JUDGMENT OF THE COURT (Sixth Chamber)

22 November 2001 *

In Case C-53/00,

REFERENCE to the Court under Article 234 EC by the Tribunal des affaires de sécurité sociale de Créteil (France) for a preliminary ruling in the proceedings pending before that court between

Ferring SA

and

Agence centrale des organismes de sécurité sociale (ACOSS),

on the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC), Article 90(2) of the EC Treaty (now Article 86(2) EC) and Article 92 of the EC Treaty (now, after amendment, Article 87 EC),

* Language of the case: French.

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, N. Colneric, C. Gulmann (Rapporteur), J.-P. Puissochet and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Ferring SA, by B. Pigalle, B. Geneste and O. Davidson, avocats,

— the Agence centrale des organismes de sécurité sociale (ACOSS), by H. Calvet, avocat,

— the French Government, by K. Rispal-Bellanger and by G. Taillandier and F. Million, acting as Agents,

— the Commission of the European Communities, by G. Rozet and M. Patakia, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ferring SA, of the Agence centrale des organismes de sécurité sociale (ACOSS), of the French Government and of the Commission at the hearing on 14 February 2001,

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

gives the following

Judgment

1 By judgment of 11 January 2000, received at the Court on 21 February 2000, the Tribunal des affaires de sécurité sociale de Créteil (Social Security Court, Créteil) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC), Article 90(2) of the EC Treaty (now Article 86(2) EC) and Article 92 of the EC Treaty (now, after amendment, Article 87 EC).

2 Those questions were raised in the course of proceedings brought by the company Ferring SA (hereinafter 'Ferring') before the Social Security Court, Créteil, for reimbursement of sums it had paid to the Agence centrale des organismes de sécurité sociale (the central agency for social security bodies, hereinafter 'ACOSS') by way of a direct sales tax on medicines.

Relevant legislation

Community legislation

3 In the final recital of the preamble to Council Directive 92/25/EEC of 31 March 1992 on the wholesale distribution of medicinal products for human use (OJ 1992 L 113, p. 1) it is observed that certain Member States impose on wholesalers who supply medicinal products to pharmacists and on persons authorised to supply medicinal products to the public certain public service obligations, that those Member States must be able to continue to impose those obligations on wholesalers established within their territory and that they must also be able to impose them on wholesalers in other Member States on condition that they do not impose any obligation more stringent than those which they impose on their own wholesalers and provided that such obligations may be regarded as warranted on grounds of public health protection and are proportionate in relation to the objective of such protection.

4 The second indent of Article 1(2) of Directive 92/25 provides that, for the purposes of the directive, 'public service obligation' means 'the obligation placed on wholesalers to guarantee permanently an adequate range of medicinal products to meet the requirements of a specific geographical area and to deliver the supplies requested within a very short time over the whole of the area in question'.

National legislation

5 Article R. 5106-5 of the Code de la santé publique (Public Health Code) defines 'wholesale distributor' as 'any undertaking that purchases and stocks medicines other than those intended for testing on humans, for the purpose of their wholesale distribution in their unaltered state'.

6 The Ministerial Decree of 3 October 1962 on the duties of wholesale distributors in relation to the supply of medicines to pharmacies (*Journal officiel de la République française* of 12 October 1962, p. 9999), which was in force until February 1998, provided, *inter alia*:

'Article 1 Every pharmaceuticals wholesaler covered by the fourth subparagraph of Article R. 5115-6 of the Public Health Code and any branches it may have must keep a permanent stock of medicinal products sufficient to ensure a month's supply to the pharmacies in its distribution area which it regularly serves as customers.

The stock of medicines must amount to a "range" of medicines, including at least two thirds of all forms of medicines currently sold, and must represent in value the equivalent of the average monthly turnover for the preceding year.

Article 2 Every pharmaceuticals wholesaler and any branches it may have must be able to guarantee delivery of every medicine sold on the market to the pharmacies in its distribution area which it regularly serves as customers and, in the case of medicines in their "range", within 24 hours of receipt of the relevant order.

They must manage their stock of medicines so as to ensure availability at all times.

