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Judgment of the Court (Fifth Chamber) of 8 November 2001. - Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten. - Reference for a preliminary ruling: Verfassungsgerichtshof - Austria. - Tax on energy - Rebate granted only to undertakings manufacturing goods - State aid. - Case C-143/99.

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Keywords

1. Preliminary rulings - Reference to the Court - Conformity of the decision to refer with the rules of national law governing the organisation of the courts and their procedure - Not a matter for the Court to determine

(EC Treaty, Art. 177 (now Art. 234 EC))

2. State aid - Proposed aid - Prohibition of implementation before the Commission's final decision - Direct effect - Scope - Obligations of national courts and tribunals - Limits

(EC Treaty, Art. 93(3) (now Art. 88(3) EC))

3. State aid - Prohibition - Derogations - Aid which may be regarded as compatible with the common market - Aid for protection of the environment - Discretion of the Commission

(EC Treaty, Art. 92(1) and (3) (now, after amendment, Art. 87(1) and (3) EC))

4. State aid - Definition - Partial rebate of taxes on energy to all undertakings in the national territory - Excluded

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

5. State aid - Definition - Selectivity of the measure - Partial rebate of taxes on energy only to undertakings producing goods - Included - Justification because of the nature or general scheme of the system established - None

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

Summary

1. In the procedure provided for by Article 177 of the Treaty (now Article 234 EC) it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organisation of the courts and their procedure.

(see para. 19)

2. National courts are involved in the system for the review of State aid through the direct effect attributed to the prohibition on implementation of planned aid without the agreement of the Commission, as laid down in the last sentence of Article 93(3) (now Article 88(3), last sentence, EC). National courts must offer to individuals the certain prospect that all appropriate conclusions will be drawn from an infringement of that provision, 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. However, while the national courts may be led, for that purpose, to determine whether or not a national measure must be classified as State aid within the meaning of the Treaty, they may not rule on the compatibility of aid measures with the common market, the final determination on that matter being the exclusive responsibility of the Commission, subject to review by the Court of Justice.

(see paras 26-27, 29)

3. The basic prohibition of State aid is neither absolute nor unconditional. Thus, Article 92(3) of the Treaty (now, after amendment, Article 87(3) EC) confers on the Commission a wide discretion to declare certain aid compatible with the common market by way of derogation from the general prohibition laid down in Article 92(1) of the Treaty. Environmental protection requirements are capable of constituting an objective by virtue of which certain State aid measures may be declared compatible with the common market.

(see paras 30-31)

4. National measures which provide for a rebate of energy taxes on natural gas and electricity do not constitute State aid within the meaning of Article 92 of the Treaty (now, after amendment, Article 87 EC) where they apply to all undertakings in national territory, regardless of their activity.

As is apparent from the terms of Article 92(1) of the Treaty, an economic benefit granted by a Member State constitutes State aid only if, by displaying a degree of selectivity, it is such as to favour certain undertakings or the production of certain goods. A State measure which benefits all undertakings in national territory, without distinction, cannot therefore constitute State aid.

(see paras 34-36, and operative part 1)

5. For the application of Article 92 of the Treaty (now, after amendment, Article 87 EC), it is irrelevant that the situation of the presumed beneficiary of the measure is better or worse in comparison with the situation under the law as it previously stood, or has not altered over time. The only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods within the meaning of Article 92(1) of the Treaty in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question. However, a measure which, although conferring an advantage on its recipient, is justified

by the nature or general scheme of the system of which it is part does not fulfil that condition of selectivity.

National measures which provide for a rebate of energy taxes on natural gas and electricity only in the case of undertakings whose activity is shown to consist primarily in the manufacture of goods must be regarded as State aid within the meaning of Article 92 of the Treaty. First, neither the large number of eligible undertakings nor the diversity and size of the sectors to which those undertakings belong provide any grounds for concluding that a State initiative constitutes a general measure of economic policy. Second, any justification for the grant of advantages to undertakings whose activity consists primarily in the production of goods is not to be found in the nature or general scheme of the taxation system established under those national measures. There is nothing in those measures to support the conclusion that the rebate scheme restricted to undertakings which primarily manufacture goods is a purely temporary measure enabling them to adapt gradually to the new scheme because they are disproportionately affected by it. Undertakings supplying services may, just like undertakings manufacturing goods, be major consumers of energy. The ecological considerations underlying the national measures do not justify treating the consumption of natural gas or electricity by undertakings supplying services differently from the consumption of such energy by undertakings manufacturing goods, as energy consumption by each of those sectors is equally damaging to the environment.

