OPINION OF ADVOCATE GENERAL
STIX-HACKL
delivered on 14 July 2005 [1]

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I — Introduction

1. The references for a preliminary ruling are concerned with the interpretation of Article 87(1) EC. They were made in proceedings in the course of which the lawfulness of the French tax to support the trade and craft sectors was challenged.

II — National law

A — *The tax to support the trade and craft sectors*

2. Under Article 1 of Law No 72-657 of 13 July 1972 establishing measures for certain categories of old age traders and craftsmen, [2] '... aid measures shall be established for working or retired persons insured under the old-age insurance schemes for persons in the craft sector and in manufacturing and trading occupations'.

2 — JORF, 14 July 1972, p. 7419.

3. Article 3(2) of Law No 72-657, as amended by Law No 94-1162 of 29 December 1994, the Finance Law for 1995, [3] ('Law No 72-657') establishes a tax to support the trade and craft sectors ('the TACA').

4. The TACA is a progressive tax borne directly by retail stores in France which have a sales area exceeding 400 m^2 and an annual turnover in excess of EUR 460 000. The tax rates progress in step with annual turnover per m^2.

5. At the material time, the TACA was collected by the Caisse nationale de l'organisation autonome d'assurance vieillesse [des travailleurs non-salariés] des professions industrielles et commerciales (National Independent Old-Age Insurance Fund for Self-Employed Persons in Manufacturing and Trading Occupations; 'Caisse Organic').

B — *The use to which the revenue from the tax is put*

1. The cessation payment

6. Under Articles 8 to 10 of Law No 72-657, the revenue from the TACA is earmarked for financing special compensation aid for specific traders and craftsmen who permanently cease all activity once they have reached the age of 60, provided that their financial means do not exceed a given ceiling.

7. Under Article 106 of Law No 81-1160 of 30 December 1981, the Finance Law for 1982, which was subsequently amended by Law No 95-95 of 1 February 1995 and by Law No 2002-1575 of 30 December 2002, that special compensation aid was replaced with a cessation payment. That article provides:

'Traders and craftsmen who have been insured for 15 years or more under the old-age insurance schemes for persons in the craft sector and in manufacturing and trading occupations shall be eligible, upon request and provided that their financial means do not exceed a ceiling determined by decree, to receive aid from the funds of those schemes if they are:

(a) over the age of 60 and permanently cease all activity;

(b) over the age of 57 and can demonstrate that they do not derive any immediate personal benefit from retirement where, without detriment to the coverage of

3 — JORF, 30 December 1994, p. 18737.

the needs of local people, their activity ceases:

— upon implementation of a collective project under Article 4 of Law No 89-1008 of 31 December 1989 on developing undertakings in the trade and craft sectors and improving their economic, legal and social environment; or

— on the implementation of action plans for restructuring the trade and craft sectors drawn up by the State pursuant to Article 11 of Law No 82-653 of 29 July 1982 on planning reform.

Traders or craftsmen suffering incapacity to the extent that they become permanently unfit for work shall be exempted from the age requirement laid down in the first paragraph.

...'

8. Decree No 82-307 of 2 April 1982 lays down the conditions governing the award of the cessation payment. That decree was implemented by ministerial order of 13 August 1996.[4] Article 10 of that order, as amended by the order of 3 September 2001 converting into euros specific amounts given in francs,[5] states that 'the amount of the payment must be between EUR 3 140 and EUR 18 820 for a household, and between EUR 2 020 and EUR 12 100 for one person.'

2. The other allocations of the TACA

9. Since the TACA was established, the revenue from it has increased considerably on account of the expansion of the market share held by the retail and distribution industry and the growth in the area covered by commercial establishments in France. Against that background, Article 4 of Law No 89-1008 of 31 December 1989 on developing undertakings in the trade and craft sectors, which is amended by Article 40-I of Law No 96-1160 of 27 December 1996 on social security funding for 1997, provides:

'The body entrusted with the collection of the [TACA] shall be authorised to use the

4 — JORF, 29 August 1996, p. 12940.

5 — JORF, 11 September 2001, p. 14495.

revenue surplus from that tax for collective projects aimed at protecting the business activity of traders in sectors affected by social change caused by the evolution of trade, for projects promoting the transfer or restructuring of undertakings in the trade or craft sector and for the financing of the basic old-age insurance schemes for persons in the craft sector or in manufacturing and trading occupations.'

10. The revenue surplus from the TACA was accordingly credited to the Fonds d'intervention pour la sauvegarde de l'artisanat et du commerce (Intervention Fund for the Support of Crafts and Trade; 'the FISAC'), for the basic old-age insurance schemes for self-employed persons in the craft sector and for self-employed persons in manufacturing and trading occupations, and to the Comité professionnel de la distribution des carburants (Fuel Distributors' Trade Committee; 'the CPDC').

(a) Allocation to the FISAC

11. Article 2 of Decree No 95-1140 of 27 October 1995 on the use to which the revenue surplus from the tax to support the trade and crafts sector is put [6] provides that a proportion of the revenue surplus from the TACA is to be paid into a special FISAC account.

12. Under Article 1 of Decree No 95-1140, the FISAC finances, on the one hand, collective projects with the aim of maintaining and making changes to the trade and craft sectors for the purposes of retaining business activity in particular geographical or occupational areas and local servicing favourable for society and, on the other hand, transfer and restructuring projects for undertakings in the trade and craft sectors with an annual turnover not exceeding amounts determined by order of the minister responsible for the trade and craft sectors.

13. Under Article 8 of Decree No 95-1140, '[d]ecisions [to grant aid measures] shall be made by the minister responsible for the trade and craft sectors in the light of an opinion delivered by [a] committee' set up by that decree.

(b) Allocation for the basic old-age insurance schemes for self-employed persons in the craft sector and for self-employed persons in manufacturing and trading occupations

14. Article 40-II of Law No 96-1160 of 27 December 1996 on social security funding for 1997 added a paragraph (6) to Article L. 633-9 of the Social Security Code which provides that a proportion of the revenue from the TACA is to be allocated for financing the basic old-age insurance schemes for self-employed persons in the craft sector and for self-employed persons in

6 — JORF, 29 October 1995, p. 15808.

manufacturing and trading occupations. The amount in question is distributed, in proportion to their respective accounting deficit, between the Caisse Organic and the Caisse nationale d'assurance vieillesse des artisans (National Old-Age Insurance Fund for Craftsmen; 'the Caisse Cancava').

15. The amount of the TACA allocated for financing the insurance schemes in question is determined each year by joint order of the Minister for the Economy, Finance and Industry and the Minister for Employment and Solidarity.

16. That mechanism for financing the basic old-age insurance schemes was abolished by Article 35-IV of Law No 2002-1575, the Finance Law for 2003.

(c) Allocation to the CPDC

17. The CPDC was created by Decree No 91-284 of 19 March 1991.[7] In accordance with Article 2 of Decree No 91-284, as amended by Article 1 of Decree No 98-132 of 2 March 1998,[8] the CPDC is entrusted with:

'(1) drawing up and implementing the action programmes for reforming the fuel distribution network, improving its productivity, modernising its marketing and management conditions and maintaining a balanced provision of service across the national territory;

(2) providing assistance to the undertakings concerned so that they can implement the programmes adopted and carry out any necessary studies to that end;

(3) gathering information such as to contribute to the purposes described above and disseminating it within the trade.'