Article 3 The distribution area referred to in Article 2 shall comprise the geographical area in which the pharmacist responsible for the pharmaceuticals wholesaler or branch thereof declares that he conducts business....'

7 Those rules were changed, *inter alia*, by Decree No 98-79 of 11 February 1998 on pharmaceuticals companies amending the Public Health Code (*JORF* of 13 February 1998, p. 2287). Article R. 5115-13 of the Public Health Code, as amended by Decree No 98-79, provides as follows:

'...

The company shall, within its distribution area, discharge the following public service obligations:

1 It must keep in stock a range of medicines comprising at least nine tenths of all forms of medicines currently sold in France;

2 It must be able:

(a) to satisfy at all times the needs of its regular customers for a period of at least two weeks;

(b) to deliver any medicine in its range within 24 hours of receipt of the relevant order;

(c) to deliver any medicine or any other product, item or article referred to in Article L. 512 which it distributes in the circumstances set out in Article R. 5108-1, or any split pharmaceutical product referred to in the fourth subparagraph of Article L. 511-1 that is sold in France to any pharmacy requesting it.

...'

8 Article 12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 (*JORF* of 23 December 1997, p. 18635), which inserted Article L. 245-6-1 into the Social Security Code, introduced a tax contribution of 2.5% of pre-tax turnover achieved in France by pharmaceutical laboratories from wholesale sales of medicinal products to dispensing pharmacies, mutual pharmacies and pharmacies belonging to mining friendly societies. The contribution is called the 'tax on direct sales'.

9 As the Conseil constitutionnel pointed out in Decision No 97-393 of 18 December 1997 (*JORF* of 23 December 1997, p. 18649), which it handed down in an action challenging Article 12 of Law No 97-1164, the contribution, which is not levied on sales of medicines by wholesale distributors, was introduced to help finance the National Sickness Insurance Fund and to restore the balance of competition between the various distribution channels for medicines, which had

been regarded as distorted by the fact that wholesale distributors are under a duty of public service which is not imposed on pharmaceutical laboratories.

The main proceedings and the questions referred

10 Ferring is a company governed by French law with its registered office in France. It belongs to a multinational pharmaceuticals group and distributes in France, through a system of direct sales to pharmacies, Lutrelef, a medicine produced in Germany by another company in the same group. Ferring was assessed to tax on direct sales in the sum of FRF 40 155, which it had to pay to ACOSS.

11 Ferring took the view that the tax on direct sales was illegal and, on 17 September 1998, brought an action before the Social Security Court, Créteil, seeking reimbursement of the sum paid to ACOSS. In support of its action it maintained that restricting the tax to sales by pharmaceutical laboratories amounted to a grant of State aid to wholesale distributors and infringed the obligation to give advance notice laid down in Article 93(3) of the EC Treaty (now Article 88(3) EC) and that the tax restricted the freedom to provide services, in breach of Article 59 of the Treaty.

12 ACOSS argues, essentially, that the tax at issue in the main proceedings is not State aid within the meaning of Article 92(1) of the Treaty and that, in any event, it is justified by the character and structure of the French system for the distribution of medicines. Were the tax to be classified as aid, it would be covered by the exemption laid down in Article 90(2) of the Treaty. As regards the alleged infringement of Article 59 of the Treaty, ACOSS maintains that that provision

does not apply in the present case, which involves a purely domestic situation within a Member State and that, in any event, the tax at issue in the main proceedings does not contravene the Community rules on the freedom to provide services.

13 Those were the circumstances in which the Social Security Court, Créteil, decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Can the contribution introduced by Article L. 245-6-1 of the Social Security Code be regarded as public aid within the meaning of Article 87 (ex Article 92) of the Treaty?

If so, is it justified by the character and structure of the system?

2. Are wholesale distributors entrusted with the operation of a service of general economic interest within the meaning of Article 86(2) (ex Article 90(2)) of the Treaty?

If the contribution at issue can be classified as public aid, must it be exactly offset by the additional costs attributable to the obligations imposed on wholesale distributors in order for the derogation provided for in Article 86(2) to apply?

