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Judgment of the Court of 5 October 1999. - French Republic v Commission of the European Communities. - Article 92 of the EC Treaty (now, after amendment, Article 87 EC) - Concept of aid - Relief on social security contributions in consideration for the costs arising for undertakings from collective agreements concerning the reorganisation and reduction of working time. - Case C-251/97.

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Keywords

State aid - Concept - Cases where social charges are partially reduced, entailing exemptions from the financial charges arising from normal application of the general social security system - Covered - State measures intended to offset costs for undertakings arising as a result of collective agreements

(EC Treaty, Art. 92(1) (now, after amendment, Art. 87(1) EC))

Summary

$$The concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges normally included in the budget of an undertaking. A partial reduction of social charges devolving upon undertakings of a particular industrial sector constitutes aid within the meaning of Article 92(1) of the Treaty (now, after amendment, Article 87(1) EC) if that measure is intended partially to exempt those undertakings from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system. The social character of State assistance is not sufficient to exclude it outright from being categorised as aid for the purposes of Article 92.

Thus, State measures the object of which is the degressive reduction of employers' social security contributions for undertakings in a number of particular industrial sectors must be categorised as aid for the purposes of Article 92 of the Treaty, where they are intended to offset the costs arising as a result of agreements concluded between employers and trade unions, which the undertakings are bound to observe and which are included, by their nature, in their budgets.

As regards the assessment of those costs, agreements concluded by both sides of industry form a whole and cannot be evaluated by taking account, out of context, of only some of their positive or negative aspects for one or other party. In view of the variety of considerations which induce the two sides of industry to negotiate, and of the fact that the result of their negotiations is the fruit of a compromise for which each party makes concessions in certain areas in exchange for advantages in other areas, which are not necessarily related, it is in principle impossible to evaluate with the required accuracy the final cost of such agreements for undertakings.

Parties

In Case C-251/97,

French Republic, represented by K. Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and G. Mignot, Foreign Affairs Secretary in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

applicant,

v

Commission of the European Communities, represented by G. Rozet, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision 97/811/EC of 9 April 1997 concerning aid granted by France to the textile, clothing, leather and footwear industries (OJ 1997 L 334, p. 25),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, G. Hirsch (Rapporteur) (Presidents of Chambers), J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, L. Sevón, M. Wathelet and R. Schintgen, Judges,

Advocate General: N. Fennelly,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 26 November 1998,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 10 July 1997, the French Republic brought an action under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) for annulment of Commission Decision 97/811/EC of 9 April 1997 concerning aid granted by France to the textile, clothing, leather and footwear industries (OJ 1997 L 334, p. 25; hereinafter `the contested decision').

2 By that decision, the Commission categorised as State aid within the meaning of Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC) State measures on the degressive reduction of employers' social security contributions for undertakings in the textile, clothing, leather and footwear industries.

Legal and factual background

3 In order to combat the continuing fall in employment in the clothing, leather, footwear and textile industries, the French Parliament, by Article 99 of Law No 96-314 of 12 April 1996 implementing various economic and financial provisions (JORF of 13 April 1996; hereinafter `the Law'), permitted the State, on an experimental basis and until 31 December 1997, to sign framework agreements with those sectors on the maintenance or development of employment to take account of the results of negotiations between employers and employees on the reorganisation and reduction of working time, which had been initiated after the national multi-sector agreement on employment of 31 October 1995. In consideration, the State was authorised to grant those sectors a reduction in social security contributions in respect of low wages in addition to the general measure of reduction applicable to all sectors of the economy which was enacted in Article 1 of Law No 95-882 of 4 August 1995 concerning emergency measures on employment and social security, amended by the Finance Law for 1996 (Law No 95-1346 of 30 December 1995).

4 Under that provision, the additional reduction in social security contributions was, first, to take the form of an extension of entitlement to that reduction to salaries lower than 1.5 times the guaranteed minimum monthly wage (`the SMIC'), which is fixed by legislation, instead of 1.2 times - then 1.33 times with effect from 1 October 1996 - in the general measure of reduction. Second, a specific coefficient for relief on contributions was to be fixed by decree in order to implement the general measure in the sectors concerned by that additional reduction.