18. Article 4 et seq. of Decree No 91-284 states that CPDC decisions are made by the CPDC's board, are notified to the Commissaire du gouvernement and the Contrôleur d'État, and become operative provided that they have not been vetoed by any of those people within 15 days.

19. Article 1 of Decree No 98-132 increased CPDC resources by supplementing its receipts with a proportion of the revenue surplus from the TACA. Under that provision, 'a joint order by the Minister for

7 — JORF, 20 March 1991.
8 — JORF, 7 March 1998.

industry, the Minister for the trade and craft sectors and the Minister for the budget shall set the ceiling each year for the funds accordingly allocated to the Fuel Distributors' Trade Committee'.

20. Such provision of additional resources for the CPDC was authorised by the Commission by Aid No N 294/97 of 18 June 1997 for the period from 1997 to 2000 and for a budget of FRF 60 million (some EUR 9 147 000). [9]

III — The main proceedings and the questions referred for a preliminary ruling

21. On 11 April 2001, the appellants in Cases C-321/04 to C-325/04 each brought an action against the Caisse Organic before the Tribunal des affaires de sécurité sociale de Saint-Étienne (Saint-Étienne Social Security Tribunal), seeking to obtain reimbursement of the sums which the companies in question had paid as TACA in 1999 and/or 2000. In their view, the TACA had been introduced in breach of Articles 87(1) EC and 88(3) EC.

22. By judgments of 27 January 2003, the Tribunal des affaires de sécurité sociale de Saint-Étienne dismissed those actions. The claimants in those actions then appealed to the Cour d'appel de Lyon (Court of Appeal, Lyon).

23. On 7 April 2003, the claimant in the main proceedings in Case C-276/04 brought an action before the Tribunal des affaires de sécurité sociale de Saint-Étienne against Caisse Organic to obtain reimbursement of the sums that it had paid as TACA in respect of the period from 2000 to 2002.

24. On 11 April 2003, the claimants in the main proceedings in Cases C-266/04 to C-270/04 each brought an action before the Saint-Étienne court against the Caisse Organic for reimbursement of the sums that they had paid as TACA in respect of 2001.

25. The referring courts in these cases seek to ascertain whether the TACA was introduced in breach of Article 87(1) EC and the final sentence of Article 88(3) EC.

26. By orders of 24 February 2004, the Cour d'appel de Lyon therefore decided to stay the proceedings before it and asked the Court of Justice 'to decide whether [the TACA]

9 — OJ 1997 C 395, p. 13.

collected from the appellants [in Cases C-321/04 to C-325/04] constitutes State aid [as provided for in] Article 87 EC'.

27. By orders of 5 April 2004, the Tribunal des affaires de sécurité sociale de Saint-Étienne decided to stay the proceedings and refer to the Court of Justice the following question for a preliminary ruling in Cases C-266/04 to C-270/04 and C-276/04:

'Must Article 87 EC be interpreted as meaning that State funding by France through the ... CPDC and the ... FISAC, by way of assistance when [self-employed] craftsmen and traders retire and grants made to the old-age insurance scheme for self-employed persons in manufacturing and trading occupations and to the scheme for self-employed persons in the craft sector, constitutes State aid?'

IV — Analysis

28. It is apparent from the written observations, in particular from those submitted by the Commission, the claimants and appellants in the main proceedings and the French Government, that two types of measures may be classified in these cases as State aid for the purposes of Article 87(1) EC. They are, first, the non-taxable treatment in respect of the TACA of some retail businesses and, secondly, various measures financed through the revenue from the TACA. Before addressing the substance, however, it is necessary to consider whether the two series of references for a preliminary ruling are admissible.

A — *Preliminary remarks on the admissibility of the references for a preliminary ruling*

29. By order of the President of the Court of 24 September 2004, all the cases referred to above were joined for the purposes of the procedure and judgment.

30. It should be stated primarily that a reference concerning the TACA was also made to the Court by the Cour de cassation (Court of Cassation) (France) on 16 November 2004.[10] The proceedings in that case have been stayed pending the judgments in these cases.

10 — Case C-488/04 *Galeries de Lisieux*. The question referred in that case reads: 'Is Community law to be interpreted as meaning that a tax, such as the tax to support the trade and craft sectors introduced by the Law of 13 July 1972, which is assessed on the basis of the sales area of retail stores in excess of 400 m^2 and the proceeds of which are paid into special accounts of the old-age insurance funds of those in trade and crafts for the purpose of paying special compensation aid, which became cessation payments under Law No 81-1160 of 30 December 1981, must be classified as State aid, since it is borne only by establishments with a sales area exceeding 400 m^2 or a turnover in excess of EUR 460 000, and it secures for the prospective recipient of the payment a reduction in charges as a result of the possibility of reducing any payments he might make into a supplementary retirement scheme?'

31. The admissibility of the references for a preliminary ruling was not called into question during the written procedure. However, I should point out that it is impossible to grasp the true significance of the issues of Community law relating to the national provisions concerned from either the orders for reference from the Tribunal des affaires de sécurité sociale de Saint-Étienne or those from the Cour d'appel de Lyon because, on the one hand, the Tribunal des affaires de sécurité sociale de Saint-Étienne does not give any details of those provisions and merely refers in the questions to specific uses to which the revenue from the contested tax is put and, on the other hand, the Cour d'appel de Lyon does not explain how the revenue from the tax at issue is allocated. Thus, it is only by reading the orders for reference from the two national courts in conjunction with one another that it is possible to acquire a sufficient understanding of the national context.

32. In this regard it should none the less be noted that, according to settled case-law, the information to be furnished in the decisions making the references 'does not serve only to enable the Court to give helpful answers but also to enable the governments of the Member States and other interested parties to submit observations in accordance with Article 20 of the Protocol on the Statute of the Court'. [11] In the light of that principle, the orders for reference from the Tribunal des affaires de sécurité sociale de Saint-Étienne appear to be excessively short in that they do not contain any information on the national provisions at issue. In those circumstances, reference cannot then be had to the written observations of the parties or the French Government, since they are not available to the governments of the other Member States when they draw up — if they decide to do so — their own observations.

33. Such deficiencies in the orders for reference should be pointed out, even though they do not prevent the Court — in particular since those cases have been joined with the cases arising from the references for a preliminary ruling from the Cour d'appel de Lyon — from giving a helpful answer to the referring courts.

B — *The non-taxable treatment of some retail businesses*

1. Relevance of that issue in the light of the subject-matter of the main proceedings

34. As regards whether the fact that some trading outlets are not liable to pay the TACA constitutes State aid, I doubt whether that question bears any relevance to the subject-matter of the main actions. Those actions, after all, concern requests for reimbursement of the sums paid as TACA by supermarkets and other mass retail outlets. If the tax exemption enjoyed by some businesses constituted State aid, it would fall

11 — See, for example, Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6.

to those businesses, as recipients of the aid, to repay it. If the exemption were classified as State aid, that would not therefore have any bearing on whether the levying of the TACA was lawful. I do not therefore consider it relevant for the Court to adjudicate on this first aspect.