(see paras 41-42, 48-52, 55, and operative part 2)

Parties

In Case C-143/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Verfassungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Adria-Wien Pipeline GmbH,

Wietersdorfer & Peggauer Zementwerke GmbH

and

Finanzlandesdirektion für Kärnten,

on the interpretation of Article 92 of the EC Treaty (now, after amendment, Article 87 EC),

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, A. La Pergola, L. Sevón, M. Wathelet (Rapporteur), and C.W.A. Timmermans, Judges,

Advocate General: J. Mischo,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Adria-Wien Pipeline GmbH, by W.-D. Arnold, Rechtsanwalt,

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the Danish Government, by J. Molde, acting as Agent,

- the Finnish Government, by T. Pynnä, acting as Agent,

- the Commission of the European Communities, by V. Kreuschitz, P.F. Nemitz and J.M. Flett, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Adria-Wien Pipeline GmbH, of the Austrian Government, of the Danish Government and of the Commission at the hearing on 15 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2001,

gives the following

Judgment

Grounds

1 By order of 10 March 1999, received at the Court on 21 April 1999, the Verfassungsgerichtshof (Constitutional Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 92 of the Treaty (now, after amendment, Article 87 EC).

2 The questions have been raised in proceedings between Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH, on the one hand, and the Finanzlandesdirektion für Kärnten, on the other, concerning energy tax rebates.

3 Under tax reforms within the framework of the Strukturanpassungsgesetz (Structural Adjustment Law) 1996 (BGBl. 1996, No 201), the Republic of Austria adopted, published and brought into force at the same time three laws, namely:

- the Elektrizitätsabgabegesetz (Law on the tax on electricity, the EAG);

- the Erdgasabgabegesetz (Law on the tax on natural gas, the EGAG);

- the Energieabgabenvergütungsgesetz (Law on the rebate of energy taxes, the EAVG).

4 The EAG provides for a tax of EUR 0.00726728 per kilowatt hour of electricity consumed. Pursuant to Article 1(1) of the EAG, the following are subject to electricity tax:

- the supply of electricity other than electricity supplied to electricity supply undertakings, and

- the consumption of electricity by electricity supply undertakings and the consumption of electricity produced by the consumer himself or imported into the territory covered by the tax.

5 By virtue of Article 6(3) of the EAG, the electricity supplier must pass on the tax to the recipient of the supply.

6 The EGAG lays down similar rules for the supply and consumption of natural gas.

7 The EAVG provides for a rebate of the energy taxes charged on supplies of natural gas and electricity under the EGAG and the EAG. Under Article 1(1) of the EAVG, those taxes must be reimbursed on application in so far as they exceed, in total, 0.35% of net production value. The rebate is paid after deduction of a maximum amount of the first ATS 5 000.

8 However, pursuant to Article 2(1) of the EAVG, only undertakings whose activity is shown to consist primarily in the production of goods are entitled to a rebate of energy taxes.

9 Applications for a rebate from undertakings not satisfying the last mentioned condition were rejected, as in the case of Adria-Wien Pipeline GmbH, the first applicant in the main proceedings, whose principal activity is the construction and operation of oil pipelines.

10 The Verfassungsgerichtshof, seised of actions contesting refusals to reimburse energy taxes, now wishes to ascertain whether the provisions of the EAVG constitute State aid within the meaning of Article 92 of the Treaty.

11 More specifically, the Verfassungsgerichtshof has doubts regarding the selective nature of the energy tax rebate. In its view, the question whether a difference in the rebate of those taxes as between undertakings producing goods and undertakings supplying services is sufficient to render the measure selective, and may therefore bring it within the scope of the State aid rules, has not been resolved.

