OPINION OF ADVOCATE GENERAL JACOBS

delivered on 30 April 2002 [1]

Introduction

1. The present case, referred by the Cour administrative d'appel (Administrative Court of Appeal) Lyon, concerns a French law establishing a public service for the collection and disposal of animal carcasses and dangerous slaughterhouse waste, which is (i) compulsory and provided free of charge for the main beneficiaries, namely farmers and slaughter-houses, (ii) operated by private carcass disposal undertakings which are remunerated for their services by the State under contracts awarded after public procurement procedures, and (iii) financed through a meat purchase tax imposed mainly on meat retailing supermarkets, but not on small meat retailers.

2. The issues are essentially whether the law contains State aid in favour of farmers and slaughterhouses which receive a service free of charge, of carcass disposal undertakings selected and paid by the State for the operation of the service in question, and/or of those small meat retailers who do not have to pay the meat purchase tax.

3. Those questions arise in proceedings in which a meat retailing supermarket requests a refund of the meat purchase tax arguing that the arrangement established by the law in issue constitutes State aid which could not be introduced without being notified in advance to the Commission pursuant to Article 88(3) EC.

4. Among the important issues raised in this case is one recently considered by the Court in *Ferring* [2] and currently before the Court in *Altmark Trans*, [3] namely whether, and under what conditions, financial compensation granted by a Member State to an undertaking providing a public service should be regarded as State aid.

1 — Original language: English.

2 — Case C-53/00, judgment of 22 November 2001, [2001] ECR I-9067.

3 — Case C-280/00, judgment of 24 july 2003, [2003] ECR I-7747.

General background

5. The national provisions in issue concern the disposal and processing of animal material not intended for human consumption.[4] Such material includes for example carcasses of farm animals which died with clinical signs of disease or animals killed in the framework of disease eradication plans, other animal carcasses (e.g. those collected after road accidents or dead pets), parts of slaughtered animals which have been declared unfit for human consumption, or parts of slaughtered animals which have been declared fit for human consumption, but where the parts in question are not intended for human consumption for example for commercial reasons.

6. Animal material not intended for human consumption can be used in various ways. The vast majority of such material is used by the rendering industry for the production of animal feed (i.e. feed of animal origin for farmed animals including meat and bone meal and rendered fats). The remainder is used for example for the production of petfood and technical products intended for purposes other than human or animal consumption (e.g. cosmetics, pharmaceutical products, tanned and treated hides and skins, processed wool, feathers).

7. Before the BSE crisis all animal material not intended for human consumption, regardless of its origin, could be used for the production of animal feed following appropriate treatment. Now it is widely accepted that at least certain dangerous material derived for example from animals found unfit for human consumption following health inspection should not be recycled into the feed chain.

8. For that purpose a distinction must be drawn between animal material which should be excluded from the feed chain and other such material which may continue to be used for the production of animal feed. Second, new ways must be devised to dispose of those materials which are excluded from the feed chain, because material which previously was used as raw material for further processing is now regarded as dangerous waste which must be disposed of safely. Third, it must be decided who has to bear the costs engendered by the disposal of that new type of waste.

4 — The following introductory remarks are based on information contained in Commission Proposal for a Regulation of the European Parliament and of the Council laying down the health rules concerning animal by-products not intended for human consumption, COM(2000) 574 final, OJ 2001 C 96 E, p. 40.

9. The substantial economic and environmental implications of a policy change in that field may be illustrated by the following figures. In 1998 the European rendering industry collected and transformed 16.1 million tonnes of animal material into 3 million tonnes of animal meal and 1.5 million tonnes of fat suitable to enter the feed chain and for use in various technical products (cosmetics, pharmaceutical products). It represented an annual revenue for European agriculture of more than EUR 2.2 billion. In particular 14.3 million tonnes of the above animal material came from slaughterhouses. 1.8 million tonnes (more than 10% of animal material not intended for human consumption) was represented by animal carcasses or other condemned material.

The French legal background

10. Under a law of 31 December 1975 carcass disposal undertakings were obliged to collect and dispose of all animal carcasses and slaughterhouse waste in a given geographical area. As a compensation they were granted a monopoly for the provision of their services for that geographical area. Their activity was normally profitable because they could transform all the raw material — including material now considered as dangerous — into secondary products and in particular into animal feed. Therefore the collection of animal material was in principle performed free of charge. However, where the undertakings in question could not perform their collection and disposal service under economically satisfactory conditions the law of 1975 allowed the State to fix tariffs to be paid by the beneficiaries (mainly farmers and slaughterhouses) as a remuneration for the services in question.

11. The BSE crisis modified the preexisting equilibrium of the sector. First in some Member States and then throughout the Community the use of certain dangerous material was prohibited. The price of animal feed derived from animal material went down dramatically. Many rendering plants stopped using animal carcasses or condemned material altogether in favour of slaughterhouse by-products considering that the market for animal feed derived from condemned material was collapsing. There was thus no longer any economic incentive for carcass disposal undertakings to collect animal carcasses from farms and condemned material from slaughterhouses.

12. Against that background the French legislature adopted Law No 96-1139 of 26 December 1996 on the collection and disposal of animal carcasses and slaughterhouse waste and modifying the Rural Code [5] ('Law No 96-1139') and the two implementing Decrees No 96-1229 of 27 December 1996 [6] and No 97-1005 of 30 October 1997. [7] The Law and the Decrees in question insert a number of

5 — JORF 19184 of 27 December 1996.
6 — JORF 19697 of 31 December 1996.
7 — JORF 15908 of 1 November 1997.

new provisions into the Rural Code, [8] insert one new provision into the General Tax Code [9] and contain one free-standing provision. [10]

Definition and scope of the public carcass disposal service

13. Article 264 of the Rural Code as amended establishes the public carcass disposal service (*service public d'équarrissage*) which is defined as the collection and disposal of animal carcasses and of meat and offal seized at slaughterhouses which are found unfit for human or animal consumption.

14. By virtue of Article 265(I) of the Rural Code the use of the public carcass disposal service is obligatory for

— owners and holders of carcasses of dead animals or batches of dead animals weighing more than 40 kilograms; [11]

— slaughterhouses, without weight limitation, in respect of carcasses of animals which died before slaughter and of meat and offal seized at the slaughterhouse found unfit for human or animal consumption.

15. Article 271 of the Rural Code excludes from the scope of the obligatory public carcass disposal service the disposal of (i) animal parts seized in the course of veterinary inspections other than those falling under Article 264, and (ii) animal waste [12] from slaughterhouses or establishments involved in the treatment or preparation of feedstuff for animals or feedstuff of animal origin. The disposal of animal material covered by Article 271 falls within the responsibility of the slaughterhouses and establishments concerned by that provision. If they are not themselves approved and registered for that purpose they have to entrust the disposal to establishments approved and registered by the administration.

16. It follows from those rules and the *travaux préparatoires* of Law No 96-1139 that the obligatory public carcass disposal service is intended to cover approximately that 10% of animal material not intended for human consumption which is con-

8 — See paragraphs 13 to 18.

9 — See paragraphs 15 to 23.

10 — See paragraph 24.

11 — That weight restriction appears to be designed to exempt owners of dead pets from the obligatory use of that service.

12 — It follows from the *travaux préparatoires* of the law and the terminology used in Council Directive 90/667/EEC of 27 November 1990 laying down the veterinary rules for the disposal and processing of animal waste, for its placing on the market and for the prevention of pathogens in feedstuffs of animal or fish origin and amending Directive 90/425/EEC (OJ 1990 L 363, p. 51) that the concept of animal waste covers essentially all animal material not intended for direct human consumption.

sidered to be dangerous (carcasses and other condemned material). By contrast the disposal and further processing of the remaining 90% (in particular parts of slaughtered animals fit, but not intended for human consumption) are left to the slaughterhouses and the establishments concerned and thus to the free market.

Operation of the public carcass disposal service

17. The public carcass disposal service falls in principle within the competence of the State. [13] For the purpose of the operation of the public carcass disposal service the State awards — in accordance with general public procurement rules — public service contracts of a maximum duration of 5 years to specialised carcass disposal undertakings. [14] Those contracts may be awarded at the level of one *département*, of several *départements* grouped together or, exceptionally, even at national level.