35. The link that the claimants and appellants in the main actions attempt to establish between the non-taxable treatment of some businesses and the legality of their own taxable treatment stems, in my view, from confusion that might be fostered by too literal a reading of the Court's case-law. It is common ground, first, that a tax exemption or an exemption from social charges can constitute aid within the meaning of the Treaty if it is regarded as a derogation, by its very nature, in relation to the structure of the overall system of which it is part, [12] and, secondly, that 'the method by which an aid is financed may render the entire aid scheme incompatible with the common market. Therefore, the aid cannot be considered separately from the effects of its method of financing ... Quite to the contrary, consideration of an aid measure by the Commission must necessarily also take into account the method of financing the aid in the case where that method forms an integral part of the measure.' [13] In my view, it cannot be asserted from a combined reading of those judgments that an exemption — as a method of financing the aid — must as a matter of course be considered to form an integral part of an aid measure.

36. In that regard, it is necessary to cite the judgment delivered on 13 January 2005 in the case of *Streekgewest Westelijk Noord-Brabant*, [14] in which the Court held that there was no hypothecation of a tax to the financing of the tax exemption. The Court further held that 'the tax revenue has no impact on the amount of the aid. The application of the tax exemption and its extent do not depend on the tax revenue.'

37. The claimants and appellants in the main proceedings maintained at the hearing that the case mentioned above could not be conclusive in this instance in view of the facts specific to that case. In that connection they explained how that case involved general tax rules designed to protect the environment, payment of the revenue from the tax into the public coffers, the absence of any competitive relationship between the operators liable for the tax and those exempted from it and the absence of any direct and inseparable link between the tax and a specific allocation, whereas the case at issue here concerns specific tax provisions whereby the revenue from the tax was not

12 — Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33; Joined Cases C-72/91 and C-73/91 *Sloman Neptun Schiffahrts* [1993] ECR I-887, paragraph 21, and Case C-75/97 *Belgium* v *Commission* ('*Maribel bis/ter*') [1999] ECR I-3671, paragraph 33.

13 — Joined Cases C-261/01 and C-262/01 *Van Calster and Others* [2003] ECR I-12249, paragraph 49. See also, to that effect, Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, paragraph 44, and Case C-345/02 *Pearle and Others* [2004] ECR I-7139, paragraph 29.

14 — Case C-174/02 [2005] ECR I-85, paragraph 28.

paid into the general State budget during the period in question. Furthermore, the revenue from the TACA, they claim, is allocated for positive measures benefiting competitors of the claimant and appellant companies and there is a direct and inseparable link between the tax and the aid attributable to exemptions from the tax.

38. I do not deny that there are differences between the tax measure which gave rise to the judgment in *Streekgewest Westelijk Noord-Brabant*, cited above, and the TACA, but the fact remains that if the exemptions provided for in the relevant national legislation were to be regarded as aid within the meaning of Article 87(1) EC, that would not signify that the claimants and appellants would be justified in refusing to pay the TACA. Where an aid measure consists in an exemption from tax for specific taxpayers, it is not the levying of the tax that is unlawful under Article 87 EC et seq. but the fact that some operators have been exempted from it. I therefore consider that, beyond the differences that exist between the tax measure at issue in the above judgment and the TACA, that judgment established a general principle that there is no sufficient link between the tax and the aid measure in the form of an exemption. In this case, even if the objectives of the exemptions laid down by Law No 72-657 were consistent with those pursued by the various allocations of the revenue from the TACA, there is still no sufficient link between the various exemptions and the levying of the tax. The reasoning set out by the claimants and appellants in the main proceedings — that there is a close link between the exemptions and the positive measures financed through the revenue from the TACA and that, if Article 88(3) EC is to be effective, it should be possible to return the TACA payments to those parties — is, in my view, confused. Since the manner in which the positive measures financed through the revenue from the TACA are to be classified has no impact on the classification of the exemptions pursuant to Article 87 (1) EC, determining the extent to which Member States encounter practical difficulties in recovering aid granted, as the case may be, in the form of exemptions, in breach of Article 88(3) EC, is of no account.

2. In the alternative: classification of the non-taxable treatment of some businesses

39. On any view, the fact that there is no expediency in considering how the non-taxable treatment of some retail businesses should be classified under Article 87(1) EC in this case should not be construed as validating the national legislation in question.

40. Thus, if the Court still intended to adjudicate on how the non-taxable treatment of particular retail businesses, on the one hand, and — because of the date on which they were established — of some super-

markets and other mass retail outlets, on the other,[15] should be classified, it would have to look in detail at the consistency of the exemptions concerned in the light of the objectives pursued by the national legislation at issue.

41. The first point to be noted here is that, according to well-established case-law, the social character of State assistance is not sufficient to exclude it outright from being categorised as aid for the purposes of Article 87 EC.[16] That article 'does not make a distinction according to the causes or aims of the measures of State intervention but defines them according to their effects'.[17]

42. As regards classification as State aid, Article 87(1) EC lays down four conditions, according to the Court's consistent case-law. First, there must be an intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between Member States. Thirdly, it must confer an advantage on the recipient, and, fourthly, it must distort or threaten to distort competition.[18] Also according to settled case-law, fulfilment of all the conditions set out in Article 87(1) EC is the prerequisite for classification as aid.[19]

43. As to exemptions from a tax the revenue from which is used to finance measures of State intervention, there is no doubt that the measures in question are attributable to the State.[20] Having regard to the mechanism created by French legislation, the disputed tax constitutes a source of receipts for the bodies appointed by the State, including primarily the Caisse Organic, and, consequently, waiver of some of those receipts in the form of an exemption for specific operators could give rise to a loss of State resources.

44. According to settled case-law, the concept of aid is therefore wider than that of a

15 — It is apparent from the case-file from the national proceedings and from oral argument at the hearing of 2 June 2005 that the claimants and appellants in the main actions consider that their liability to the tax constitutes an obstacle to competition, since many distribution networks are made up of small outlets which are not liable for the tax at issue and, furthermore, since they are in competition with large town-centre stores which also qualify for an exemption (because they opened before 1 January 1960; see Article 3 of Law No 72-657).

16 — Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 21; Case C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 23, and *Maribel bis/ter*, cited above in footnote 12, paragraph 25.

17 — Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 79; *France* v *Commission* (cited above in footnote 16), paragraph 20, and *Maribel bis/ter* (cited above in footnote 12), paragraph 25.

18 — Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 75, and *Pearle and Others* (cited above in footnote 13), paragraph 33.

19 — See Case C-142/87 *Belgium* v *Commission* (*Tubemeuse*) [1990] ECR I-959, paragraph 25; Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 20; Case C-482/99 *France* v *Commission* (*Stardust*) [2002] ECR I-4397, paragraph 68; *Altmark Trans and Regierungspräsidium Magdeburg* (cited above in footnote 18), paragraph 74; and *Pearle and Others* (cited above in footnote 13), paragraph 32.

20 — On that condition, see Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 35; Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 11; Case C-305/89 *Italy* v *Commission* [1991] ECR I-1603, paragraph 13; and *Stardust* (cited above in footnote 19), paragraphs 24 and 50 et seq.

subsidy because it embraces not only positive benefits, such as subsidies themselves, 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 meaning of the word, are similar in character and have the same effect. It follows that it will not always be necessary to show that there has been a transfer of State resources for the advantage conferred on one or more undertakings to be considered as State aid for the purposes of Article 87 (1) EC. [21]

45. Therefore, classification of the exemption of some businesses from the disputed tax as a use of State resources is not inconceivable in this case. It should be ascertained whether, in the light of the specific characteristics of the disputed national rules, the difference in taxable treatment under the legislation at issue in fact entails a use of resources and, correlatively, whether there is a selective advantage, that is to say, whether the legislation places specific undertakings at an advantage.