5 That coefficient was fixed by Decree No 96-572 of 27 June 1996 on the degressive reduction of employers' social security contributions in undertakings in the textile, clothing, leather and footwear industries introduced by Article 99 of Law No 96-314 (JORF of 28 June 1996, p. 9683; hereinafter `the implementing decree') at a level such that the additional reduction in contributions amounts to FRF 734 per month per employee for employees earning the SMIC, progressively decreasing to nothing for employees earning 1.5 times the SMIC. The total cost of the scheme thus defined, which was initially estimated at FRF 2.1 billion, ultimately cost between FRF 1.8 and 1.9 billion.

6 In addition to the condition concerning the conclusion of a framework agreement between the State and each of the sectors concerned, the third paragraph of Article 99 of the Law made the granting of the additional reduction in social security contributions, for undertakings with at least 50 employees, subject to the condition that an individual agreement be signed between the undertaking concerned and the State specifying the framework agreement with which the

undertaking is associated and the undertaking's specific commitments regarding employment and the reorganisation and reduction of working time. The last paragraph of Article 99 states explicitly that failure by the undertaking to comply with those commitments will result in the abolition of additional relief on social security contributions, including, possibly, with retroactive effect.

7 Undertakings with fewer than 50 employees, which are not subject to the statutory requirement to create a works council on which sit representatives of management and employees, are required, in order to qualify for additional relief on social security contributions, to send to the labour authority a declaration stating the framework agreement with which they are associated (Article 6 of the implementing decree). In the event of a false declaration designed to obtain improperly the benefit of the additional reduction, the undertaking will be penalised by the withdrawal of the reduction and the recovery of the unpaid social security contributions (Article 7 of the implementing decree).

8 Sectoral collective agreements were signed on 7 May 1996 in the textile sector, on 29 May 1996 in the clothing sector and on 5 June 1996 in the leather and footwear sector. They provide for the payment of a 25% increase on overtime hours - that is those which exceed the statutory working week of 39 hours - although the statutory scheme for the variation of working time does not require it. Furthermore, additional paid leave, representing between 10% and 20% of the hours worked after the 44th hour, is to be granted in addition to statutory paid leave and increases. Reduction in working time can thus represent more than seven days' leave, that is, about 3% of working time. Those agreements were incorporated into the existing sectoral collective agreements.

9 Pursuant to Article 99 of the Law and the implementing decree, framework agreements on employment were then concluded by the State with each of the sectors concerned, namely on 14 May 1996 with the Union des Industries Textiles (for the textile sector), on 31 May with the Union Française des Industries de l'Habillement (for the clothing sector) and on 28 June 1996 with the Fédération Nationale de l'Industrie de la Chaussure de France (for the leather and footwear sector). Those framework agreements contain, in particular, commitments by each sector in respect of the maintenance of employment and the recruitment of young people.

10 Furthermore, in accordance with Article 99 of the Law, framework agreements take account of commitments made by the industry in the sectoral collective agreements mentioned in paragraph 8 of the present judgment. For example, paragraph 3 of the framework agreement for the textile industry, entitled `Mise en oeuvre des dispositifs "d'Aménagement - Réduction du temps de travail"' (`Implementation of the schemes for "Reorganisation - Reduction of working time"') is worded as follows:

`In signing the agreement of 18 May 1982 on the reduction of working time and on improvement in the use of equipment, an agreement which enables, in particular, the development of part-time employment, and the national sectoral agreement of 13 April 1993 on the variation of working hours, an agreement which expressly includes consideration for the variation as part of a scheme of reduction of working time, the industry has shown its willingness to implement the schemes of reorganisation - reduction of working time, which may contribute to the development of competitiveness and employment in the sector.

The three agreements of 7 May [1996] signed as part of the negotiations on reorganisation and reduction of working time, which had been initiated after the multi-sector agreement of 31 October 1995, show the industry's willingness significantly to strengthen that policy by seeking the most positive effects on employment.'

Framework agreements in the clothing, leather and footwear sectors contain similar clauses.

