the latter confers an advantage on beneficiaries in relation to their competitors and is likely to benefit undertakings engaged in trade between Member States. Thus, in a decision which concerns such a scheme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned (see, to that effect, judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63 and the case-law cited).

28 As a result, before proceeding to the recovery of an advantage, the national authorities of a Member State are required to verify, in each individual case, whether the advantage granted was, in the hands of its beneficiary, capable of distorting competition and affecting trade between the Member States (see, to that effect, judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraphs 64 and 115).

29 In that regard, it is important to bear in mind that, for the purpose of categorising a national measure as 'State aid', it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but merely to examine whether that aid is liable to affect such trade and to distort competition (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 78 and the case-law cited).

30 In particular, when aid granted by a Member State strengthens the position of certain undertakings as compared with that of other undertakings competing in trade between Member States, such trade must be regarded as being affected by the aid. In that regard, it is not necessary that the beneficiary undertakings themselves be involved in trade between Member States. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 79 and the case-law cited).

31 Consequently, the condition that the aid must be capable of affecting trade between Member States does not depend on the local or regional character of the transport services supplied (judgments of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 82, and of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 69).

32 As regards the requirement that competition be distorted, it should be noted that, in principle, aid intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities distorts the conditions of competition (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 80 and the case-law cited).

33 In the present case, it appears to be common ground that the reduced social security contributions from which ANM benefited and which are at issue in the main proceedings are costs which it would normally have had to bear in its day-to-day management or normal activities.

34 By contrast, both before the national court and before the Court of Justice, ANM submits that, during the period from 1997 to 2001, it was not exposed to any competition as regards the local public transport services in question in the main proceedings and that, during that same period, the Italian local public transport market was not liberalised, even in part.

35 Contrary to what ANM claims, the Italian Government submitted before the Court that, during the period at issue in the main proceedings, the Italian local public transport market was open to competition. Moreover, according to that government, there was no prohibition on operators from other Member States offering such services in Italy and there are examples of such operators providing such services.

36 In that regard, it is important to note that since 1995 several Member States have started to open certain transport markets to competition from undertakings established in other Member States, with the result that, during the period from 1997 to 2001, a number of undertakings already offered their urban, suburban or regional transport services in Member States other than their State of origin (see, to that effect, judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 79).

37 As regards whether or not ANM was, during that period, exposed to competition in respect of the local public transport services at issue in the main proceedings, it is true that it is apparent from the file submitted to the Court that those services were allocated exclusively and directly to ANM without any prior procedure for the award of a public contract having been organised.

38 However, there is no evidence in that file that the municipality of Naples was required, by legislative or regulatory measures, to award those services exclusively to that undertaking, with the result that it appears that it would also have been free to award those services to another service provider, including through the organisation of a public procurement procedure in which operators from other Member States could have participated, as the Italian Government submitted before the Court.

39 As the Advocate General observed in points 33 to 35 and 38 of his Opinion, in the absence of such a legislative or regulatory obligation, it is clear that competition for the services at issue in the main proceedings was possible. As a result it cannot be ruled out either that the reduction in the social security contributions from which ANM benefited conferred on that undertaking an advantage in relation to potential competitors, even those from other Member States, or that, accordingly, competition in that market was distorted and trade between Member States was affected by those reductions.

40 It is thus for the national court, which alone has direct knowledge of the dispute in the main proceedings, to carry out the necessary checks in order to determine whether, during the period at issue in the main proceedings, the Italian local public transport market was open to competition and therefore allowed operators from other Member States to offer to provide the services in question in the main proceedings or whether the municipality of Naples was subject to a legislative or regulatory obligation to award those services exclusively to ANM.

41 Furthermore, in the light of the circumstances set out by the Advocate General in points 40 and 41 of his Opinion, which concern the status of ANM and the content of the service contract at issue in the main proceedings, it is also for the referring court to carry out, as appropriate, the checks necessary to determine whether ANM engaged in activities, during the period from 1997 to 2001, on other product or service markets or even on other geographical markets open to effective competition.

42 If it were established that ANM engaged in activities on other markets during that period, it could not be ruled out that the social security payment reductions from which that company benefited under the Italian legislation at issue in the main proceedings distorted competition and affected trade between Member States on those other markets, unless those activities did not benefit from those reductions and any risk of cross-subsidisation had been excluded through demonstration that the undertaking kept separate accounts, thus ensuring that those reductions had been unable to benefit those activities (see, to that effect, judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 51, and of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51, paragraph 42).

43 In the light of all the foregoing considerations, the answer to the question referred is that, subject to verifications which are to be made by the referring court, Decision 2000/128 must be interpreted as applying to an undertaking, such as that in the main proceedings, which, on the basis of a direct and exclusive award by a municipality, provided local public transport services and benefited from reductions in social security contributions under national legislation which was declared by that decision to be incompatible, in part, with the prohibition laid down in Article 107(1) TFEU.

Costs

44 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 (Second Chamber) hereby rules:

Subject to verifications which are to be made by the referring court, Commission Decision 2000/128/EC of 11 May 1999 concerning aid granted by Italy to promote employment must be interpreted as applying to an undertaking, such as that in the main proceedings, which, on the basis of a direct and exclusive award by a municipality, provided local public transport services and benefited from reductions in social security contributions under national legislation which was declared by that decision to be incompatible, in part, with the prohibition laid down in Article 107(1) TFEU.

[Signatures]