46. On that issue Advocate General Tizzano stated in his Opinion in *Ferring* [22] that 'it can neither be accepted nor excluded a priori that failure to levy a tax on certain parties is tantamount to conferring a selective advantage within the meaning of Article [87 EC]. The solution must be sought on a case-by-case basis, with regard being had to the particular circumstances of the case and, above all, to the competitive relationship between the operators concerned, the reason for the tax and its effects.'

47. The Court has held that 'the concept of aid does not encompass measures creating different treatment of undertakings in relation to charges where that difference is attributable to the nature and general scheme of the system of charges in question'. [23]

48. On that point the Commission, the Caisse Organic and the French Government have asserted that the non-taxable treatment of small business outlets and of some other businesses was justified by the nature and general structure of the tax scheme at issue. [24] Thus, there are no selective measures for the purposes of Article 87(1) EC. The Commission explains for that purpose that, in view of the difficulties experienced by small traders following the development of new forms of distribution, the French public

21 — See in particular Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraphs 13 and 14; Case C-6/97 *Italy* v *Commission* [1999] ECR I-2981; *Stardust* (cited above in footnote 19), paragraph 23, and joined Cases C-128/03 and C-129/03 *AEM and AEM Torino* [2005] ECR I-2861, paragraph 38.

22 — Opinion delivered on 8 May 2001 in Case C-53/00 *Ferring* [2001] ECR I-9067, point 39.

23 — *AEM and AEM Torino* (cited above in footnote 21), paragraph 39. See also, inter alia, Case C-351/98 *Spain* v *Commission* [2002] ECR I-8031, paragraph 42, and Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-4461, paragraph 42.

24 — On that point see *Sloman Neptun Schiffahrts* (cited above in footnote 12), paragraph 15; *Maribel bis ter* (cited above in footnote 12), paragraphs 26 to 39; Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 3, Case C-351/98 *Spain* v *Commission* (cited above in footnote 23), paragraph 43; and *Netherlands* v *Commission* (cited above in footnote 23), paragraph 42.

authorities called on the large retail outlets to express their solidarity through their ability to pay tax. Thus, it explains, the TACA is collected according to a scale of progressive rates depending on annual turnover by square metre, but an exemption is made for sales areas covering less than 400 m^2 or having an annual turnover of less than EUR 460 000 and a reduced rate introduced for sales areas measuring between 400 and 600 m^2. It is consistent, it argues, with the nature and scheme of a system based on occupational solidarity and a redistribution objective that the persons liable for the tax should be determined on the basis of their ability to pay. The French Government sets out a similar line of reasoning. As far as the defendant in the main actions is concerned, it is consistent with the overall scheme of the system, the founding principle of which is to ensure that the supermarkets and other mass retail outlets contribute to supporting local business, that the establishments liable for the tax should be determined essentially by the size of their sales area, incorporating an adjustment based on their turnover, and, conversely, that the undertakings which do not meet the relevant criteria should be exempted from the tax. [25]

49. However, the claimants and appellants in the main proceedings observe that, although it is consistent to exempt businesses with only a weak ability to pay tax, namely those with a low turnover, that is not the case for businesses which are part of large distribution networks — irrespective, moreover, of their sales area — and for the superstores located in town centres which qualify for the exemption because they were set up before 1 January 1960 (first paragraph of Article 3 of Law No 72-657).

50. I agree only in part with the analysis put forward by the Commission, the French Government and the Caisse Organic: in my opinion, they are somewhat hasty in the conclusions they draw from the social objective of the legislation concerned as to how the various instances of non-taxable treatment should be classified.

51. I consider it vital to make a distinction, as requested by the claimants and appellants in the main proceedings, between those various cases whilst bearing in mind that, although the initial objective of the law was to facilitate the granting of assistance on retirement to craftsmen and traders satisfying the relevant means-related conditions, the wealth of funds acquired through the tax made it possible over time to set up other uses for the revenue from the disputed charge, including, above all, its payment into the FISAC. A more subtle analysis of the objectives pursued by the various intervention measures financed, in particular, through allocation of the revenue surplus from the TACA indicates that there are a large number of objectives. Thus, whilst the assistance granted to craftsmen and traders when they retire clearly pertains to the scheme's aim of redistribution which led to the creation of the TACA, the State inter-

25 — On that point Caisse Organic relies on a judgment delivered by the Court of First Instance in Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1385, paragraph 62.

vention measures implemented through the FISAC appear in essence to be designed to maintain the drawing power — from the point of view of trade in particular — of town centres, in the face of the development of out-of-town retail parks, which only indirectly pertains to the scheme's aim of redistribution.

52. More generally, it appears that the question underlying the debate concerns the degree to which the non-liability for a tax of some operators in receipt of aid measures financed through the revenue from that tax is consistent with the overall logic of the system, where there is a competitive relationship between the operators subject to the tax and those exempted from it. In my view, that question calls for a subtle response. Indeed, although the non-taxable treatment of some economic operators may appear to be consistent with the overall logic of redistribution of a scheme promoting occupational solidarity, where the operators in question are recipients of aid financed through the revenue from that tax, such consistency presupposes at the very least that the criteria defining the exempted operators pertain to that systematic aim of redistribution.

53. It is therefore necessary to examine whether the distinctions made in the national legislation as regards liability to tax are simply based on the differences in ability to pay [26] and therefore appear to be objectively justified, meaning that there is no failure to accord equal treatment to competing operators.

54. It does not seem to me certain in this instance that the distinctions made in the disputed national legislation are attributable solely to the account of differences in ability to pay. Thus, under the sales area criterion, it is possible for traders with a sales area measuring less than the thresholds laid down by the national legislation but with a large turnover because they are part of a well-known retail brand to refrain from contributing to the solidarity effort. Nor can the objective of 'revitalising' town centres justify such difference in treatment of 'superstores' and small retail outlets since such retail names can be found in the shopping centres adjoining a large number of 'superstores'.

55. According to the explanations given by the claimants and appellants in the main proceedings, which have not been refuted, it is mainly the large town-centre stores that benefit from the exemption applying to supermarket businesses established before 1 January 1960. It therefore seems that supermarket businesses are treated differently depending on the location in which they were established. However, it should be

26 — On that criterion, see footnote 18 in my Opinion of 28 October 2004 in *AEM* (judgment cited above in footnote 21).

pointed out that keeping such stores in town centres may have a spillover effect on the small businesses nearby, and thus the exemption could be considered to be justified not only in view of the redistribution aim of the system established but also in view of the objective of revitalising town centres.

56. In any case, it would be for the national court to make the factual findings necessary to compare the situation of taxable businesses with that of exempted businesses.

57. Concerning the conditions relating to the effects on trade between Member States and to the impact on competition, the Commission is — in my view — right to have recourse to the judgment of 7 March 2002 in *Italy* v *Commission*,[27] under which 'when aid granted by the State strengthens the position of an undertaking vis-à-vis other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. For that purpose, it is not necessary for the recipient undertaking itself to export its products ...

Similarly, where a Member State grants aid to undertakings operating in the service and distribution industries, it is not necessary for the recipient undertakings themselves to carry on their business outside the Member State for the aid to have an effect on Community trade, especially in the case of undertakings established close to the frontier between two Member States.