18. The carcass disposal undertakings charged with the public service must provide their collection and disposal services free of charge to the beneficiaries of the public service (mainly farmers and slaughterhouses) and are remunerated exclusively by the State. [15]

13 — Article 264 of the Rural Code.
14 — Article 264-1 of the Rural Code.
15 — Article 264-2 of the Rural Code.

The financing of the public carcass disposal service

19. In order to guarantee the financing of the public carcass disposal service Law No 96-1139 inserted Article 302 bis ZD into the General Tax Code (*Code Général des Impôts*).

20. That provision institutes with effect from 1 January 1997 a tax which is in principle payable by any person who makes retail sales of meat. By way of exception the tax is not payable by undertakings with an annual turnover below FRF 2 500 000 or where the amount of meat purchases per month is lower than FRF 20 000 exclusive of value added tax.

21. The tax is levied on a retailer's meat purchases and is based on the value of those purchases.

22. The rate of the tax which is to be fixed jointly by the Minister for Economic Affairs and the Budget and the Minister for Agriculture may not exceed 0.6% for a first tranche of purchases per month up to and including FRF 125 000 and 1% for purchases over FRF 125 000.

23. The tax is to be determined, collected and checked according to the same procedures and subject to the same penalties, safeguards and privileges as value added tax.

24. Article 1 B of Law No 96-1139 establishes the link between the tax regulated in the General Tax Code and the public carcass disposal service regulated in the Rural Code. Under that provision the sums generated by the tax are paid into a fund operated by the *Centre national pour l'aménagement des structures des exploitations agricoles*. The fund's objective is to finance the collection and disposal of animal carcasses and animal material seized in slaughterhouses found unfit for human or animal consumption.

25. The Court has been informed that the Commission has called on France to put an end to the discriminatory effects of the meat purchase tax. In a reasoned opinion (second stage in an infringement procedure under Article 226 EC) of October 2000 the Commission stated that, in its view, the meat purchase tax is a discriminatory tax measure incompatible with Article 90 EC because it applied to imported meat whereas only French meat producers have access to the public carcass disposal service. [16]

16 — See press release IP/00/1167 of 17 October 2000. The Court has also been informed that since a legislative amendment of December 2000 the sums generated by the tax are to be paid to the general budget and no longer into a special fund. That subsequent development has no influence on the main proceedings.

The main proceedings and the order for reference

26. GEMO SA ('GEMO') manages a medium-sized supermarket with a butchery counter at Venarey Les Launes (Côte d'Or).

27. By judgment of 25 May 2000 the Tribunal administratif de Dijon (Administrative Court, Dijon) granted GEMO a refund of the tax on meat purchases which it had paid between 1 January 1997 and 31 August 1998 in the amount of FRF 106 178 (about EUR 16 200). That court considered that the arrangement established by Law No 96-1139, first, constituted State aid within the meaning of Article 87 EC which could not be introduced without being notified in advance to the Commission under Article 88(3) EC, and second, was incompatible with the prohibition of discriminatory taxation under Article 90 EC.

28. In the main appeal proceedings the Ministre de l'économie, des finances et de l'industrie (Minister for Economic Affairs, Finance and Industry, 'the Minister') requests the Cour administrative d'appel de Lyon to annul that judgment and to reimpose the tax in issue on GEMO.

29. Before that court GEMO submits in essence, first, that the arrangement in issue constitutes State aid in favour of farmers since it relieves the meat production chain of a cost which is inherent in its activity and

thus supports the marketing of French-produced meat to other Member States at a lower price. That State aid should not have been introduced without notification. Second, the tax has an equivalent effect to a customs duty because meat products imported from other Member States (whose production costs include that of carcass disposal) have to bear the economic burden of the tax on meat purchases whilst the apparent economic burden on meat produced in France is cancelled out by the advantage of the public carcass disposal service provided free of charge. Third, the general nature of its scope of application and its proportionate rate give the tax in issue the character of a turnover tax whose introduction is contrary to Community value added tax rules.

30. The Minister submits in essence that the tax does not have the effect of giving aid either to carcass disposal undertakings or to national farmers and operators of slaughterhouses and could thus be established without prior notification. That is because the sums paid by the State to carcass disposal undertakings correspond to the price of the services which they provide, the purpose of the tax is to finance a public service with a view to health protection, and the charge ensures the maintenance of a free system for the removal of carcasses from farmers' premises and has not changed the conditions of competition. Furthermore, the tax does not have an effect equivalent to a customs duty and is also compatible with the Community value added tax rules.

31. The referring court recalls that the validity of acts of national authorities is adversely affected by the breach of the obligation imposed on them by Article 88(3) EC not to put into effect any plans to alter or grant aid which they have not notified to the Commission. [17] It considers that the arrangement established by Law No 96-1139 cannot be regarded as State aid in favour of carcass disposal undertakings since the remuneration paid to those undertakings by the State represents the price of the services which they perform. The public carcass disposal service provides farmers and slaughterhouses however with the free collection and destruction of waste which they produce. It might thus be regarded as relieving an economic sector of a burden which it would normally have to bear. Moreover the plan to introduce the tax on meat purchases was not notified to the Commission.

32. In the light of those considerations the Cour administrative d'appel de Lyon has referred to the Court for a preliminary ruling the question

'whether the tax on meat purchases provided for under Article 302 bis ZD of the Code Général des Impôts forms part of an arrangement which may be regarded as aid within the meaning of Article 92 of the Treaty of 25 March 1957 establishing the

17 — See, for example, 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 11 of the judgment; Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 40.

European Community (now Article 87 EC).'

33. Written observations were submitted by GEMO, the French Government and the Commission. At the hearing all those who had submitted written observations and the United Kingdom Government were represented.

34. GEMO states that the compatibility of the tax in issue with the Community State aid rules and with the prohibition of discriminatory taxation pursuant to Article 90 EC has been challenged in several other proceedings in France.

Admissibility

35. The French Government contests the admissibility of the reference on the basis of the judgments in *EKW*,[18] *Idéal Tourisme*[19] and *Banks*[20] where the Court essentially held that operators liable to pay an obligatory contribution (e.g. a duty or a tax) cannot rely before a national court on the argument that an exemption from that contribution enjoyed by other operators constitutes (unnotified) State aid in order to avoid the payment or to obtain the repayment of that contribution. In *EKW* and *Idéal Tourisme* the Court therefore found it unnecessary to assess whether the measure constituted State aid since that question was 'wholly irrelevant' to the main proceedings.[21] According to the French Government, it follows from that case-law that even if the scheme set up by Law No 96-1139 were to be classified as State aid, the referring court could at most order the recovery of that aid, but not grant to GEMO a refund of the tax. In its view, the question as to the classification of the measure as State aid is thus irrelevant for the main proceedings.

36. Despite its apparent attractiveness I am not convinced by that line of argument.

37. As regards, first, the underlying premiss that Community law precludes the referring court from granting a refund of the tax the present case differs in a crucial point from the three cases invoked by the French Government: GEMO's main argument is not that the exemption of small meat retailers from the payment of the tax constitutes aid, but that the tax in issue is

18 — Case C-437/97 [2000] ECR I-1157, paragraphs 51 to 54 of the judgment.

19 — Case C-36/99 [2000] ECR I-6049, paragraphs 26 to 29 of the judgment.

20 — Case C-390/98 [2001] ECR I-6117, paragraph 80 of the judgment.

21 — See also the Opinion of 20 September 2001 of Advocate General Alber in Joined Cases C-430/99 and C-431/99 *Sea-Land Service*, paragraphs 132 to 140 of the Opinion.

the financing side of a broader State aid scheme in favour of French farmers and slaughterhouses and in favour of carcass disposal undertakings. In numerous cases concerning the compatibility with Community law of parafiscal charges levied by a Member State which were brought by applicants unwilling to pay those charges the Court has not hesitated to reply to questions regarding the classification of the measures as State aid. [22]

38. Moreover, I confess that I find the judgments invoked by the French Government and in particular the judgment in *Banks* problematic.