3. Must Article 49 (ex Article 59) of the Treaty be interpreted as precluding national legislation of the kind embodied in the Law of 19 December 1997?'

Interpretation of Article 92 of the Treaty

14 Article 92(1) of the Treaty provides that, '[s]ave as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

15 As the Court has already held, the concept of aid is wider than that of a subsidy because it embraces not only positive contributions, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13, and Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 34).

16 The expression 'aid', for the purposes of Article 92(1) of the Treaty, necessarily designates advantages granted directly or indirectly through State resources or

constituting an additional charge for the State or for bodies designated or established by the State for that purpose (see, in particular, Joined Cases C-52/97 to C-54/97 *Viscido and Others* [1998] ECR I-2629, paragraph 13).

17 Nevertheless, the fact that undertakings are treated differently does not automatically imply the existence of an advantage for the purposes of Article 92(1) of the Treaty. There is no such advantage where the difference in treatment is justified by reasons relating to the logic of the system (see, to that effect, Case C-353/95 P *Tiercé Ladbroke* v *Commission* [1997] ECR I-7007, and particularly paragraphs 33 and 35).

18 It is therefore appropriate, as the Advocate General pointed out in paragraph 30 of his Opinion, to consider first of all whether, leaving aside the public service obligations laid down by French law, exempting wholesale distributors from tax on direct sales may, in principle, amount to State aid for the purposes of Article 92(1) of the Treaty. If it may, then it will be necessary to consider whether the specific public service obligations imposed on wholesale distributors by the French system for the supply of medicines to pharmacies precludes the tax from being State aid.

19 It is important to note that there are two directly competing medicine distribution channels in France, that of the wholesale distributors and that of the pharmaceutical laboratories which sell directly to pharmacies. Furthermore, it is common ground that a particular objective of the tax on direct sales is to restore the balance of competition between the two medicine distribution channels, which, according to the French legislature, had been distorted by the imposition of public service obligations on wholesale distributors alone. It is also common ground that, following the introduction of Law No 97-1164 and the direct sales tax, not only did the growth of direct sales recorded in the immediately preceding years cease, but the trend even reversed, with wholesale distributors recovering market share.

20 It would appear that not assessing wholesale distributors to the tax on direct sales — a tax which is designed to help finance the National Insurance Sickness Fund — equates to granting them a tax exemption. The French authorities have, in practice, waived their right to receive tax payments from wholesale distributors, thus conferring upon them an economic advantage. Consequently, that advantage was conferred through the use of State resources and made wholesale distributors better able to compete with the other distribution channel.

21 It is also appropriate to observe that when an advantage conferred by a Member State strengthens the position of a class of undertakings in relation to other undertakings competing in intra-Community trade the latter must be regarded as affected by that advantage (see, *inter alia*, Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11). Since the pharmaceuticals markets are characterised by the presence of a large number of multinational undertakings which distribute their products in the Member States, there can be no doubt that a measure such as the tax on direct sales will influence trade patterns between the Member States.

22 In the light of the foregoing, it must be held that, leaving aside the public service obligations laid down by French law, the tax on direct sales may in fact constitute State aid within the meaning of Article 92(1) of the Treaty inasmuch as it does not apply to wholesale distributors.

23 However, it is necessary to consider whether the specific public service obligations imposed on wholesale distributors by the French system for the supply of medicines to pharmacies precludes the tax from being State aid.

24 It may be recalled that the French regulation requires only wholesale distributors 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, in such a way that the population as a whole can be guaranteed an adequate supply of medicines at all times.

25 Discharging those obligations entails additional costs for wholesale distributors which pharmaceutical laboratories do not have to bear.

26 In this connection it is appropriate to recall the finding of the Court of Justice in relation to an indemnity provided for by Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils (OJ 1975 L 194, p. 23). The indemnity in question was financed in accordance with the principle that the polluter pays, in the case in point by way of a charge imposed on products transformed into waste oils, or on waste oils, not exceeding the actual yearly costs. The indemnity could be granted to undertakings collecting and/or disposing of waste oils as compensation for their obligations to collect and/or dispose of the products offered to them by holders. The Court held that an indemnity of that type did not constitute aid within the meaning of Articles 92 et seq. of the Treaty, but rather consideration for the services performed by the collection or disposal undertakings (Case 240/83 *ADBHU* [1985] ECR 531, paragraph 18).