The relatively small amount of aid, or the relatively small size of the undertaking which receives it, does not as such exclude the possibility that intra-Community trade might be affected.'

58. Therefore, the fact that it is mainly smaller businesses that are not liable to pay the TACA does not preclude fulfilment of the conditions relating to the effects on intra-Community trade and the impact on competition.

59. In conclusion, I take the view, primarily, that there is no need to look into how the various instances of non-taxable treatment under the national legislation at issue should be classified in the light of Article 87(1) EC. In the alternative, the national court should be called upon to compare the situation of taxable businesses with that of exempted businesses in terms of their respective ability to pay tax, having regard to the objectives pursued by the national legislation at issue,

27 — Case C-310/99 [2002] ECR I-2289, paragraphs 84 to 86.

in order to ascertain whether the condition of selectivity is met.

C — Whether there is hypothecation of the revenue from the TACA

60. Even before examining how the various measures financed, at least in part, through the revenue from the TACA should be classified in the light of Article 87(1) EC, it is necessary at the outset to consider whether there is hypothecation of the TACA to those various measures. If there is no such hypothecation, the tax in question cannot be considered to be an integral part of those measures and their classification would therefore have no bearing on the actions brought before the national courts for reimbursement of the taxes paid.

61. Since the Court delivered judgments clarifying that concept of hypothecation after the written pleadings in this case had been lodged, it requested in writing that the parties state their position at the hearing 'on whether there is hypothecation, within the meaning of the Court's judgments of 13 January 2005 (Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraph 26, and Case C-175/02 *Pape* [2005] ECR I-127, paragraph 15), of the TACA to the various measures financed through the revenue from that tax'.

1. The parties' answers to the Court's written question

62. The claimants and appellants in the main proceedings consider that the present cases differ in particular from the *Streekgewest* case, mentioned above. They claim that the absence of hypothecation in that case can be attributed to the fact that the matter concerned general tax rules for the protection of the environment, that the revenue from the tax was paid into the public coffers, that the operators liable for payment of the tax and the operators exempted from its payment were not in competition with each other and that there was no direct and inseparable link between the tax and a specific allocation. However, in the present cases, they maintain that the matter concerns specific rules to assist particular categories of traders who are in competition with traders liable to pay the TACA, the revenue from the TACA has not been paid into the public coffers over the relevant periods and the TACA is used to finance positive measures benefiting competitors of the claimants and appellants.

63. As far as the aid paid through the FISAC is concerned, the claimants and appellants in the main proceedings point out that the FISAC is credited with the revenue surplus from the tax, an interministerial order setting the ceiling for the funds allocated for that purpose. The same applies, they claim, to grants made to the old-age insurance scheme for traders and craftsmen and to the financing of the CPDC.

64. The claimants and appellants in the main proceedings further assert that there is also a direct and inseparable link between the tax and the aid in the form of the exemption, thus signifying that the TACA must be considered to be hypothecated to the exemption applying to small businesses. The Caisse Organic and the French Government alike reject that analysis, citing the abovementioned judgment in *Streekgewest*.

65. For its part, the defendant in the main proceedings claims that the proportion of the revenue from the TACA which is not earmarked for financing the cessation payment depends on the — variable — overall amount allocated for the cessation payment and that the decision on the various uses to which that proportion of the revenue is put each year is subject to the discretion of the national authorities. The surplus available for financing measures other than the cessation payment scheme can therefore vary; that surplus, the defendant adds, is earmarked in part for financing public intervention measures which cannot in any event be classified as State aid, such as the measures undertaken by the Epareca. [28] Furthermore, the FISAC and the CPDC alike have resources other than the allocated proportion of revenue from the TACA. The defendant in the main proceedings notes, lastly, that part of the revenue from the TACA can none the less be withheld and paid directly into the State budget. In those circumstances, the revenue from the TACA does not have a direct impact on the amount of individual aid that might be granted through the FISAC or the CPDC.

66. The French Government and the Commission essentially concur with that analysis put forward by the defendant in the main proceedings, pointing out that the amount of aid that may be paid through the FISAC or the CPDC is determined and attributed an upper limit by legislative and regulatory provisions and is by no means dependent on the revenue from the tax. The Commission adds that the respective amounts for the various allocations of the revenue surplus from the TACA are fixed at the start of the year and remain constant, whatever the revenue from the tax. Nor is there, according to the Commission, any specific formula for distributing the revenue surplus from the tax between its various allocations.

2. Legal assessment

(a) Case-law

67. The Court has held that the concept of State aid includes not only certain parafiscal charges, depending on the use to which the revenue from such charges is put, [29] but also the actual collection of a contribution constituting a parafiscal charge. [30]

28 — Établissement public national d'aménagement et de restructuration des espaces commerciaux et artisanaux (National public establishment responsible for the planning and restructuring of areas occupied by traders and craftsmen).

29 — See, in particular, Case C-17/91 *Lornoy and Others* [1992] ECR I-6523, paragraph 28.

30 — See Case C-72/92 *Scharbatke* [1993] ECR I-5509, paragraph 20, and *Enirisorse* (cited above in footnote 13), paragraph 43.

68. According to the judgments cited, [31] '[f]or a tax, or part of a tax, to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid. In the event of such hypothecation, the revenue from the tax has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of the aid with the common market (see, to that effect, Case 47/69 *France* v *Commission* [1970] ECR 487, paragraphs 17, 20 and 21). The Court thus held that, where there is such a link between the aid measure and its financing, the notification of the aid provided for in Article 93(3) of the Treaty must also cover the method of financing, so that the Commission may consider it on the basis of all the facts. If this requirement is not satisfied, it is possible that the Commission may declare that an aid measure is compatible when, if the Commission had been aware of its method of financing, it could not have been so declared (*Van Calster and Others*, paragraphs 49 and 50, and Case C-345/02 *Pearle and Others* [2004] ECR I-7139, paragraph 30).'

(b) Legal analysis

69. The various parties have given concordant accounts of the process for allocating the revenue from the TACA but are divided over the conclusions to be drawn from it as regards hypothecation.

70. As regards the link that the claimants and appellants in the main proceedings establish between the exemptions and the revenue from the TACA, I would simply refer to my earlier observations. [32]

71. Concerning the link to be established between the TACA and the various uses to which its revenue is put, it should first be observed that the TACA's hypothecation to the financing of the cessation payment scheme cannot seriously be disputed, given that the TACA was introduced for the purpose of financing, in particular, grants of that advantage to craftsmen and traders who have seen their businesses depreciate on account of the supermarket boom.

72. The differences of opinion therefore relate specifically to the mechanism for allocating the revenue surplus that may be left over from that tax once the cessation payments have been made to the persons satisfying the conditions laid down by the legislation.

73. Hypothecation could exist as a result of the revenue from the TACA being used to

31 — The judgments, cited above, in *Streekgewest* and *Pape*.

32 — At point 35 et seq.

finance various intervention measures through public funds. In that regard it must be determined whether uncertainty over whether there is in fact any surplus and the absence of a specific formula for distributing any surplus that may be generated between its various allocations precludes any hypothecation of the tax to such allocations.