39. That is, essentially, because I cannot see any basis in Community law for prohibiting a national legal order from providing that type of remedy in a case where both the notification and the standstill requirement under the first and the last sentence of Article 88(3) EC have been infringed. It follows on the contrary from several leading judgments of the Court that that remedy is not only permissible, but may sometimes even be required by Community law to ensure the effectiveness of the prohibition in the last sentence of Article 88(3) EC.

40. According to the first sentence of Article 88(3) EC 'the Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid'. According to the last sentence thereof 'the Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision'.

41. In *Lorenz* the referring court had asked whether a law adopted in violation of the obligations laid down in Article 88(3) EC was invalid. The Court held that the direct effect of the last sentence of Article 88 EC compelled national courts to apply that provision without its being possible to object on the grounds of rules of national law, but that it was for the internal legal system of each Member State to determine the legal procedure (in the French version *procédé juridique*) leading to that result. [23]

42. In *FNCE*, a case very similar to the present one, [24] the Court was asked the

22 — See, for example, Case 77/72 *Capolongo* [1973] ECR 611; Joined Cases C-78/90 to C-83/90 *Compagnie commerciale de l'Ouest and Others* [1992] ECR I-1847; Case C-17/91 *Lornoy and Others* [1992] ECR I-6523; Joined Cases C-144/91 and C-145/91 *Demoor Gilbert and Others* [1992] ECR I-6613; Case C-72/92 *Scharbatke* [1993] ECR I-5509.

23 — Case 120/73 *Lorenz* [1973] ECR 1471, paragraph 9 of the judgment.

24 — Case C-354/90, cited in note 17: two trade associations challenged before the French courts a law instituting parafiscal charges for the benefit of French fishermen on the ground that the last sentence of Article 88(3) EC had been disregarded.

same question as in *Lorenz*. Here the Court was more explicit and held that 'the last sentence of Article [88(3) EC] is to be interpreted as imposing on authorities of Member States an obligation whose infringement will affect the validity of measures giving effect to aid...'.[25] The Court held also that 'national courts must offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, 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.'[26]

43. It follows from that case-law that one of several consequences of the violation of the last sentence of Article 88(3) EC is the invalidity of the measures giving effect to the aid and that the sanction of invalidity is as important as for example the sanction of the recovery of the aid.

44. Under the principle of procedural autonomy it is then in my view for the national legal order to determine precisely which national measures are affected by that invalidity and what consequences that invalidity has for example for the refund of charges collected on the basis of the measures concerned. The only limitations on that autonomy are the principle of equivalence and the principle of effectiveness.

45. It seems to me that a national court which wishes under its national law to order the refund of charges collected on the basis of a law adopted in violation of Article 88(3) EC does not violate any of those principles but furthers the effectiveness of Community law.

46. As regards, second, the assertion that the reply to the question referred is manifestly irrelevant for the main proceedings, it must be recalled that it is solely for the referring court to determine both the need for a preliminary ruling and the relevance of the questions which it submits to the Court. Only where it is obvious that the requested interpretation of Community law bears no relation to the actual facts of the

25 — Operative part of the judgment.

26 — Paragraph 12 of the judgment. That was confirmed in Case C-39/94 *SFEI*, cited in note 17, paragraph 40 of the judgment.

main action or its purpose may the Court refuse to give the ruling. [27] Even if it were correct that Community law precludes the refund of a tax levied for the unlawful purpose of financing an unnotified aid, the question referred might still be of relevance for the main proceedings, for example for a decision on the award of damages. It would thus be against the principle of cooperation in good faith between national courts and the Court of Justice to declare the question referred as *manifestly* irrelevant.

47. My analysis seems confirmed by the judgment in *Ferring* [28] which was delivered after *EKW*, *Idéal Tourisme* and *Banks*. In *Ferring* the French Government had contested the admissibility of the reference on the basis of exactly the same arguments as in the present case. In his Opinion Advocate General Tizzano rejected those arguments for reasons similar to those set out above. [29] In its judgment the Court did not even mention the French Government's objection and may therefore be taken to have endorsed the Advocate General's line of argument.

48. Accordingly, the reference is admissible.

27 — See, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59 of the judgment.

28 — Cited in note 2.

29 — Paragraphs 20 to 24 of the Opinion.

Classification of the scheme as State aid

49. Article 87(1) EC defines State aid as '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..., in so far as it affects trade between Member States'.

50. As an important preliminary point, which must be borne in mind throughout the consideration of the present case, it must be stressed that the issue in the present case is not whether Law No 96-1139 is compatible with the State aid rules of the Treaty. The assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Community Courts. Even if Law No 96-1139 constitutes State aid, it may still be authorisable. In that connection it will be noted that the Commission recently authorised BSE-related aid measures in Belgium and Germany, which concerned *inter alia* the costs of BSE tests and of the disposal of risk material. [30]

51. At issue in the present case is therefore only the scope of application of the regime

30 — See the Commission press release of 13 February 2002, IP/02/246.

for the control of State aid. In other words, does a measure such as Law No 96-1139 fall entirely outside the State aid rules or is a Member State which wishes to adopt that type of measure obliged to comply with the procedural obligations of Article 88 EC namely the obligation to notify the measure and not to implement it until the procedure has resulted in a final decision?

52. Second, the scope of the question referred must be clarified. The French Government maintains that the referring court wishes only to know whether the law in issue contains State aid in favour of farmers and slaughterhouses. The Commission discusses by contrast whether there is State aid in favour of farmers and slaughterhouses (who receive a service free of charge), of carcass disposal undertakings (who receive payments for their services), of small meat retailers (who are exonerated from the payment of the meat purchase tax), of meat wholesale undertakings (who are equally exempted from the burden of the tax) and/or of hotels and other clients of meat wholesale undertakings (who benefit indirectly from the exemption of meat wholesale undertakings).

53. The referring court admittedly states that, in its view, the scheme in issue cannot be regarded as State aid in favour of carcass disposal undertakings. It has none the less decided to ask the question whether the meat purchase tax in issue forms part of a wider arrangement which may be regarded as aid without indicating who might in its view be the potential beneficiaries of that aid. In the light of the arguments submitted and in order to give a useful reply I will therefore examine whether there is State aid in favour of (i) farmers and slaughterhouses, (ii) carcass disposal undertakings and (iii) small meat retailers. I will by contrast not discuss aid to meat wholesale undertakings and their clients since that point was addressed only by the Commission.

54. Third, the written and oral observations have concentrated on the three questions whether the law in issue grants *economic advantages* within the meaning of Article 87(1) EC in favour of *certain undertakings or the production of certain goods* which *distort competition and affect trade between Member States*. All those submitting observations accept by contrast that the advantages in question are 'granted by a Member State or through State resources'. It is indeed settled case-law that where the funds used for a measure are financed through compulsory contributions (e.g. parafiscal charges) and then distributed according to State legislation they must be regarded as State resources even if they are collected and administered by institutions distinct from the public authorities. [31]

31 — See for example Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 35 of the judgment.

State aid in favour of farmers and slaughterhouses

55. The first issue is whether the provision free of charge to farmers and slaughterhouses of the obligatory public collection and disposal service for dangerous animal waste constitutes State aid.

56. GEMO and the Commission argue in essence, first, that the provision free of charge of that waste disposal service relieves farmers and slaughterhouses of charges which according to the polluter-pays principle they would normally have to bear. The service thus constitutes an economic advantage falling under Article 87(1) EC. Second, since the service in question is designed to benefit mainly French farmers and slaughterhouses it favours 'certain undertakings or the production of certain goods' within the meaning of Article 87(1) EC. Third, it affects trade between Member State and distorts competition since it favours French meat exports and disadvantages meat imports from other Member States.

57. The French Government replies in essence that the provision free of charge of the waste disposal service in question does not constitute an advantage within the meaning of the State aid rules because it pursues a public health objective and because the service has always been provided free of charge. It is thus erroneous to assume that the costs of the disposal of animal waste are normally borne by farmers and slaughterhouses. Second, the service in issue is a general measure which benefits not only French farmers and slaughterhouses, but also other holders of animal material not intended for human consumption. Third, there is no adverse effect on trade between Member States since between 1996 and 2000 the other Member States did not have a comparable policy of elimination of high-risk animal material.