11 Commitments on working time are therefore regarded as fulfilled for the purposes of the first and second paragraphs of Article 99 of the Law. In accordance with the third paragraph of that article, those commitments are then specified, in respect of recipient undertakings with at least 50 employees, in individual agreements signed by each of them with the State. It is stated therein, as regards the part concerning the reorganisation of working time, that undertakings `agree to enter into negotiations about the reorganisation of working time or to implement the agreements'. In order to qualify for the measures, an undertaking is thus required either to apply the results of the collective negotiations or to draw up its own agreement, which must be more favourable.

The contested decision

12 At the end of the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC) which it had initiated in respect of the measures enacted in Article 99 of the Law (`the contested measures'), the Commission, by letter of 5 May 1997, notified the French Government of the contested decision.

13 Article 1 of the contested decision provides:

`The reduction in employers' social security contributions introduced under the "Textile Plan" by Article 99 of Law No 96-314 of 12 April 1996 implementing various economic and financial provisions and by Decree No 96-572 of 27 June 1996 on the degressive reduction of employers' social security contributions in undertakings in the textile, clothing, leather and footwear industries is, as regards the part not covered by the "de minimis" rule, illegal aid in that it was implemented before the Commission had taken a decision on it, in accordance with the provisions of Article 93(3) of the Treaty.

As regards the part not covered by the "de minimis" rule, which set a threshold of ECU 100 000 over three years, the aid is also incompatible with the common market in accordance with the provisions of Article 92(1) of the Treaty and Article 61(1) of the EEA Agreement and does not qualify for any of the derogations provided for in Article 92(2) and (3) of the Treaty and Article 61(2) and (3) of the EEA Agreement.'

14 Article 2 of the contested decision requires the French Republic to terminate forthwith the granting of the illegal aid and to take the measures necessary to ensure the recovery of the aid already paid.

Pleas and arguments of the parties

15 In support of its application, the French Government relies on a single plea, alleging infringement of Article 92(1) of the Treaty, which it breaks down into two grounds.

16 It claims, first, that the Commission erred in law in categorising measures, such as those taken by the French authorities in favour of the textile, clothing, leather and footwear industries, consisting in the grant of specific financial advantages to undertakings in return for commitments whose financial cost offsets the amount of that aid, as aid `which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods' within the meaning of Article 92(1) of the Treaty, in so far as they exceed the de minimis threshold.

17 The French Government claims, second, that in this case the Commission made a manifest error of assessment of the facts in failing to accept, in its subsequent review of the effect of the contested measures, that those measures were financially and economically neutral for the recipient undertakings.

18 In the alternative, the French Government requests the Court to annul the contested decision in that it fixes the amount of the aid which is deemed incompatible with the common market, illegally granted and to be repaid, at a level equal to the total amount of the aid, without deducting from that last figure the cost of the corresponding concessions borne by each of the recipient undertakings.

19 As regards the first ground, the French Government claims, first, that a financial advantage granted by a Member State to an undertaking in return for optional action by that undertaking in favour of its employees does not constitute aid within the meaning of Article 92(1) of the Treaty, since the amount of that advantage does not exceed the cost to the undertaking of that action, or exceeds it only by an amount below the de minimis threshold.

20 According to the French Government, it is beyond doubt that, overall, the government assistance given in exchange for optional action by the undertakings in favour of employees, that is, action which no undertaking was obliged to take, has not had the effect of procuring any financial advantage for those undertakings as opposed to undertakings which do not receive any assistance, where that action imposes additional charges on them. The costs associated with the corresponding concessions which the undertakings agreed to make cannot therefore be regarded as `normally included in their budget' since those undertakings would not have agreed to make such concessions without State intervention and, `normally', would not therefore have had to bear such charges.

21 The French Government claims, second, that such State intervention, which is only the quid pro quo for commitments not required by the generally applicable rules which the recipient undertakings agree to make vis-à-vis their employees, cannot, furthermore, be regarded as distorting or being liable to distort competition.

22 Relying on the contents of the sectoral collective agreements signed within the industries concerned, the French Government states that the commitments made by the undertakings in respect of the remuneration of overtime and compensatory leave go well beyond the commitments which employers would have agreed to make without State intervention. That observation is particularly true of the textile sector, in which the sectoral collective agreement, which does no more than amend a previous agreement of 1993, strengthens only the employers' commitments, and not those of the organisations representing employees. Those commitments thus provide exceptional protection for employees, which makes it easier for them to accept measures varying working time and encourages undertakings not to make abusive use of overtime at the expense of recruiting new employees.