74. It is necessary to ascertain the extent to which the revenue from the tax directly affects the amount of the various aid measures granted, or, in the words of Advocate General Geelhoed in his Opinion in *Streekgewest* and *Pape*,[33] the extent to which the disappearance of the tax also removes the specific source of funding for the aid. In that regard Advocate General Geelhoed examined the criteria appropriate for establishing the existence of what he refers to as a 'direct and inseparable link' between the tax and the aid financed through that tax, explaining that a link of that kind would be much less apparent in cases where the use to which the revenue from the tax is put is subject to assessment by the competent national authorities, where the aid is financed only in part through the tax, where the revenue from the tax is earmarked for more uses than merely the aid in question and where the tax does not specifically affect the sector receiving the aid.

75. Although there is no doubt here that the operators subject to the tax and those benefiting from the measures financed through the revenue surplus from the tax are in competition with each other, a number of factors seem to point to the absence of a direct and inseparable link between the TACA and the various allocations of its revenue surplus.

76. The fact that only a proportion of the revenue from the TACA, namely its surplus, is used to finance measures of State intervention is not conclusive in itself. In the *Enirisorse* judgment,[34] the Court held that the collection of a charge a proportion of the revenue from which was paid to a public undertaking could constitute State aid incompatible with the common market, explaining in that context that 'the fact that the collection and allocation of a proportion of the charges may be unlawful concerns only that proportion of the charges paid to the public undertaking in question and does not affect the charges as a whole'.

77. However, it appears to be significant that, although the various allocations of the revenue surplus from the TACA are indeed laid down by the national legislation in question, the manner of their distribution is left to the discretion of the ministers responsible who, by order, set the ceilings for the respective allocations. Furthermore, diverse resources are available to the funds granting the aid measures, namely the FISAC and the CPDC.

33 — Point 32 of the Opinion.

34 — Cited above in footnote 13.

78. Moreover, the Commission rightly observes that the amounts credited to the FISAC and the CPDC by interministerial order remain constant, irrespective of the revenue from the tax.

79. Lastly, it is common ground that the amount of the assistance financed through the FISAC and the CPDC is determined by regulatory provisions and does not in any way depend on the amount of revenue from the TACA earmarked for such assistance.

80. Thus, the TACA cannot be considered to be hypothecated to the assistance financed through the FISAC and the CPDC.

81. As regards the aid allegedly granted to traders inasmuch as they do not need to make increased contributions because a proportion of the surplus from the TACA is used to finance the basic old-age insurance schemes for self-employed persons in the craft sector and for self-employed persons in manufacturing and trading occupations, it need only be stated that the level of contributions is fixed by a discretionary decision of the administrators of those old-age insurance schemes. In the absence of a direct or indirect link between the amount of the revenue surplus from the TACA used for that purpose and the overall pattern of the monies paid into the old-age insurance funds in question, it must inevitably be concluded that there is no hypothecation of the TACA to the allocation of a proportion of its revenue surplus to those funds.

D — *The various intervention measures financed in part by the disputed charge*

82. First it is necessary to consider how the cessation payment for traders and craftsmen permanently ceasing their activities may constitute aid within the meaning of Article 87(1) EC.

83. As to the intervention measures financed in part by the revenue surplus from the TACA, I shall be assessing merely in the alternative whether they can be regarded as State aid for the purposes of Article 87 (1) EC, because there is no hypothecation of the tax to the various intervention measures in question.

1. Main arguments of the parties concerned

84. The claimants and appellants in the main proceedings submit, first, that the cessation payment constitutes State aid as

defined in Article 87(1) EC. They rely on the fact that an advantage is conferred on some undertakings, namely to working traders and craftsmen (see the order of 13 August 1996 on the general rules on payment of aid to traders and craftsmen established by Article 106 of the Finance Law for 1982, [35] which states that 'applicants must furnish proof ... of an ongoing business activity in the trade or craft sector at the time of application'). They conclude that the cessation payment distorts competition. The fact that some traders and craftsmen know that they will receive a cessation payment when they cease working is, they explain, sufficient to have an effect on the charges they pay throughout their working lives. Knowing that they will receive the cessation payment, they might reduce their contributions to a supplementary retirement scheme and thus reduce their social security costs. Working traders or craftsmen could in that case use that financial saving to make the investments necessary for their business activities, unlike the undertakings which do not receive such an advantage. [36] In any case, they argue, inasmuch as the cessation payment encourages those eligible to receive it to cease working, it has a direct impact on competition because it gives rise to a reduction in the number of economic operators in a given market.

85. Secondly, as regards paying a proportion of the revenue from the TACA into the FISAC, the claimants and appellants in the main proceedings maintain that the aim of that fund is to finance, using State resources, aid measures for particular categories of traders and craftsmen. Those measures, they submit, are detrimental to competition and intra-Community trade. Like the cessation payment, the measures implemented by the FISAC constitute State aid measures which are subject to the obligation of prior notification to the Commission pursuant to Article 88(3) EC.

86. Thirdly, with regard to the financing of the basic old-age insurance schemes for self-employed persons in the craft sector and for self-employed persons in manufacturing and trading occupations, the claimants and appellants assert that the allocation of a proportion of the revenue from the TACA for those schemes also has the character of State aid. Such financing, they claim, mitigates the costs associated with financing the retirement system for recipient craftsmen and traders because it is used instead of increasing contributions, which would otherwise have been inevitable in view of the existing deficits in the retirement schemes concerned. That reduction in financial costs therefore strengthens the competitive position of the craftsmen and traders in relation to undertakings belonging to other old-age insurance schemes.

87. Fourthly, as regards paying a proportion of the revenue from the TACA to the CPDC, the claimants and appellants argue that it is

35 — JORF, 29 August 1996, p. 12940.

36 — On that point the claimants and appellants rely on Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraphs 29 and 30.

apparent from the relevant national provisions that the abovementioned committee, like the FISAC, grants State aid for the purposes of Article 87(1) EC. They also maintain that the conditions laid down in the Commission decision of 18 June 1997 were not satisfied. They explain that the CPDC continued to pay aid beyond 31 December 2000 without having obtained separate authorisation to extend the duration of aid payments which had been authorised up to that date. The CPDC's budget also consistently exceeded the amounts authorised by the Commission decision.

88. As to the application of the *de minimis* rule, the claimants and appellants point out that the rule — mentioned in Commission notices from 1992 and 1996 and subsequently set out in detail in Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid [37] — was introduced after the contested aid measures had been implemented. [38] In any event, the French authorities did not meet the conditions necessary for application of the *de minimis* rule: they failed to inform the recipient companies of the *de minimis* nature of the aid, and they also failed to establish control procedures to ensure that the *de minimis* ceiling was not exceeded. [39]

89. Lastly the claimants and appellants maintain that the social objective pursued by the French authorities in implementing the various measures financed through the revenue from the TACA is not sufficient to rule out classification of those measures as State aid as defined by Article 87(1) EC and cannot therefore justify the failure to give prior notification to the Commission pursuant to Article 88(3) EC. [40]

90. The defendant in the main proceedings contends, first, that the cessation payment is an advantage conferred on individuals — not on undertakings — who have ceased all economic activity beforehand. That allocation of the TACA is not therefore likely, in its view, to distort competition or affect intra-Community trade.

91. As to payment into the FISAC of a proportion of the revenue surplus from the TACA, the Caisse Organic points out that the FISAC primarily finances local town planning and regional development projects. Financing of that kind, it claims, falls outside the scope of Article 87(1) EC. Any subsidies paid through the FISAC to undertakings constitute small amounts of aid which are

37 — OJ 2001 L 10, p. 30.