— Economic advantage within the meaning of Article 87(1) EC

58. It will be recalled that the French measure in issue obliges the carcass disposal undertakings entrusted with the operation of the public carcass disposal service to provide their collection and disposal services free of charge and to receive their remuneration exclusively from the State.

59. Article 87(1) EC applies expressly to aid 'in any form whatsoever'. According to settled case-law the concept of aid thus encompasses not only positive benefits, such as subsidies, but also interventions 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 sense of the word, are of the same character and have the same effect. [32]

60. On the basis of that case-law I consider, first, that the provision of a service free of charge is capable of constituting State aid. In *Van der Kooy* the Court classified the provision of gas at a preferential tariff as State aid. [33] In *SFEI* the Court regarded the provision of logistical and commercial assistance by the French Post Office to SFMI and Chronopost as State aid provided that the remuneration received in return was less than that which would have been demanded under normal market conditions. [34] The Court has thus established that the supply of goods or services on preferential terms is capable of constituting State aid. *A fortiori* the supply of a service entirely free of charge is capable of constituting State aid.

61. Second, the fact that the French State does not provide the service in issue itself but entrusts private carcass disposal undertakings with its provisions does not preclude classification of the service as State aid.

62. It is well established case-law that State aid may be granted indirectly via private third parties [35] as long as the measure granting the aid is imputable to the State and financed through State resources. [36] That has been confirmed by the recent judgment in *Germany* v *Commission* [37] which concerned a tax concession in favour of investors who acquired holdings in east German companies. That tax concession did not constitute aid to the investors since it was a general measure applicable without distinction to all economically active persons. [38] It did however indirectly confer an advantage on undertakings situated in the new Länder. [39]

63. In the present case the intervention of the French State in favour of the recipients of the service in question is less indirect: the private undertakings entrusted with the collection and disposal service in question are not merely encouraged through a tax incentive to act in favour of the intended beneficiaries of the measure, but obliged under the public service contracts concluded with the State to provide their services.

32 — See, for example, *SFEI and Others*, cited in note 17, paragraph 58 of the judgment.

33 — Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 28 of the judgment; see also Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 10.

34 — *SFEI and Others*, cited in note 17, paragraph 62 of the judgment.

35 — Case 6/64 *Costa* [1964] ECR 585, at page 596. The same follows implicitly from Article 87(2)(a) EC which concerns aid granted to individual consumers but intended in reality to further the consumption of certain products.

36 — See Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 58 of the judgment and my Opinion of 13 December 2001 in Case C-482/99 *France* v *Commission*, paragraphs 53 et seq. with further references.

37 — Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857.

38 — Paragraph 22 of the judgment.

39 — Paragraphs 26 to 28 of the judgment.

64. Third, the provision free of charge of a collection and disposal service for dangerous animal waste relieves French farmers and slaughterhouses of an economic burden which would normally, in accordance with the polluter-pays principle, have to be borne by those undertakings.

65. According to Article 2 EC the Community must promote a high level of protection and improvement of the quality of the environment. According to Article 6 EC environmental protection requirements must be integrated into the definition and implementation of all Community policies and activities. According to Article 174(2) EC the Community's policy on the environment must be based *inter alia* on the principle that the polluter should pay.

66. The polluter-pays principle has its origin in economic theory and was conceived to deal with a market failure: pollution is perhaps the most important example of what economists call a negative externality, that is a loss (normally to society) which is not priced. In the absence of State intervention a producer of chemical products causing air pollution does not pay for that pollution. He can therefore ignore the costs to society in deciding how much to produce and at what price to sell his products. Pursuant to the polluter-pays principle the costs of measures to deal with pollution should be borne not by society through general taxation but by the polluter who causes the pollution. The costs associated with the protection of the environment should be included in a firm's production costs (internalisation of costs). The principle can be put into practice through a variety of State measures such as the taxation of pollution or liability rules.

67. The polluter-pays principle was inserted in the EC Treaty in 1987, though it has been referred to at the Community level since 1973.[40] Its formulation in Article 174(2) EC is laconic and varies considerably in the different language versions of the Treaty.[41] The Treaty refers to it merely as a 'principle' on which the Community's environmental policy is to be 'based'. Its precise meaning and its legal effects are therefore not entirely clear. In a recent judgment the Court did not take a firm position on its legal effects in a case where it was invoked as a ground of invalidity for a general Community measure.[42]

68. In its State aid practice the Commission uses the polluter-pays principle for two

40 — Declaration of the Council of the European Communities and of the representatives of Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, OJ 1973 C 112, p. 1.

41 — L. Krämer, 'Das Verursacherprinzip im Gemeinschaftsrecht: zur Auslegung von Artikel 130 r EWG-Vertrag', *Europäische Grundrechte-Zeitschrift* 1989, p. 353.

42 — Case C-293/97 *Standley and Others* [1999] ECR I-2603, paragraphs 51 and 52 of the judgment.

distinct purposes, namely (a) to determine whether a measure constitutes State aid within the meaning of Article 87(1) EC and (b) to decide whether a given aid may be declared compatible with the Treaty under Article 87(3) EC.

69. In the first context, that of Article 87(1) EC, the principle is used as an analytical tool to allocate responsibility according to economic criteria for the costs entailed by the pollution in question. A given measure will constitute State aid where it relieves those liable under the polluter-pays principle from their primary responsibility to bear the costs. [43]

70. In the second context, that of Article 87(3) EC, the polluter-pays principle is used by contrast in a prescriptive way as a policy criterion. It is relied on to argue that the costs of environmental protection *should* as a matter of sound environmental and State aid policy ultimately be borne by the polluters themselves rather than by States. [44]

71. The role of the polluter-pays principle as a basic policy prescription for the analysis of the compatibility of environmental aid under Article 87(3) EC is sometimes contested. [45] In my view, there can however be no serious objection to its use as an analytical tool to allocate responsibilities for costs in order to establish whether a given measure constitutes State aid within the meaning of Article 87(1) EC.

72. In the field of waste disposal the polluter-pays principle requires that the costs of disposing of waste be borne by the holder of the waste and/or the producer of the product from which the waste comes. [46] From an economic point of view there can therefore be no doubt that the costs of the disposal of dangerous animal material are attributable to those farmers, slaughterhouses and other persons who produce and hold that type of material. A State measure which relieves those actors of those costs is thus to be regarded as an economic advantage capable of constituting State aid. The provision free of charge of the waste disposal service in issue has in practice the same effects as a direct subsidy intended to compensate undertakings for the costs which they incur for the disposal of their waste.

43 — See, for example, Commission Decision 92/316/EEC of 11 March 1992 concerning aid envisaged by the Netherlands Government in favour of an environmentally-sound disposal of manure, OJ 1992 L 170, p. 34; Commission Decision 1999/227/ECSC of 29 July 1998 on aid granted by the Land of Lower Saxony (Germany) to Georgsmarienhütte GmbH, OJ 1999 L 83, p. 72.

44 — See for example Commission guidelines on State aid for environmental protection, OJ 2001 C 37, p. 3; see also Commission Decision 73/293/EEC of 11 September 1973 on aid which the Belgian Government intends to grant for extending an oil refinery at Antwerp (province of Antwerp) and for setting up a new refinery at Kallo (province of East Flanders), OJ 1973 L 270, p. 22.

45 — See, on the one hand, L. Krämer, *EC Environmental Law* (4th ed., 2000), page 19, and, on the other, J.-P. Keppenne, 'National environmental policies: uncharted waters for EC State aid control', *Nederlandse tijdschrift voor Europees recht* 2001, p. 193.

46 — See Article 15 of Council Directive 75/442/EEC of 15 July 1975 on waste, OJ 1975 L 194, p. 39 as principally amended by Council Directive 91/156/EEC of 18 March 1991, OJ 1991 L 78, p. 32..

73. The French Government's first counter-argument that the measure in issue pursues a public health objective cannot be accepted. It is well established case-law that the notion of State aid is an objective concept. Article 87(1) EC does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects. The causes or aims of a measure are not to be taken into account for its classification as aid but only for the assessment of its compatibility under Article 87(2) and (3) EC. In the present case there might in fact be valid reasons for a State to provide a public carcass disposal service free of charge, for example to prevent farmers from burying dangerous animal material on the farm. Those reasons do not however affect the classification of the measure as State aid.

