Opinion of Advocate General Jacobs delivered on 19 February 1998

Epifanio Viscido (C-52/97), Mauro Scandella and Others (C-53/97) and Massimiliano Terragnolo and Others (C-54/97) v Ente Poste Italiane

References for a preliminary ruling: Pretura circondariale di Trento - Italy

Aid granted by Member States - Meaning - National law providing that only one public utility is relieved of the obligation of observing a rule of general application relating to fixed-term employment contracts

Joined cases C-52/97, C-53/97 and C-54/97

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Opinion of the Advocate-General

1 The issue raised by the Pretura Circondariale di Trento (Magistrate's Court, Trento) is whether a national rule providing for the recruitment of staff by the Italian Post Office under fixed-term contracts, by way of derogation from the general rule of Italian law that employment contracts should be of indeterminate duration, constitutes State aid notifiable under the last sentence of Article 93(3) of the Treaty.

2 Under Italian law, employment under fixed-term contracts is permitted only in a number of specified exceptional cases. Article 1 of Law No 230 of 18 April 1962 provides that, subject to certain exceptions specified in the Law, (1) an employment contract is to be considered to be of indeterminate duration.

3 However, Article 9(21) of Decree-Law No 510 of 1 October 1996, converted into Law No 608 of 28 November 1996, laying down urgent measures in relation to work of social utility, provides:

`Workers employed from 1 December 1994 under a fixed-term contract by Poste Italiane shall have a right of priority, in accordance with the contractual provisions and those of a specific agreement with the trade unions, in the event of staff being taken on for an indeterminate period by Poste Italiane for posts of the same level and/or involving the same duties until 31 December 1996; the workers concerned must give notice of their wish to exercise that right by 30 November 1996. Recruitment of staff under fixed-term contracts of employment by Poste Italiane, from the date on which it was set up until 30 June 1997, shall not give rise to employment relationships of indeterminate duration and shall lapse upon the expiry date of each contract.'

4 The above provision is linked to the transformation of the Italian Post and Telecommunications Administration into a public undertaking with effect from 1 January 1994. Under Article 6(2) of Law No 71/1994 the staff of the Post and Telecommunications Administration became employees of Poste Italiane under private-law contracts. According to the order for reference, the purpose of the second sentence of Article 9(21) was to lay down a transitional period at the end of which employment relationships were brought into line with the private-sector system.

5 The applicants in the main proceedings, Mr Epifanio Viscido, Mr Mauro Scandella and Mr Massimiliano Terragnolo, brought proceedings against Poste Italiane complaining that, since 1 January 1994, the undertaking had responded to staff shortages by recruiting workers on fixed-term contracts. They contended that recruitment on that basis should be regarded as having given rise to employment relationships of indeterminate duration. They argued that the disputed provision, in so far as it relieved Poste Italiane of a burden applicable to other undertakings under the general law, entailed the grant of State aid contrary to Articles 92 and 93 of the Treaty.

6 Against that background the national court has put the following questions to this Court:

`(1) whether a legal provision which relieves a particular public economic entity from the obligation of complying with the generally applicable legislation concerning fixed-term employment contracts falls within the scope of "aid granted by a Member State or through State resources in any form whatsoever";

(2) whether, if question (1) is answered in the affirmative, an aid of that kind should be subject to the preliminary examination procedure under Article 93(3) of the Treaty;

(3) whether, where that procedure has not been followed, the prohibition of an aid of that kind can be regarded as directly applicable within the domestic law of the Italian State;

(4) whether, in the event of question (3) being answered in the affirmative, such a prohibition may be relied on in a dispute between the public economic entity and an individual who complains of failure to apply to him the general legislation concerning fixed-term employment in order to secure conversion of his employment relationship into one of indeterminate duration and/or compensation for damage.'

7 The applicants have not submitted written or oral observations to the Court. The German and Italian Governments and the Commission take the view that the contested provision does not involve the grant of State aid within the meaning of Article 92(1) of the Treaty. I share that view.

8 Article 92(1) provides:

`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.'

9 It is clear from the case-law of the Court that a measure constitutes aid only if it involves the transfer of State resources to an undertaking (or relief from financial obligations towards the State, such as tax or social security charges).