38 — The claimants and appellants cite the Opinion of Advocate General Ruiz-Jarabo Colomer in *Pearle and Others* (judgment cited above in footnote 13), point 87.

39 — See Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, and *Germany* v *Commission* (cited above in footnote 36).

40 — See Case 173/73 *Italy* v *Commission* (cited above in footnote 12), Case 52/83 *Commission* v *France* [1983] ECR 3707, and *Maribel bis/ter* (cited above in footnote 12).

exempt from the requirement of notification to the Commission. [41] In that connection the defendant explains that, under Decree No 95-1140, the maximum amount of direct subsidies to an undertaking could not exceed FRF 60 000 (approximately EUR 9 150). Under Decree No 2003-107 of 5 February 2003, the ceiling for that amount was fixed at EUR 10 000 (or, in exceptional circumstances, at EUR 20 000).

92. As concerns using a proportion of the revenue surplus from the TACA for old-age insurance schemes, the defendant maintains — bearing in mind that the schemes concerned are basic compulsory schemes — that such use comes under the systematic aim inherent to all social security schemes based on national or occupational solidarity. It notes that Community law does not restrict the freedom of the Member States to organise their social security systems. [42]

93. Finally, it concludes that the aid granted by the CPDC is also *de minimis*.

94. As to the various allocations of the revenue from the TACA, the French Government also argues, first, that the proportion used for the cessation payment does not constitute State aid since the payment in question is conditional on the permanent cessation of the trader's activity, as is apparent from Articles 5 and 10 of Decree No 82-307 of 2 April 1982.

95. Secondly, as to the proportion of the revenue surplus from the TACA credited to the FISAC and the CPDC, the French Government, having regard to Regulation No 69/2001, points out that any subsidies paid through the FISAC and the CPDC to undertakings are earmarked for local small businesses in problem areas and are of a value not exceeding the ceiling set in that regulation. They do not therefore constitute State aid for the purposes of Article 87 (1) EC. In support of its reasoning, the French Government additionally has regard to the Commission Communication of 14 May 1997 on guidelines on State aid for undertakings in deprived urban areas. [43]

96. Thirdly, concerning the use of a proportion of the revenue surplus from the TACA for old-age insurance schemes for craftsmen and traders, the recipient funds (Caisse Organic and Caisse Cancava) each administer a basic social security scheme founded on

41 — The Caisse Organic refers to paragraph 3.2 of the information from the Commission, dated 20 May 1992, on Community guidelines on State aid for small and medium-sized enterprises (SMEs) (OJ 1992 C 213, p. 2) and to the Commission notice of 6 March 1996 on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9).

42 — Joined Cases C-159/91 and C-160/91 *Poucet and Pistre* [1993] ECR I-637, paragraph 6, and Case C-238/94 *García and Others* [1996] ECR I-1673, paragraph 15.

43 — OJ 1997 C 146, p. 6.

the principle of solidarity. Since, it concludes, the activity in which the funds concerned engage does not constitute an economic activity, [44] the financing of that activity falls outside the scope of Article 87 (1) EC.

97. With regard to the use to which the revenue from the TACA is put, the Commission asserts, first, that the cessation payment for craftsmen and traders is made after the recipient has ceased his economic activity. Thus, it concludes, the payment concerned cannot distort competition; it is a social measure.

98. Secondly, so far as concerns paying a proportion of the TACA into the FISAC, the Commission considers that the amounts of aid concerned are minimal and fall within the scope of Regulation No 69/2001.

99. Thirdly, the aim of using a proportion of the revenue from the TACA for the basic old-age insurance schemes for craftsmen and traders is to ensure that a balance is maintained within the relevant schemes. Such grants do not constitute State aid where the recipient public bodies entrusted with the management of compulsory retirement schemes do not constitute undertakings pursuing an economic activity. [45]

100. Fourthly, as regards paying a proportion of the revenue from the TACA to the CPDC, such payments, like the aid for the FISAC, are also *de minimis* aid.

2. Legal assessment

a) Case-law

101. The defining elements of the concept of aid have already been mentioned. [46]

102. In the *PreussenElektra* judgment, [47] the Court stated that the concept of aid covered not only those cases where the aid is granted directly by the State but also those where it is

44 — See *Poucet and Pistre* (cited above in footnote 42), paragraphs 15 to 18, and Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK-Bundesverband and Others* [2004] ECR I-2493, paragraph 47.

45 — See, to that effect, Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 77 and 78.

46 — See point 42 above.

47 — Case C-379/98 [2001] ECR I-2099, paragraph 58 and case-law cited.

granted by public or private bodies which the State establishes or designates. 'Community law cannot permit the rules on State aid to be circumvented merely through the creation of autonomous institutions charged with allocating aid.' [48]

(b) The cessation payment scheme

103. It is not disputed that the aim of the scheme in question is to grant advantages through State resources, the advantages being granted in this case by a body, the Caisse Organic, which was designated by the State for that purpose. The parties and persons concerned which submitted observations to the Court are, however, divided over whether the recipients of the advantages in question pursue an economic activity and/or whether the scheme concerned affects competition.

104. Robust arguments for and against those positions may be put forward: under Article 106 of Law No 81-1160, in the version applicable at the material time in this dispute, the grant of the cessation payment is conditional on the prospective recipient's capacity as a trader or craftsman; however, it may also be argued that, under the provision in question, the grant of that payment is conditional on the prospective recipient having ceased his activity as a trader or craftsman.

105. However, the argument that the very prospect of being awarded a cessation payment influences the decisions made by potential recipients in the course of their occupational activity, in that they reduce their contributions to supplementary social security cover, the cessation payment thus effectively mitigating their costs, does not stand up to scrutiny. After all, the decision to contribute to a supplementary social security scheme does not entail a normal operating cost; it is a matter for the discretion of the traders and craftsmen concerned. In any case, the grant of a cessation payment is subject to a minimum period of affiliation to the relevant basic old-age insurance scheme. Furthermore, the decision to contribute to a supplementary social security scheme is made, as the defendant in the main proceedings rightly pointed out at the hearing, well before retirement, so the trader or craftsman concerned is by no means able at that time to anticipate whether he will be eligible to receive the cessation payment. Lastly, the argument put forward by the claimants and appellants does not take account of the fact that the cessation payment is subject to stringent means-related conditions on account of its social nature and does not in any event come to amounts sufficient to support traders and craftsmen ceasing their activities throughout their retirement. [49]

48 — *Stardust*, cited above in footnote 19, paragraph 23.

49 — Under Article 10 of the ministerial order of 13 August 1996 (JORF, 29 August 1996, p. 12940), as amended by the order of 3 September 2001 converting into euros specific amounts given in francs (JORF, 11 September 2001, p. 14495), 'the amount of the payment must come to between EUR 3 140 and EUR 18 820 for a household, and between EUR 2 020 and EUR 12 100 for one person' (see also point 8).

106. It remains to be established whether the cessation payment must be considered to benefit certain undertakings, for the purposes of Community law on competition, simply because it is granted to traders and craftsmen. In line with the Court's case-law, [50] I consider it appropriate here to focus on the effects of the advantage concerned. Clearly, as the Commission rightly points out, [51] the cessation payment is made to the trader or craftsman after he has terminated his business activity, meaning that the payment cannot constitute an advantage with a view to further pursuing that activity. Consequently, even if it were concluded that the cessation payment benefits certain undertakings, it would not significantly affect competition, also on account of the fact that the recipient traders and craftsmen are indeed recipients in particular because of their low turnover.