74. The French Government's second objection that the polluter-pays principle does not apply in exceptional circumstances such as those caused by the BSE crisis must also be rejected. Since the legal effects of the law in issue are not limited in time it is apparently designed to tackle not a short-term crisis, but a long-term problem, namely the safe disposal of dangerous animal material. In any event, it follows indirectly from Article 87(2)(b) EC that even economic assistance granted to make good the damage caused by natural disasters or exceptional occurrences may constitute State aid within the meaning of Article 87(1) EC.

75. The French Government's third and final objection that the collection and disposal service has always been provided free of charge and that its costs are therefore not normally borne by farmers and slaughterhouses can also not be accepted.

76. It must first be recalled that under the French rules previously in force the service was provided free of charge only where the disposal undertakings could perform their collection and disposal service 'under economically satisfactory conditions'. Where this was not the case the law allowed the State to fix tariffs to be paid by the beneficiaries as a remuneration for the services in question. [47]

77. In any event, even if the service in question was under the previous regulatory regime practically always provided free of charge, the costs of the disposal of animal waste are, in my view, *normally* included in the budget of farmers and slaughterhouses within the meaning of the Court's case-law. 'Normally' in that context means 'under normal market conditions'. [48] Under normal market conditions, i.e. under the conditions of a market without State intervention or market failures, undertakings have to bear the costs of the disposal of the waste which they produce. That a Member State has in the past interfered with those

47 — See above at paragraph 10.

48 — *SFEI and Others*, cited in note 17, paragraph 60 of the judgment.

normal market conditions in order to relieve undertakings of analogous costs cannot therefore have as a consequence that further interferences with normal market conditions escape the State aid rules.

78. Accordingly, the provision free of charge of the public carcass disposal service constitutes an economic advantage capable of constituting State aid to the undertakings receiving that service.

— Specificity of the measure

79. A measure will not fall within Article 87(1) EC unless it favours 'certain undertakings or the production of certain goods' rather than being a general measure.

80. The French Government maintains that in the present case the condition of specificity is not satisfied since the public carcass disposal service benefits not only farmers and slaughterhouses, but also zoos, private pet-owners, and the authorities responsible for clearing public roads of dead animals; the service may also benefit farmers from other Member States, for example where their animals die in transit in France or in French slaughterhouses before slaughter.

81. It will be recalled that Law No 96-1139 indicates as the beneficiaries of the obligatory public carcass disposal service (a) owners and holders of carcasses of dead animals or batches of dead animals weighing more than 40 kilograms and (b) slaughterhouses.

82. It is thus true that according to the wording of the law the first category of beneficiaries is defined on the basis of objective and apparently general criteria. It is also true that, on the basis of those criteria, others — for example zoos — might benefit from the service. But the 40 kilograms weight limit has the effect of excluding most private pet-owners from the scope of the public service in question and the fact that some undertakings such as zoos or foreign farmers or some public authorities might also occasionally benefit from the measure cannot in my view undermine the finding that it is to French farmers and slaughterhouses that the law essentially applies.[49] Moreover, according to the *travaux préparatoires* submitted to the Court the central preoccupation of the authors of the law was to relieve farmers and slaughterhouses of the costs of the

49 — See Case C-169/84 *CDF Chimie AZF* v *Commission* [1990] ECR I-3083, paragraph 22 of the judgment.

disposal of animal material. A further indication that the law was in fact designed essentially to benefit farmers and slaughterhouses is the insertion of its provisions into the Rural Code.

83. I am therefore satisfied that the measure essentially favours two specific categories of undertakings, namely French slaughterhouses and farmers, and thus 'certain undertakings' within the meaning of Article 87(1) EC.

— Distortion of competition and effect on trade between Member States

84. I agree with GEMO and the Commission that the provision free of charge of the collection and disposal service distorts competition and affects trade between Member States within the meaning of Article 87(1) EC. The provision free of charge of that service reduces the price of French meat exports to other Member States by relieving the meat export sector from costs which it would normally have to bear. Conversely, meat imports from other Member States, which have to bear the costs of the disposal of dangerous animal material in their State of origin, are made more difficult: through the meat purchase tax at the retail stage those meat imports have to contribute to the costs of disposing of waste produced by their French competitors.

85. In that connection I cannot accept the French Government's argument that between 1996 and 2000 there was practically no other country with a comparable policy of eliminating dangerous animal material so that trade between Member States could not be affected because in other Member States comparable waste disposal costs did not arise. The French Government itself admits that such a policy existed in the United Kingdom. That means that French meat exports at least to that Member State benefited during that period from a clear competitive advantage. In any event the French Government has not submitted any evidence that farmers and slaughterhouses in other Member States did not have to pay for the disposal of dangerous animal material which they produced.

86. I accordingly conclude that a measure such as Law No 96-1139 constitutes State aid in favour of farmers and slaughterhouses.

State aid in favour of carcass disposal undertakings

87. The second substantive issue in the present case is whether the payments made by the State to carcass disposal undertakings for the operation of the public carcass

disposal service constitute State aid to those undertakings within the meaning of Article 87(1) EC.

88. That issue raises important and complex questions about the correct analysis under Articles 87(1) and 86(2) EC of State funding of services of general interest. The importance of those questions is illustrated by recent attempts at the highest political level to ensure greater predictability and increased legal certainty in the application of the State aid rules to that type of funding. [50]

89. However, if the Court accepts that Law No 96-1139 contains State aid in favour of farmers and slaughterhouses, the referring court will not need a ruling on the second issue: the measure in any event constitutes State aid. Moreover, in the pending case *Altmark Trans* [51] the plenary formation of the Court might have an opportunity to clarify the issue before judgment is given in the present case.

90. I will therefore deal less exhaustively than might otherwise be necessary with the correct analysis of State funding of services of general interest, an issue which has already been discussed by Advocate General Tizzano in his Opinion in *Ferring* [52] and by Advocate General Léger in his Opinion in *Altmark Trans*. [53] I will also not consider whether Article 86(2) EC has direct effect in the context of the application of the State aid rules and to what extent it affects the procedural obligations of the Member States under Article 88(3) EC [54] since under the solution which I will propose below those important questions do not need to be resolved in the present case.

50 — See the Presidency Conclusions of the European Council Meeting in Laeken of 14 and 15 December 2001, paragraph 26; Conclusions of the Internal Market, Consumer Affairs and Tourism Council meeting of 26 November 2001 on services of general interest; Commission Report to the Laeken European Council on Services of General Interest of 17 October 2001, COM(2001) 598; Communication from the Commission on the application of the State aid rules to public service broadcasting, OJ 2001 C 320, p. 5; see also the two general Commission Communications on Services of General Interest of 1996 and 2000 in OJ 1996 C 281, p. 3 and OJ 2001 C 17, p. 4.

51 — Case C-280/00, cited in note 3; the issue might also arise in Joined Cases C-34/01 to C-38/01 *Enirisorse*.

52 — Opinion of 8 May 2001 in Case C-53/00, cited in note 2.

53 — Opinion of 19 March 2002.

54 — See on those points the Opinion of Advocate General Tizzano in *Ferring*, cited in note 2, paragraphs 76 et seq.

— Background

91. The text of Article 87(1) EC has been set out above. [55] Article 86(2) EC provides:

'Undertakings entrusted with the operation of services of general economic interest... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.'

92. State funding of services of general interest may take various forms, such as for example the payment of a remuneration for those services under a public service contract, the payment of annual subsidies, a preferential fiscal treatment or lower social contributions.

93. Under Article 87(1) and 86(2) EC there are basically two possible ways to analyse State funding of services of general interest.

94. Under the first approach — to which I will refer for convenience as 'the State aid approach' — State funding granted to an undertaking for the performance of general interest obligations constitutes State aid within the meaning of Article 87(1) EC which may however be justified under Article 86(2) EC if the conditions of that derogation are fulfilled and, in particular, if the funding complies with the principle of proportionality.

95. I will refer to the second approach as 'the compensation approach', the term 'compensation' being intended to cover an appropriate remuneration for the services provided or the costs of providing those services. Under that approach State funding of services of general interest amounts to State aid within the meaning of Article 87(1) EC only if and to the extent that the economic advantage which it provides exceeds such an appropriate remuneration or such additional costs.