27 In like manner, provided that the tax on direct sales imposed on pharmaceutical laboratories corresponds to the additional costs actually incurred by wholesale distributors in discharging their public service obligations, not assessing wholesale distributors to the tax may be regarded as compensation for the services they provide and hence not State aid within the meaning of Article 92 of the Treaty. Moreover, provided there is the necessary equivalence between the exemption and the additional costs incurred, wholesale distributors will not be enjoying any real advantage for the purposes of Article 92(1) of the Treaty because the only effect of the tax will be to put distributors and laboratories on an equal competitive footing.

28 In this case it is for the national court to decide whether that condition is satisfied.

29 The answer must therefore be that Article 92 of the Treaty is to be interpreted as meaning that, because it is charged only on direct sales of medicines by pharmaceutical laboratories, a measure such as the tax introduced by Article 12 of Law No 97-1164 amounts to State aid to wholesale distributors only to the extent that the advantage in not being assessed to the tax on direct sales of medicines exceeds the additional costs that they bear in discharging the public service obligations imposed on them by national law.

Interpretation of Article 90(2) of the Treaty

30 In the event that the advantage for wholesale distributors in not being assessed to the tax on direct sales of medicines exceeds the additional costs that they bear in discharging their public service obligations, the national court asks, essentially, whether an advantage of that kind is covered by Article 90(2) of the Treaty.

31 Under Article 90(2) of the Treaty, undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaty in so far 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.

32 If it is the case that the advantage for wholesale distributors in not being assessed to the tax on direct sales of medicines exceeds the additional costs that they bear in discharging the public service obligations imposed on them by national law, that advantage, to the extent that it exceeds the additional costs mentioned, cannot, in any event, be regarded as necessary to enable them to carry out the particular tasks assigned to them.

33 Consequently, the answer must be that Article 90(2) of the Treaty is to be interpreted as meaning that it does not cover a tax advantage enjoyed by undertakings entrusted with the operation of a public service such as those concerned in the main proceedings in so far as that advantage exceeds the additional costs of performing the public service.

The interpretation of Article 59 of the Treaty

34 The tax on direct sales at issue in the main proceedings is charged on sales of medicines by Ferring and is not, in this case, linked to the provision of services of the kind defined in Article 60 of the EC Treaty (now Article 50 EC). A situation resulting from the imposition of the tax, such as the situation which gave rise to the main proceedings, therefore does not fall within the scope of Article 59 of the Treaty, which prohibits restrictions on the freedom to provide services within the Community.

35 The Court's answer must therefore be that Article 59 of the Treaty does not apply to a situation such as that at issue in the main proceedings, where there is no connection with the provision of services.

Costs

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

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Tribunal des affaires de sécurité sociale de Créteil by judgment of 11 January 2000, hereby rules:

1. **Article 92 of the EC Treaty (now, after amendment, Article 87 EC) is to be interpreted as meaning that, because it is charged only on direct sales of medicines by pharmaceutical laboratories, a measure such as the tax introduced by Article 12 of Law No 97-1164 of 19 December 1997 on social security funding for 1998 amounts to State aid to wholesale distributors only to the extent that the advantage in not being assessed to the tax on direct sales of medicines exceeds the additional costs that they bear in discharging the public service obligations imposed on them by national law.**

2. **Article 90(2) of the EC Treaty (now Article 86(2) EC) is to be interpreted as meaning that it does not cover a tax advantage enjoyed by undertakings entrusted with the operation of a public service such as those concerned in the main proceedings in so far as that advantage exceeds the additional costs of performing the public service.**

3. **Article 59 of the EC Treaty (now, after amendment, Article 49 EC) must be interpreted as meaning that it does not apply to a situation such as that at issue in the main proceedings, where there is no connection with the provision of services.**

Macken Colneric Gulmann

Puissochet Cunha Rodrigues

Delivered in open court in Luxembourg on 22 November 2001.

R. Grass — Registrar

F. Macken — President of the Sixth Chamber