12 If the answer is in the affirmative, the Verfassungsgerichtshof wishes to ascertain whether a finding of State aid should also be made if all undertakings could receive energy tax rebates.

13 The Verfassungsgerichtshof therefore referred the following questions to the Court for a preliminary ruling:

(1) Are legislative measures of a Member State which provide for a rebate of energy taxes on natural gas and electricity but grant that rebate only to undertakings whose activity is shown to consist primarily in the manufacture of goods, to be regarded as State aid within the meaning of Article 92 of the EC Treaty?

(2) If the answer to Question 1 is in the affirmative, is such a legislative measure to be regarded as State aid within the meaning of Article 92 of the EC Treaty even if it applies to all undertakings, regardless of whether their activity is shown to consist primarily in the manufacture of goods?

Admissibility

14 The Austrian Government questions the validity of the national court's questions for the purposes of the main proceedings, having regard to the division of powers between the Austrian courts.

15 It states that the Austrian constitution divides judicial review of administrative decisions between the Verwaltungsgerichtshof (Administrative Court of Appeal) and the Verfassungsgerichtshof. The Verfassungsgerichtshof may hear cases alleging infringements of the constitution only if there has been a sufficiently serious and therefore also manifest breach of ordinary legislation. Except in those cases, it must leave judicial review to the Verwaltungsgerichtshof.

16 Even if the measure at issue were State aid, the national legislature would not have committed a manifest breach of the relevant Community provisions. As is clear from the grounds of the order for reference, the Verfassungsgerichtshof itself entertains doubts in that regard. It does not therefore have jurisdiction to determine the main proceedings.

17 It is settled case-law that it is for the national court hearing a dispute to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. The Court may, however, refuse to rule on a question referred for a preliminary ruling by a national court where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or its purpose (see, for example, Case C-379/98 PreussenElektra [2001] ECR I-2099, paragraphs 38 and 39).

18 The main proceedings do not fall foul of that rule since they relate to national provisions providing for energy tax rebates and the national court asks whether such rebates constitute aid within the meaning of Article 92 of the Treaty.

19 Moreover, as regards the national court's alleged lack of jurisdiction, it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organisation of the courts and their procedure (Case 65/81 Reina [1982] ECR 33, paragraph 7; Case C-10/92 Balocchi [1993] ECR I-5105, paragraph 16; and Case C-39/94 SFEI and Others [1996] ECR I-3547, paragraph 24).

20 It follows from the foregoing that the questions submitted by the Verfassungsgerichtshof are admissible.

The questions

Preliminary observations

21 It is important to bear in mind the system for monitoring State aids established by the Treaty and the respective roles of the Commission and the national courts in applying that system.

22 According to Article 3(g) of the EC Treaty (now, after amendment, Article 3(1)(g) EC), the activities of the Community are to include a system ensuring that competition in the internal market is not distorted. In that context, Article 92(1) of the Treaty declares aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods to be, in so far as it affects trade between Member States, incompatible with the common market.

23 In order to ensure the effectiveness of that prohibition, Article 93 of the EC Treaty (now Article 88 EC) places on the Commission a specific duty to monitor aid and imposes on the Member States specific obligations to facilitate the Commission's task and to prevent faits accomplis for that institution.

24 As regards plans to grant or alter aid, Article 93(3) of the Treaty requires, first, that the Commission be informed in sufficient time to enable it to submit its comments. Article 93(3) then requires the Commission to initiate without delay the procedure provided for in Article 93(2) of the Treaty if it considers that the plan notified is not compatible with the common market. Finally, the last sentence of Article 93(3) of the Treaty unequivocally prohibits the Member States from putting the proposed measure into effect until that procedure has resulted in a final decision.

25 As the Court has emphasised, inter alia in its order of 20 September 1983 in Case 171/83 R Commission v France [1983] ECR 2621, paragraph 12, the final sentence of Article 93(3) of the Treaty is the safeguard of the review machinery established by that article which, in turn, is essential for protecting the proper functioning of the common market.