96. At least at first sight it seems that the Community Courts' case-law on the correct approach is inconsistent. [56]

55 — Paragraph 49.

56 — Below at paragraphs 125 to 128 I will try to explain the rationale underlying that case-law.

97. Initially, in *ADBHU*,[57] the Court followed the compensation approach. That case concerned the compatibility with 'the requirements of free competition' of a provision of a Community Directive pursuant to which Member States could grant indemnities, not exceeding the actual yearly costs, to waste oil disposal undertakings as compensation for the obligations imposed on them to collect and dispose of the waste oil offered to them by the holders in given geographical zones. The Court held that the indemnities in question did not constitute State aid within the meaning of the Treaty, but rather consideration for the services performed by the collection and disposal undertakings.[58]

98. In subsequent cases however the Community Courts followed expressly or implicitly the State aid approach.

99. In *Banco Exterior de España* the Court held that a Spanish tax exemption for public banks constituted existing State aid and that as long as the Commission had not found the aid to be incompatible with the common market, it was not necessary to examine whether and to what extent the aid in question was 'capable of falling outside the prohibition of Article [87 EC] by virtue of Article [86(2) EC].'[59] Under the compensation approach the Court would have had to examine first whether general interest obligations of Spanish public banks precluded the exemption from actually being State aid.

100. In *FFSA*[60] the Court of First Instance held that where Article 86(2) may be relied upon, the aid involved is still State aid within the meaning of Article 87(1) EC but may be considered to be compatible with the common market under Article 86(2) EC.[61] The order of the Court of Justice rejecting an appeal against that judgment can perhaps be read as an implicit endorsement of that solution.[62]

101. In *SIC*[63] the Court of First Instance stated very clearly that 'the fact that a

57 — Case 240/83 [1985] ECR 531, paragraph 16 to 21 of the judgment.

58 — The Opinion of Advocate General Lenz in Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889 is also based on the compensation approach: see paragraph 58 of the Opinion.

59 — Case C-387/92 [1994] ECR I-877, paragraph 21 of the judgment.

60 — Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229.

61 — Paragraph 172 of the judgment.

62 — Case C-174/97 P [1998] ECR I-1303: see in particular paragraph 31 of the order.

63 — Case T-46/97 [2000] ECR II-2125.

financial advantage is granted to an undertaking by the public authorities in order to offset the cost of public service obligations which that undertaking is claimed to have assumed has no bearing on the classification of that measure as aid within the meaning of Article [87(1) EC], although that aspect may be taken into account when considering whether the aid in question is compatible with the common market under Article [86(2) EC].' [64]

102. In its recent judgment in *Ferring* [65] however the Court applied the compensation approach. That case concerned a tax on direct sales imposed on pharmaceutical laboratories designed to restore the balance of competition between those laboratories and wholesale distributors of medicine since only the latter were required under French law to have at their disposal a permanent range of medicinal products sufficient to meet the requirements of a specific geographical area and to deliver requested supplies within a very short time over the whole of that area.

103. Advocate General Tizzano emphasised in his Opinion that the concept of aid requires the grant of an economic advantage and an ensuing distortion of competition. Where State funding is confined strictly to offsetting an objective disadvantage imposed by the State on the recipient there is no such economic advantage and there is also no distortion of competition. [66]

104. The Court held that, leaving aside the public service obligations in question, the tax on direct sales could constitute State aid inasmuch as it did not apply to wholesale distributors. However, provided that the tax corresponded to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, not assessing them to the tax could be regarded as compensation (in the French original *contrepartie*) for the services they provided. [67] Moreover, provided there was the necessary equivalence between the exemption and the additional costs incurred — it was for the referring court to decide whether that condition was satisfied — wholesale distributors would not be enjoying any real advantage for the purposes of Article 87(1) EC because the only effect of the tax would be to put distributors and laboratories on an equal footing. In so far as the tax advantage exceeded the additional costs of performing the public service the advantage could not be regarded as necessary to enable the undertakings concerned to carry out the

64 — Paragraph 84 of the judgment. Already before the judgment in *SIC* the EFTA Court had followed the State aid approach in Case E-4/97 *Norwegian Bankers' Association* v *EFTA Surveillance Authority*, judgment of 3 March 1999.

65 — Case C-53/00, cited in note 2.

66 — Paragraphs 60 to 63 of the Opinion.

67 — Paragraph 27 of the judgment.

particular tasks assigned to them and was therefore not covered by Article 86(2) EC.

105. In his Opinion in *Altmark Trans* [68] Advocate General Léger criticised the compensation approach followed in *Ferring*. In his view, first, that approach confuses two distinct legal questions, namely the classification of a measure as aid and the justification of that measure. Second, the compensation approach deprives Article 86(2) EC and the requirements which it imposes of any useful role in the analysis of State funding of services of general interest. Third, the compensation approach shelters State funding of services of general interest from the necessary control by the Commission.

106. Initially the Commission in its practice adopted the compensation approach. After the judgments in *FFSA* and *SIC* however it followed the State aid approach. [69]

107. In the present case GEMO and the Commission defend the State aid approach. They criticise the judgment in *Ferring* or try to distinguish it on the facts. In the alternative they contend that because of the oligopolistic market structure in France and because of the opportunities for fraud the carcass disposal undertakings receive funds which substantially exceed the costs of the collection and disposal services provided.

108. The French Government welcomes the judgment in *Ferring* and maintains that the carcass disposal undertakings in issue do not receive an economic advantage within the meaning of Article 87(1) EC but a compensation for the costs of their service. The compensation approach should be relied on at least where as in the present case the compensation is determined following an open, transparent and non-discriminatory procedure for the award of a public service contract. If there is no overcompensation there is by definition no distortion of competition. It is for the national court to determine whether there is overcompensation.

109. The United Kingdom Government maintains that the funding of the carcass disposal undertakings in issue presents certain characteristics typical of State aid. That funding should however not be regarded as State aid if it is manifest that it does not distort or threaten to distort competition. For that purpose the national court must take into account possible distortions of competition not only on the market in the services provided by carcass disposal undertakings but also on the markets of the recipients of the services in question (farmers and slaughterhouses).

68 — Cited above in note 3.

69 — A survey of the Commission's practice can be found in J.-Y. Chérot, 'Financement des obligations de service public et aides d'État', *Europe* 2000, p. 4.

— Analysis

110. The choice between the State aid approach and the compensation approach is not merely a theoretical matter: it has important practical consequences. [70]

111. It is true that under both approaches the most important substantive question is essentially whether the State funding exceeds what is necessary to provide for an appropriate remuneration for or to offset the extra costs caused by the general interest obligations. However, the two approaches have — at least under the case-law as it stands — very different procedural implications.

112. Where, on the basis of the compensation approach, a given financing measure does not constitute State aid, the measure falls outside the scope of the State aid rules and need not be notified to the Commission. Moreover, national courts can decide directly whether State aid is involved and do not have to wait for an assessment by the Commission of the compatibility of the measure.

113. Under the State aid approach the same measure would constitute State aid which, under the first sentence of Article 88(3) EC, must be notified in advance to the Commission. Moreover, it seems to follow from *Banco Exterior de España* [71] and *France* v *Commission* [72] that the derogation in Article 86(2) EC is subject to the same procedural regime as the derogations in Article 87(2) and (3) EC. That means that under the last sentence of Article 88(3) EC new aid cannot be implemented until the Commission has declared it compatible with Article 86(2) EC and that measures which infringe that stand-still obligation constitute illegal aid. It also means that national courts must 'offer to individuals the certain prospect that all the appropriate conclusions will be drawn' from the infringement of the last sentence of Article 88(3) EC, 'as regards the validity of the measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures'. [73]

114. Second, it follows in my view from the above survey of the Community Courts' case-law that neither the State aid nor the compensation approach provides for an ideal solution in all cases.

70 — See paragraph 31 of the Opinion of Advocate General Tizzano in *Ferring*, cited in note 2.

71 — Cited in note 59.

72 — Case C-332/98 [2000] ECR I-4833.

73 — *SFEI and Others*, cited in note 17, paragraph 40 of the judgment.