23 The Government adds that a not inconsiderable number of undertakings, in particular the large ones, refused to take advantage of the measures of relief on social security contributions, taking the view that the corresponding concessions demanded by the State were too onerous. Overall, only two thirds of undertakings in the sectors concerned, representing an equal proportion of employees, have taken part in the scheme. That shows with sufficient certainty that the contested measures did not provide any clear competitive advantage for their recipients.

24 According to the Commission, the scheme established by Article 99 of the Law constitutes State aid within the meaning of Article 92(1) of the Treaty. Referring to the case-law of the Court of Justice, it contends that charges, whether required by the generally applicable rules or not, arising for undertakings from agreements concluded, voluntarily, by both sides of industry in a specific sector, must be regarded as having to be normally borne by the budgets of those undertakings. According to the Commission, it is irrelevant whether the relief is, or is not, designed to offset additional costs assumed by the recipient undertaking as a result of State intervention.

25 The Commission insists that, in a market where the volume of trade is considerable, any aid, whatever its amount or intensity, distorts or is liable to distort normal competition as soon as the beneficiary undertakings receive State aid which their competitors do not receive. In the present case, the relief on social security contributions places undertakings in those sectors in a more favourable position than their competitors who are carrying out or will have to carry out in the future reorganisations of working time, or other similar measures, without State support. Those considerations are equally applicable in a more general way vis-à-vis undertakings which, in other Member States, make efforts, without government aid, to rationalise production in order to be able to compete internationally.

26 The Commission therefore considers that the scheme enacted in Article 99 of the Law constitutes, by its very nature and in its totality, State aid within the meaning of Article 92(1) of the Treaty.

27 As regards the second ground, based on the Commission's refusal to accept that the contested measures were financially neutral, the French Government contends, first, that the Commission cannot question the accuracy and reliability of statistics supplied by the French authorities.

28 Second, in response to the Commission's argument that the calculations submitted by the French authorities fail to take into account the financial advantage which the recipient undertakings will derive from the gains in productivity which the contested measures will enable them to achieve because of the reorganisation of working time, the French Government states that the scheme set up does not, in itself, procure any financial advantage for undertakings in the form of gains in competitiveness for the future, associated with the reorganisation of working time. That scheme does no more than impose on the undertakings concerned obligations, which are favourable to employees, in terms of recruitment and in terms of the remuneration and compensation of overtime, which are part of the Government's general policy and represent for undertakings additional expenses which they would never have incurred without the inducement which the relief on social security contributions constitutes.

29 Accordingly, gains in competitiveness associated with the reorganisation of working time are not a direct consequence of the contested measures, but result in reality from the effectiveness of the reforms adopted by each of the undertakings concerning the organisation of labour. The contested measures merely facilitate the establishment of those reforms by provisionally offsetting the cost of the particularly favourable conditions for employees of which they are part.

30 The French Government points out, furthermore, that the gains in competitiveness which might result from the establishment in undertakings of a new organisation based on the reorganisation of working time, which the contested measures are designed to facilitate, are potential and difficult to measure. Those measures of reorganisation and reduction of working time are liable to generate costs in terms of restructuring, particularly in the case of rapid implementation. In any event, achieving gains in productivity in the short term is clearly not possible.

31 The Commission contends that, because of its uncertainty, the information available does not prove the alleged neutrality of the scheme at issue.

32 Thus, the calculations on which the French authorities rely in order to claim that the advantages gained by the aid were offset by the costs assumed by the recipients relate to all undertakings belonging to the sectors concerned, although only the costs assumed by the participating undertakings should be taken into account for that purpose. If it were impossible to predict the number and size of those undertakings, it would be equally impossible to assert that the scheme at issue was neutral.

33 In order to demonstrate the neutrality of the aid, the French Republic should, in any event, have deducted from the costs borne by the recipient undertakings those which the employers would have assumed even without State intervention. The impossibility of doing so entails, in its turn, the impossibility of pleading the neutrality of the scheme at issue.

34 Finally, the Commission contends that, although gains in competitiveness are not a direct consequence of the contested measures, they are the necessary consequence of adapting the productive plant to the market, which was made possible by the reorganisation of working time in question.