107. That conclusion is consistent with the judgment of 21 June 2001 in *Moccia Irme and Others* v *Commission*. [52] In that judgment, the Court upheld a judgment by the Court of First Instance classifying aid for a closure scheme as aid for the purposes of Article 4 of the ECSC Treaty. Noting that Article 4(c) of the ECSC Treaty categorically prohibited all aid, the Court pointed out that '*unlike in the case of Article 92(1) of the EC Treaty*, for aid to be deemed incompatible with the common market under Article 4(c) of the ECSC Treaty, there is no requirement that it distorts or threatens to distort competition' [53] (my emphasis).

108. It must therefore be found that the cessation payment provided for in Article 106 of Law No 81-1160 does not come under the concept of aid within the meaning of Article 87(1) EC.

(c) Supplementary grants to the old-age insurance schemes

109. As regards using a proportion of the revenue from the TACA to finance the old-age insurance schemes for traders and craftsmen as provided for by Law No 96-1160, the parties concurred at the hearing that the recipient funds are not undertakings engaging in an economic activity since they manage basic compulsory old-age insurance schemes on the basis of a principle of solidarity. On this point reference need only be made to the Court's case-law cited above. [54]

50 — See inter alia *Maribel bis/ter* (cited above in footnote 12), paragraph 25.

51 — The Commission also refers to its communication on the restructuring of road haulage in Italy (OJ 1998 C 211, p. 5), in which it stated — at page 14 of OJ C 211 — that '[a] State contribution provided to a self-employed individual who terminates all business activities does not benefit an undertaking operating in the market and, therefore, does not have any impact on competition or trade between Member States If it can be ensured that such funds do not re-enter the road haulage sector either directly or indirectly, its provision, in principle, does not fall under Article 92(1) of the Treaty.'

52 — Joined Cases C-280/99 P to C-282/99 P [2001] ECR I-4717.

53 — Judgment cited above, at paragraph 32.

54 — Footnotes 44 and 45.

110. However, the claimants and appellants in the main proceedings take the view that the supplementary payments into the old-age insurance schemes in question benefit the traders and craftsmen insured under them: by such funding through taxation of some of the receipts of the retirement funds concerned, an increase in contributions to those funds can be avoided, the traders and craftsmen insured under them consequently benefiting from a reduction in their costs. As I have already stated, [55] that line of reasoning cannot hold any weight because there is no — essential — link between the level of contributions and the supplementary payments. Thus, if there were no such supplementary payments, the State could finance the receipts of those funds through taxation without the funds having to increase contributions.

111. Accordingly, the supplementary payments to the old-age insurance schemes likewise do not come under the concept of aid within the meaning of Article 87(1) EC.

(d) The individual measures granted by the FISAC and the CPDC

112. It is not disputed that the FISAC finances local town planning and regional development projects which fall outside the scope of Article 87(1) EC because they do not confer selective advantages on certain undertakings or sectors of activity.

113. As regards the subsidies paid on an individual basis to undertakings, whether by the FISAC or by the CPDC, the debate does not hinge on whether those measures might be classified as aid but, rather, on whether they are part of a *de minimis* aid scheme which, if deemed to exist, would signify that there was no obligation to notify.

114. There is no doubt that the concept of a *de minimis* aid scheme must be interpreted strictly since it involves a derogation from the obligations under Article 88(3) EC. Therefore, it cannot, for instance, be applied retroactively. [56]

115. It should be pointed out that the obligation to notify under Article 88(3) EC was abolished, with effect from 19 August 1992, for small amounts of aid granted to small and medium-sized enterprises. According to paragraph 3.2 of the 1992

55 — See above, point 81.

56 — See, in that regard, the Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 11 March 2004 in *Pearle and Others* (judgment cited above in footnote 13), point 91: 'there is no legal basis whatsoever for giving the *de minimis* rule retroactive effect, since such effect cannot be assumed to exist in the case of a provision which includes an exception to a statutory obligation'.

Community guidelines on State aid for small and medium-sized enterprises, [57] '[i]n future, ... one-off payments of aid of up to ECU 50 000, in respect of a given type of expenditure and schemes under which the amount of aid a given firm may receive in respect of a given type of expenditure over a three-year period is limited to that figure, will no longer be considered notifiable under Article 93(3), provided that it is an express condition of the award or scheme that any further aid the same firm may receive in respect of the same type of expenditure from other sources or under other schemes does not take the total aid the firm receives above the ECU 50 000 limit.'

116. Although the assistance provided through the FISAC when the disputed charges were levied was indeed governed by Decree No 95-1140, in particular Articles 1 and 8 thereof, it was specifically Article 4 of Law No 89-1008 of 31 December 1989 on the development of undertakings in the trade and craft sectors and the improvement of their economic, legal and social environment, the 'Doubin Law', [58] that was first to provide that a proportion of any surplus from the charge could be used for collective operations towards maintaining and modernising the trade and craft industries in the sectors significantly affected by economic and social change but also for operations supporting the transfer or restructuring of undertakings in the trade and craft sectors.

117. Decree No 95-1140, cited above, merely amended the conditions governing the award of the aid financed through the revenue surplus from the TACA, setting up an open account in the Caisse Organic for payments to the FISAC pursuant to the Doubin Law.

118. I consequently take the view that the individual aid scheme managed by the FISAC was established on the basis of provisions which predated the 1992 Community guidelines and, therefore, that such individual aid measures cannot in any case be considered to be *de minimis*.

119. That is not the case, however, for the assistance financed by the CPDC, since the single legal basis for supplementing the receipts of the CPDC with a proportion of the surplus from the TACA was Decree No 98-132, amending Decree No 91-284 creating a Fuel Distributors' Trade Committee. That increased funding for the CPDC was, moreover, authorised by the European Commission for the period from 1997 to 2000, [59] as the claimants and appellants in the main proceedings have themselves conceded.

57 — Commission communication (OJ 1992 C 213, p. 2)

58 — JORF, 2 January 1990.

59 — Decision N 294/97 of 18 June 1997

120. The question whether the assistance provided by the CPDC after that period should have been the subject of a further notification to the Commission thus depends on the rules on *de minimis* aid in force at that time, in this case the rules laid down in Regulation No 69/2001. The Commission has rightly noted that the ceilings applying to aid that could be granted by the CPDC were lower than the ceiling imposed in Regulation No 69/2001, even before examining the percentage of the financing to be provided by the CPDC itself.

V — Conclusion

121. On those grounds, I propose that the questions referred for a preliminary ruling by the Tribunal des affaires de sécurité sociale de Saint-Étienne and the Cour d'appel de Lyon should be answered as follows:

(1) Article 87(1) EC must be interpreted as meaning that, in circumstances such as those in the main proceedings, cessation payments made, subject to specific conditions, to traders and craftsmen terminating their business activities are not covered by the concept of aid.

(2) In circumstances such as those in the main proceedings, examination of the national legislative and regulatory provisions has not brought to light any hypothecation of the tax to support the trade and craft sectors to the various public assistance measures that may be financed in part by the revenue surplus from that tax, which is left over after the financing of the cessation payment scheme.