115. The main arguments against a generalised application of the State aid approach in all cases are the following:

(i) The concept of State aid in Article 87(1) EC applies only to measures which provide an economic advantage and which distort or threaten to distort competition. There are no obvious reasons why those two requirements should not apply where State funding of services of general interest is involved.

(ii) Where the State or emanations of the State purchase goods (e.g. computers) or services (e.g. room cleaning services) on the markets, there will be State aid only if and only to the extent that the remuneration paid exceeds what is appropriate. There are again no obvious reasons why the analysis should be different where the State purchases services which are to be provided to the collectivity (e.g. waste disposal services).

(iii) Under the case-law on the procedural implications of the State aid approach[74] the notification requirement and in particular the standstill requirement in Article 88(3) EC might seriously disrupt the provision of services of general interest through private undertakings. Thus, with regard to the provision of certain services (e.g. disposal of toxic waste, ambulance services) it may be difficult or even impossible to wait for prior authorisation by the Commission. On the other hand, if a Member State implements the aid before such an authorisation has been granted, the aid will be illegal with all the consequences which that illegality entails.

74 — See above paragraph 113.

116. The main arguments against a generalised application of the compensation approach are the following:

(i) The *lex specialis of* Article 86(2) EC and the conditions which it imposes would be deprived of any role in the control of State aid. Where State financing does not exceed what is necessary to offset the extra costs of the services provided, there would be no State aid within the meaning of Article 87(1) EC and thus no need to examine the compatibility of the measure with Article 86(2) EC. In so far as the financing exceeds what is necessary the measure could not be justified under Article 86(2) EC because it would infringe the principle of proportionality. There would thus be no cases

in which the Commission or a national court would be able to control

— whether the services in issue in fact constitute 'services of general economic interest', [75]

— whether the services in issue have in fact been 'entrusted' to the undertaking(s) concerned, [76]

— whether the financing in issue affects the development of trade to an extent contrary to the interests of the Community (last sentence of Article 86(2) EC). [77]

(ii) A generalised application of the compensation approach would make it less risky for Member States not to notify certain potentially harmful unilateral State financing measures and would thus create an incentive to conceal those measures from scrutiny by the Commission.

(iii) The analysis in two steps under the State aid approach — first the assessment of an infringement of the prohibition in Article 87(1) EC and then the assessment of the derogation of Article 86(2) EC — is more consistent with the parallel analysis in two steps of measures which infringe Article 86(1) EC read in conjunction with the competition rules [78] or with the rules on free movement. [79]

(iv) In the field of transport pursuant to Article 73 EC 'aids shall be compatible with this Treaty... if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service'; the authors of the Treaty thus regarded State financing of services of general interest in principle as State aid which could however be justified.

75 — It is clear that that control is in principle a marginal control. None the less in Case C-18/88 *GB-INNO-BM* [1991] ECR I-5941, paragraph 22 of the judgment, the Court did not accept that the production and sale of telephones constituted a service of general interest; see as regards dockwork Case C-179/90 *Merci convenzionali porto di Genova* [1991] ECR I-5889, paragraph 27, and as regards the transfers by banks of funds from one Member State to another Case 172/80 *Züchner* [1981] ECR 2021, paragraph 7.

76 — Case 127/73 *BRT* v *SABAM and NV Fonior* [1974] ECR 313, paragraph 20 of the judgment; Case 66/86 *Ahmed Saeed Flugreisen* [1989] ECR 803, paragraph 55.

77 — In the already mentioned Case E-4/97 *Norwegian Bankers' Association* v *EFTA Surveillance Authority*, cited in note 64, the EFTA Court annulled on that basis a decision of the EFTA Surveillance authority.

78 — See, for example, Case C-475/99 *Ambulanz Glöckner*, judgment of 25 October 2001.

79 — See, for example, Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699.

117. Since neither the compensation nor the State aid approach provides for an ideal solution in all cases, I consider it necessary to seek a solution which applies one approach to one category of cases and the other approach to another category.

118. In that regard the key to the correct analysis under Articles 87(1) and 86(2) EC of State financing of services of general interest might in my view be a distinction between two different categories of cases which is based (i) on the nature of the link between the financing granted and the general interest duties imposed and (ii) on how clearly those duties are defined.

119. In accordance with the proposed distinction the first category would comprise cases where the financing measures are clearly intended as a *quid pro quo* for clearly defined general interest obligations, or in other words where the link between, on the one hand, the State financing granted and, on the other hand, clearly defined general interest obligations imposed is direct and manifest. The clearest example of such a direct and manifest link between State financing and clearly defined obligations are public service contracts awarded after public procurement procedures: one and the same contract defines the obligations of the undertakings entrusted with the services of general interest in question and the remuneration which they will receive in return. Cases falling into that category should in my view be analysed according to the compensation approach.

120. The second category consists of cases where it is not clear from the outset that the State funding is intended as a *quid pro quo* for clearly defined general interest obligations. In those cases the link between State funding and the general interest obligations imposed is either not direct or not manifest or the general interest obligations are not clearly defined. A good example of that category is *Banco Exterior de España* in which a Spanish law exempted all public banks from the payment of taxes. The law did not indicate that that advantage was intended as a *quid pro quo* for the fulfilment of general interest obligations nor did it define exactly any such obligations. Only before the Court did the Spanish Government allege that the exemption was necessary for the fulfilment by public banks of their function of 'administering the public provision of credit'. Cases in the second category should in my view be analysed according to the State aid approach.

121. The proposed distinction has a number of advantages. First it is consistent with the general case-law on the interpretation of Article 87(1) EC.

122. Under that case-law, bilateral arrangements or more complex transactions involving mutual rights and obligations are to be analysed as a whole. Where for example the State purchases goods or services from an undertaking, there will be aid only if and to the extent that the price paid exceeds the market price. [80] Where the State lends money to an undertaking there will be aid only if and to the extent that it does not ask for an appropriate return as would a private investor. [81] The same global analysis must in my view prevail where the link between State funding and the clearly defined general interest obligations imposed is so direct and manifest that financing and obligation must be regarded as a single measure.

123. Under the general case-law on Article 87(1) EC the causes and aims of a unilateral measure are by contrast not to be taken into account for the classification of the measure as State aid but only for the assessment of its compatibility under Article 87(2) and (3) EC. Where it is not clear from the outset that State funding is granted as a *quid pro quo* for clearly defined general interest obligations, a State's contention that the funding is in fact intended to offset the additional cost of the general interest tasks assumed by certain undertakings must be viewed as referring merely to the causes and aims of the measure. Whilst many instances of that second type of funding measure may be justified under Article 86(2) EC, I consider that they should not fall outside the scope of the State aid rules.

124. A second advantage of the proposed distinction is that it gives appropriate weight to the importance now attached to services of general interest, as recognised in Article 16 EC and in Article 36 of the EU Charter of Fundamental Rights, while avoiding the risk of circumvention of the State aid rules. It thus strikes a balance between those potentially conflicting policies; it also avoids the objections which may be made to the exclusive use of one or other of the compensation approach on the one hand or the State aid approach on the other hand.

125. Finally, the proposed distinction might help to explain the case-law of the Court of Justice set out above.

126. ADBHU concerned an indemnity to be granted to undertakings collecting and/or disposing of waste oils, as compensation for the collection and disposal obligations imposed on them. Advocate General Lenz regarded those indemnities as a *quid pro quo* for the obligations imposed and the Court regarded them as 'consideration for the services performed'. They thus

80 — See the Opinion of Advocate General Fennelly in Case C-251/97 *France* v *Commission* [1999] ECR I-6639, paragraph 19 with further references.

81 — See, for example, Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 39 to 41 of the judgment.

viewed the indemnities in question as one side of a bilateral bargain measure and therefore refused to classify them as State aid.

127. By contrast in *Banco Exterior de España* the Court classified the tax exemption for public banks as (existing) State aid and thus as a unilateral measure without taking into account the aims of the measure.