Findings of the Court

35 According to settled case-law, the concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking (see, inter alia, the judgments in Case 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authority [1961] ECR 1, 19; Case C-387/92 Banco Exterior de España [1994] ECR I-877, paragraph 13; Case C-241/94 France v Commission [1996] ECR I-4551, paragraph 34 (known as `Kimberly Clark'); and Case C-256/97 DM Transport [1999] ECR I-0000, paragraph 19).

36 The Court has held, in this respect, that a partial reduction of social charges devolving upon undertakings of a particular industrial sector constitutes aid within the meaning of Article 92(1) of the Treaty if that measure is intended partially to exempt those undertakings from the financial charges arising from the normal application of the general social security system, without there being any justification for this exemption on the basis of the nature or general scheme of this system (judgment in Case 173/73 Italy v Commission [1974] ECR 709, paragraph 15; to the same effect, judgment in Case C-301/87 France v Commission [1990] ECR I-307, paragraph 41).

37 The Court has also held that the social character of State assistance is not sufficient to exclude it outright from being categorised as aid for the purposes of Article 92 of the Treaty (see, inter alia, Italy v Commission, cited above, paragraph 13; Kimberly Clark, paragraph 21; and Case C-75/97 Belgium v Commission [1999] ECR I-0000, paragraph 25).

38 In this case, the contested measures have as their object the degressive reduction of employers' social security contributions for undertakings in a number of particular industrial sectors and they thus appear to be measures which, since they satisfy the conditions laid down in the case-law cited in paragraphs 35 to 37 of the present judgment, come within the scope of Article 92(1) of the Treaty.

39 The French Government contests, however, such a categorisation, claiming that the relief on social security contributions is only the quid pro quo of exceptional additional costs which the undertakings agreed to assume as a result of the negotiation of collective agreements and that, in any event, taking account of those additional costs, the contested measures are revealed to be financially neutral.

40 In this respect, it should be recalled that the costs for undertakings, to which the French Government draws attention, arise from collective agreements, concluded between employers and trade unions, which undertakings are bound to observe, either because they have acceded to those agreements or because those agreements have been extended by regulation. Such costs are included, by their nature, in the budgets of undertakings.

41 Furthermore, it is not disputed that, in this case, the establishment of sectoral collective

agreements is not only liable to generate, for undertakings, costs in terms of reorganisation, but is designed also to improve their competitiveness.

42 It is clear, in fact, from the terms of the framework agreements mentioned in paragraph 10 of the present judgment that, although sectoral collective agreements strengthen employers' commitments towards their employees, they are also designed, by reorganising and reducing working time, to contribute to the development of competitiveness and employment in the sectors concerned.

43 The 26th paragraph, Chapter VII, in the preamble to the contested decision states, on this point, that it may reasonably be supposed that any reorganisation of labour that helps undertakings to adapt their resources better to market conditions and characteristics will allow undertakings to increase their efficiency.

44 The French Government does not deny gains in competitiveness for undertakings, but insists that such gains are potential and difficult to measure.

45 That assessment cannot be challenged. However, it is true not only of the advantages which undertakings derive from sectoral collective agreements, but also of the costs arising from those agreements.

46 Agreements concluded by both sides of industry form a whole and cannot be evaluated by taking account, out of context, of only some of their positive or negative aspects for one or other party. In view of the variety of considerations which induce the two sides of industry to negotiate, and of the fact that the result of their negotiations is the fruit of a compromise for which each party makes concessions in certain areas in exchange for advantages in other areas, which are not necessarily related, it is, at least in the present context, impossible to evaluate with the required accuracy the final cost of such agreements for undertakings.

47 Therefore, the fact that the State measures at issue seek to offset additional costs which undertakings in certain sectors have assumed as a result of the conclusion and implementation of collective agreements cannot exclude them from being categorised as aid within the meaning of Article 92 of the Treaty.

48 It also follows from the foregoing that the claim put forward in the alternative must be dismissed. The additional costs for the undertakings concerned cannot be deducted from the amount of the aid which must be reimbursed.

49 Since none of the arguments put forward by the French Government has been successful, the application must be dismissed.

Decision on costs

Costs

50 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

Operative part

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the French Republic to pay the costs.