10 In van Tiggele (2) the Court held that the fixing by a national authority of a minimum retail price for a product at the exclusive expense of consumers did not constitute State aid since it did not entail the direct or indirect grant of State resources.

11 Subsequently, in Sloman Neptun, (3) the Court held that the partial non-application of German employment law and social security law to foreign crews on ships flying the German flag did not constitute State aid. Referring to its ruling in van Tiggele the Court observed: (4)

`... only advantages which are granted directly or indirectly through State resources are to be regarded as State aid within the meaning of Article 92(1) of the EEC Treaty. The wording of this provision itself and the procedural rules laid down in Article 93 of the EEC Treaty show that advantages granted from resources other than those of the State do not fall within the scope of the provisions in question. The distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted by the State, but also aid granted by public or private bodies designated or established by the State.'

12 Turning to the German rules the Court noted: (5)

`The system at issue does not seek, through its object and general structure, to create an advantage which would constitute an additional burden for the State or the abovementioned bodies, but only to alter in favour of shipping undertakings the framework within which contractual relations are formed between those undertakings and their employees. The consequences arising from this, in so far as they relate to the difference in the basis for the calculation of social security contributions, mentioned by the national court, and to the potential loss of tax revenue because of the low rates of pay, referred to by the Commission, are inherent in the system and are not a means of granting a particular advantage to the undertakings concerned.'

13 In Kirsammer-Hack (6) the Court, applying its earlier rulings, held that the exclusion of small businesses from a national system protecting workers against unfair dismissal did not constitute State aid. The Court noted: (7)

`In the present case, the exclusion of a category of businesses from the protection system in question does not entail any direct or indirect transfer of State resources to those businesses but derives solely from the legislature's intention to provide a specific legislative framework for working relationships between employers and employees in small businesses and to avoid imposing on those businesses financial constraints which might hinder their development.'

14 It is clear that the above case-law applies to the present case. By relieving Poste Italiane for a transitional period of the obligation to recruit staff under contracts of indeterminate duration the Italian rules do not provide for any direct or indirect transfer of State resources to that undertaking. Instead by suspending the ordinary rules of Italian employment law their purpose was to remove legal constraints which might hinder the smooth transformation of the Italian Postal Administration into a public undertaking.

15 It might be argued that employment under fixed-term contracts could result in costs for the State in the form of lost tax revenue or unemployment benefits. However, as the Court put it in Sloman Neptun, (8) such costs `are inherent in the system and are not a means of granting a particular advantage' to Poste Italiane. In any event such costs are uncertain and unquantifiable since, in the absence of the flexibility provided by the contested provision, Poste Italiane may not have employed, or may have employed fewer, additional staff to cover short-term staff shortages.

16 It might be asked why, given their potential effect on competition, Article 92(1) does not cover all labour and other social measures which by virtue of being selective in their impact might distort competition and thereby have an equivalent effect to State aid. The answer is perhaps essentially a pragmatic one: to investigate all such regimes would entail an inquiry on the basis of the Treaty alone into the entire social and economic life of a Member State. (9)

17 I conclude therefore, in answer to the national court's first question, that a provision such as that in issue does not entail the grant of aid within the meaning of Article 92(1) of the Treaty. It is therefore unnecessary to consider the national court's remaining questions.

Conclusion

18 Accordingly, I am of the opinion that the questions referred by the Pretura Circondariale di Trento should be answered as follows:

A national provision which relieves an undertaking from the obligation of complying with the generally applicable legislation concerning the duration of employment contracts does not entail the grant of State aid within the meaning of Article 92(1) of the Treaty.

(1) - A number of additional exceptions were provided for the Law No 56 of 28 February 1987.

(2) - Case 82/77 Openbaar Ministerie of the Netherlands v van Tiggele [1978] ECR 25.

(3) - Joined Cases C-72/91 and C-73/91 Sloman Neptun v Bodo Ziesemer [1993] ECR I-887.

(4) - Paragraph 19 of the judgment.

(5) - Paragraph 21 of the judgment.

(6) - Case C-189/91 Kirsammer-Hack v Sidal [1993] ECR I-6185.

(7) - Paragraph 17 of the judgment.

(8) - Cited in note 3.

(9) - For a discussion of this issue see Paul Davies, `Market Integration and Social Policy in the Court of Justice', Industrial Law Journal 1995, p. 49, in particular at p. 58 et seq.