128. Ferring was perhaps a borderline case since the tax advantage was granted in a separate law and only after the general interest obligations had been imposed. On the other hand, it followed from the *travaux préparatoires* of the law and the circumstances of its adoption, and in particular the judgment of the Conseil constitutionnel, that there was a strong nexus between the tax advantage granted and the obligations imposed, which were moreover clearly defined. [82] That might explain why the Court referred to *ADBHU* and analysed the advantage in question and the obligations imposed as 'two sides of the same coin'.

129. It is of course clear that the proposed distinction between the two categories of cases based on a 'direct and manifest link' and 'clearly defined general interest obligations' might not always be easy to draw. Those criteria seem however more satisfactory than others which might be proposed. First, it would be disproportionate, in order for the compensation approach to apply, always to require a formal public service contract between the State and the service-provider concerned, since a Member State may in my view legitimately wish to organise the provision of public services on the basis not of contracts, but for example of legislation. Second, the Court relies on similar criteria in other fields of Community law: in the field of value added tax, for example, the Court requires a direct link between the supply provided and the consideration received. [83] Third, in order to dispel any doubts in a particular case Member States will have an incentive to grant compensation for the provision of general interest services on the basis of unequivocal and transparent arrangements, and perhaps even on the basis of public service contracts awarded after open, transparent and non-discriminatory public procurement procedures.

130. As regards the application of the proposed distinction to resolve the present case it will be recalled that for the purpose of the operation of the public carcass disposal service the French State awards, in accordance with general public procurement rules, public service contracts of a maximum duration of five years to specialised carcass disposal undertakings. It is obvious that there is a direct and manifest link between the remuneration which those undertakings receive and the clearly defined obligations which they have to fulfil under the public service contracts in question. The payments made by the State

82 — See for further details the Opinion of Advocate General Tizzano.

83 — The leading case is still Case 154/80 *Coöperatieve Aardappelenbewaarplaats* [1981] ECR 445, paragraph 12 of the judgment.

to carcass disposal undertakings for the operation of the public carcass disposal service will thus constitute State aid within the meaning of Article 87(1) EC only if and to the extent that they exceed an appropriate remuneration [84] for providing that service.

131. Much attention has focused in this case on the fact that the market for the provision of those services in France is very concentrated and that there are substantial opportunities for fraud in the waste disposal sector. Undertakings may therefore receive funds which substantially exceed the remuneration they would receive on a normally functioning market for the collection and disposal services provided. It is for the referring court to determine whether that is the case.

132. Accordingly the payments made by the French State to carcass disposal undertakings for the operation of the public carcass disposal service will constitute State aid within the meaning of Article 87(1) EC only if and to the extent that they exceed an appropriate remuneration for providing that service.

84 — In cases where the State purchases general interest services on the market the appropriate point of reference is not the costs of the measure but the remuneration they would receive on a normally functioning market; see, for that distinction, paragraph 95 above.

State aid in favour of small meat retailers

133. The third substantive issue in the present case is whether the exemption of small meat retailers from the payment of the meat purchase tax constitutes State aid in favour of those small meat retailers.

134. It will be recalled that the meat purchase tax introduced by Law No 96-1139 is in principle payable by any person who makes retail sales of meat. It is levied on a retailer's meat purchases and based on the value of those purchases. Undertakings with an annual turnover below FRF 2.5 million are however exempted from payment of the tax. The tax is also not payable where the amount of meat purchases per month is lower than FRF 20 000 exclusive of value added tax.

135. GEMO and the Commission maintain essentially that the exemption in question grants meat retail undertakings with a turnover below the FRF 2.5 million threshold an economic advantage capable of constituting State aid. Moreover that advantage is granted to 'certain undertakings' within the meaning of Article 87(1) EC without there being any objective justification for the exemption on the basis of the nature or general scheme of the French tax system.

136. Neither the French nor the United Kingdom Government expressed a view

on the classification of the exemption in issue.

137. I would point out, first, that the classification of a tax exemption for small undertakings as State aid necessarily raises complex and sensitive questions. Moreover, if the Court accepts that Law No 96-1139 contains State aid in favour of farmers and slaughterhouses, the referring court will not need a ruling on that issue. [85] Finally, both the written observations and the oral submissions of the parties have focused more on the other two issues. I will therefore state my views only briefly and on the basis of a preliminary assessment.

138. It is well established case-law that tax exemptions are in principle capable of constituting State aid within the meaning of Article 87(1) EC. In *Banco Exterior de España* the Court held for example:

'A measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article [87(1) EC].' [86]

139. At least at first sight it appears moreover that the exemption in issue is selective or specific in that it favours 'certain undertakings' within the meaning of Article 87(1) EC, namely those meat retailers with a turnover below a determined threshold and thus only undertakings of a specified size.

140. The fact that undertakings are treated differently does not, however, automatically imply the existence of a selectively granted economic advantage for the purposes of Article 87(1) EC. There is no such advantage where the difference in treatment is justified by reasons relating to the nature or general scheme [87] or, in another formulation, the logic [88] of the system.

141. In the present case, nothing indicates that the exemption in issue pursues objectives inherent in the tax system, i.e. objectives related to the proper functioning and the effectiveness of that tax system. The rationale of the exemption does not seem to be for example to relieve smaller meat retail undertakings of burdensome accounting requirements (an objective which could be

85 — See above paragraph 89.

86 — Case C-387/92, cited in note 59, paragraph 14 of the judgment; see also Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981.

87 — Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 33 of the judgment.

88 — Case C-53/00 *Ferring*, cited in note 2, paragraph 17 of the judgment.

achieved through flat-rate taxation) or to renounce tax revenue where the cost of collecting the tax exceeds the gains from it.

142. On the contrary there are indications that the exemption might pursue objectives external to the tax system such as aims of a social nature or the interests of urban planning: it will be noted that the turnover threshold in issue is not based on the turnover generated by meat retailing but on the turnover generated by the undertaking as a whole. The effect is that an undertaking engaged exclusively in meat retailing (e.g. a local butcher) with a turnover of FRF 2.4 million will be exempted from tax, whereas an undertaking engaged also in other economic activities (e.g. a supermarket) will be subject to the tax even where its meat retailing activities taken in isolation generate a much smaller turnover.

143. Since the issue was not fully debated before this Court it should be left to the referring court to determine whether the exemption is justified by reasons relating to the nature or general scheme of the tax system in issue. In a case such as the present one it will be for the State concerned to show that the exemption in issue fulfils that condition. [89]

89 — See the Opinion of Advocate General Ruiz-Jarabo Colomer in *Italy* v *Commission*, cited in note 86, at paragraph 27.

144. It remains to deal with the effects of the exemption on competition and in particular on trade between Member States. In that regard the Court has held:

'When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid.' [90]

145. The problem here is that it is not clear whether there is any significant intra-Community competition in the meat retailing sector. In economic sectors with little competition in intra-Community trade such as car repairs, taxi services, or sectors with prohibitive transport costs, aid of a relatively small amount granted to small undertakings operating on essentially local markets might not affect trade between Member States. [91] In my view it should again be left to the national court to decide whether on the basis of those considerations the exemption in issue affects trade between Member States.

90 — Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11 of the judgment.

91 — See my recent Opinion in Cases C-113/00 and C-114/00 *Spain* v *Commission*, delivered on 24 January 2002, at paragraph 25.

146. Accordingly the exemption of small meat retailers from the payment of the meat purchase tax in issue constitutes State aid in favour of those small meat retailers unless it can be shown that the exemption is justified by reasons relating to the nature or the general scheme of the tax and provided that it affects trade between Member States in the meat retailing sector.

Conclusion

147. For the above reasons the question referred should in my opinion be answered as follows:

A measure such as Law No 96-1139 of 26 December 1996 on the collection and disposal of animal carcasses and slaughterhouse waste and modifying the Rural Code provides for State aid within the meaning of Article 87(1) EC

— in favour of farmers and slaughterhouses, in that the public collection and disposal service for dangerous animal waste is provided to them free of charge;

— in favour of carcass disposal undertakings only if and to the extent that the payments made by the French State to carcass disposal undertakings for the operation of the public carcass disposal service exceed an appropriate remuneration for providing that service; and

— in favour of small meat retailers in that they are exempted from the meat purchase tax, unless it can be shown that that exemption is justified by reasons relating to the nature or the general scheme of the tax and provided that the exemption affects trade between Member States in the meat retailing sector.