26 National courts are involved in the system for the review of State aid through the direct effect attributed to the prohibition on implementation of planned aid laid down in the last sentence of Article 93(3).

27 National courts must offer to individuals the certain prospect that all appropriate conclusions will be drawn from an infringement of that provision, 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 (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, paragraph 12).

28 Aware of the principles set out above, the Verfassungsgerichtshof has referred questions to the Court for a preliminary ruling only in order that it may, if necessary, draw the conclusions from a failure to observe the last sentence of Article 93(3) of the Treaty, the national legislation at issue in the main proceedings not having been notified to the Commission.

29 While the national courts may be led, for that purpose, to determine whether or not a national measure must be classified as State aid within the meaning of the Treaty, they may not, however, rule on the compatibility of aid measures with the common market, the final determination on that matter being the exclusive responsibility of the Commission, subject to review by the Court of Justice (see, to that effect, Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon, cited above, paragraph 14).

30 It should be borne in mind that the basic prohibition of State aid is neither absolute nor unconditional. Thus, Article 92(3) of the Treaty confers on the Commission a wide discretion to declare certain aid compatible with the common market by way of derogation from the general prohibition laid down in Article 92(1) of the Treaty.

31 Environmental protection requirements are capable of constituting an objective by virtue of which certain State aid measures may be declared compatible with the common market (see, in particular, the Community guidelines on State aid for environmental protection, OJ 1994 C 72, p. 3).

32 It follows from the foregoing considerations that the answer which the Court decides to give to the national court regarding the question whether the measures in question may constitute State aid cannot prejudge the issue of their compatibility with the Treaty.

The second question

33 By its second question, which should be dealt with first, the national court wishes to ascertain in substance whether national measures such as those at issue in the main proceedings constitute State aid within the meaning of Article 92 even if they apply to all undertakings in national territory, regardless of their activity.

34 As is apparent from the terms of Article 92(1) of the Treaty, an economic benefit granted by a Member State constitutes State aid only if, by displaying a degree of selectivity, it is such as to favour certain undertakings or the production of certain goods.

35 A State measure which benefits all undertakings in national territory, without distinction, cannot therefore constitute State aid.

36 The answer to the national court's second question must therefore be that national measures such as those at issue in the main proceedings do not constitute State aid within the meaning of Article 92 of the Treaty if they apply to all undertakings in national territory, regardless of their activity.

The first question

37 By its first question, the national court asks in substance whether national measures which provide for a rebate of energy taxes on natural gas and electricity only in the case of undertakings whose activity is shown to consist primarily in the manufacture of goods are to be regarded as State aid within the meaning of Article 92 of the Treaty.

38 The concept of aid is more general than that of a subsidy. It embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (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; and Case C-200/97 Ecotrade [1998] ECR I-7907, paragraph 34).

39 Applying those principles, the Court has held that a tariff charged to a category of undertakings for a source of energy at a lower level than that which would normally have been applied may be regarded as State aid if that tariff, adopted by a body subject to the control and direction of public authorities, is attributable to the Member State concerned and that State, unlike an ordinary economic operator, uses its powers to confer a pecuniary advantage on energy consumers by foregoing the profit which it could normally realise (see, to that effect, Joined Cases 67/85, 68/85 and 70/85 Van der Kooy and Others v Commission [1988] ECR 219, paragraph 28).

40 It follows from the foregoing considerations that the supply of energy on preferential terms to undertakings manufacturing goods, which is the end result of national legislation such as that at issue in the main proceedings, is capable of constituting State aid (see, to that effect, the judgment in SFEI and Others, cited above, paragraph 59).

41 For the application of Article 92 of the Treaty, it is irrelevant that the situation of the presumed beneficiary of the measure is better or worse in comparison with the situation under the law as it previously stood, or has not altered over time (see, to that effect, Case 57/86 Greece v Commission [1988] ECR 2855, paragraph 10). The only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favour certain undertakings or the production of certain goods within the meaning of Article 92(1) of the Treaty in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question (see, to that effect, Case C-75/97 Belgium v Commission [1999] ECR I-3671, paragraphs 28 to 31).

42 According to the case-law of the Court, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil that condition of selectivity (see Case 173/73 Italy v Commission [1974] ECR 709, paragraph 33, and Belgium v Commission, cited above, paragraph 33).

43 The Austrian Government points out that the introduction of the energy taxes and their rebate was not adopted as an isolated measure but in the context of the Strukturanpassungsgesetz of 1996, which provides for an overall package of measures intended to consolidate the budget. That package, composed of general socially balanced measures affecting all socio-professional groups, should be considered as a whole.

44 The Austrian Government also points out that, frequently in this type of overall package, new measures affecting a category of operators disproportionately are not fully applicable to that category during the implementation phase. The justification for restricting energy tax rebates to undertakings manufacturing goods lies in the very fact that they are proportionately more affected than others by those taxes.

45 According to the Austrian Government, since this type of measure is based on objective criteria and benefits a very large number of undertakings, it does not have the selective nature which would trigger application of Article 92(1) of the Treaty.

46 The Danish Government also submits that the Austrian rules at issue are general measures falling outside the scope of Article 92(1) of the Treaty.

47 First of all, it submits that the energy taxes at issue, which are of general application, are levied on the basis of objective criteria. The rebate rules form an integral part of the overall energy taxation system. Lastly, since the conditions to which the energy tax rebate is subject are directly determined by the legislature, the competent authorities may not exercise any discretion with regard to the choice of undertakings eligible for the rebate or alter its scope.

48 It must be observed, first, that neither the large number of eligible undertakings nor the diversity and size of the sectors to which those undertakings belong provide any grounds for concluding that a State initiative constitutes a general measure of economic policy (see, to that effect, Belgium v Commission, cited above, paragraph 32).

49 Second, any justification for the grant of advantages to undertakings whose activity consists primarily in the production of goods is not to be found in the nature or general scheme of the taxation system established under the Strukturanpassungsgesetz of 1996.

50 For one thing, undertakings supplying services may, just like undertakings manufacturing goods, be major consumers of energy and incur energy taxes above 0.35% of their net production value - the threshold above which undertakings manufacturing principally goods are eligible for the energy tax rebate.

51 There is nothing in the national legislation at issue to support the conclusion that the rebate scheme restricted to undertakings which primarily manufacture goods is a purely temporary measure enabling them to adapt gradually to the new scheme because they are disproportionately affected by it, as the Austrian Government maintains.

52 For another thing, the ecological considerations underlying the national legislation at issue do not justify treating the consumption of natural gas or electricity by undertakings supplying services differently than the consumption of such energy by undertakings manufacturing goods. Energy consumption by each of those sectors is equally damaging to the environment.

53 It follows from the foregoing considerations that, although objective, the criterion applied by the national legislation at issue is not justified by the nature or general scheme of that legislation, so that it cannot save the measure at issue from being in the nature of State aid.

54 Besides, as the Commission has rightly observed, the statement of reasons for the bill which led to the enactment of the national legislation at issue indicates that the advantageous terms granted to undertakings manufacturing goods were intended to preserve the competitiveness of the manufacturing sector, in particular within the Community.

55 Having regard to the foregoing considerations, the answer to be given to the first question must be that national measures which provide for a rebate of energy taxes on natural gas and electricity only in the case of undertakings whose activity is shown to consist primarily in the manufacture of goods must be regarded as State aid within the meaning of Article 92 of the Treaty.

Decision on costs

Costs

56 The costs incurred by the Austrian, Danish and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Verfassungsgerichtshof by order of 10 March 1999, hereby rules:

1. National measures which provide for a rebate of energy taxes on natural gas and electricity do not constitute State aid within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) where they apply to all undertakings in national territory, regardless of their activity.

2. National measures which provide for a rebate of energy taxes on natural gas and electricity only in the case of undertakings whose activity is shown to consist primarily in the manufacture of goods must be regarded as State aid within the meaning of Article 92 of the Treaty.