Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 6 June 2019 [1]

Case C-659/17

Istituto nazionale della previdenza sociale (INPS)
v
Azienda Napoletana Mobilità SpA

(Request for a preliminary ruling from the Corte suprema di cassazione, Sezione Lavoro (Supreme Court of Cassation, Labour Division, Italy))

(Request for a preliminary ruling — Article 107(1) TFEU — State aid — Commission Decision 2000/128/EC — Aid granted by Italy to promote employment — Exemption and reduction of social security contributions — Commission decision declaring certain aid for training and work experience contracts and for the conversion of training and work experience contracts into open-ended contracts incompatible with the common market — Applicability of decision to employer operating local public transport services on a substantially non-competitive basis)

1. The present request for a preliminary ruling concerns the interpretation of the State aid provisions of Article 107(1) TFEU. The dispute arose in the context of a dispute between the Istituto nazionale della previdenza sociale ('INPS') (National Social Security Institution, Italy) on the one hand and Azienda Napoletana Mobilità SpA ('ANM') on the other in respect of whether the latter was obliged to pay social security contributions to INPS in respect of members of staff on training and work experience contracts between 1997 and 2001.

2. ANM is a company which is wholly owned by the Municipality of Naples and which provides local urban transport services in that municipality. [2]

3. By its Decision 2000/128/EC of 11 May 1999 concerning aid granted by Italy to promote employment, [3] the European Commission declared partially incompatible with the common market aid granted by Italy in the form of a reduction of the social security contributions payable by employers relating to training and work contracts and the conversion of training and work experience contracts

1 Original language: English.

2 It would appear, subject to verification by the referring court, that ANM was originally set up in 1995 by Resolution No 94 of 6 April 1995 of the Municipal Council of Naples, pursuant to Article 22 of National Law No 142/1990 and Articles 54 to 60 of the Statute of the Municipality of Naples as a special company of that municipality in order to manage the public transport service within the municipality. Moreover, subject to verification by the referring court, it would further appear that ANM was transformed into a company limited by shares in 2001 and, in accordance with the provisions of Article 18(1) of decreto legislativo n. 422 — Conferimento alle regioni ed agli enti locali di funzioni e compiti in materia di trasporto pubblico locale, a norma dell'articolo 4, comma 4, della legge 15 marzo 1997, n. 59 (Legislative Decree No 422 — Conferment of duties and powers in the area of public transport at local level to the regions and local bodies, under Article 4(4) of Law No 59 of 15 March 1997), of 19 November 1997 (GURI No 287, 10 December 1997, p. 4) '(Legislative Decree No 422/1997), the management of the entire urban transport services network of the Municipality of Naples was awarded to ANM without any competitive tender procedure.

3 OJ 2000 L 42, p. 1.

into open-ended contracts.[4] On the basis of that decision, INPS requested the payment of social security contributions from ANM relating to the period 1997-2001 in order to recover such reductions. In the main proceedings, ANM sought to establish, inter alia, that it was not obliged to pay such sums.

4. The question which must now be answered by the Court is whether Decision 2000/128 applies in respect of a company such as ANM. After all, this company provides local public transport services 'on a substantially non-competitive basis, given the exclusive nature of the service carried out'.[5] A critical question is whether trade between Member States is affected and competition is distorted or threatens to be distorted as required by Article 107(1) TFEU.

Legal context

5. Articles 1 to 3 of Decision 2000/128 provide:

'Article 1

1. The aid granted unlawfully by Italy since November 1995 for employment under the training and work experience contracts provided for in Laws Nos 863/84, 407/90, 169/91 and 451/94 is compatible with the common market and the EEA Agreement provided that it concerns:

– the creation of jobs in the recipient firm for persons who have not yet found employment or have lost their previous employment within the meaning of the guidelines on aid to employment,

– the employment of workers experiencing particular difficulties in entering or re-entering the labour market. For the purposes of this Decision, workers experiencing particular difficulties in entering or re-entering the labour market shall mean young persons under the age of 25, [graduates] up to the age of 29 and the long-term unemployed, i.e. out of employment for more than one year.

2. Aid for training and work experience contracts which does not satisfy the conditions set out in paragraph 1 is incompatible with the common market.

Article 2

1. The aid granted by Italy under Article 15 of Law No 196/97 for the conversion of training and work experience contracts into open-ended contracts is compatible with the common market and the EEA Agreement provided that it complies with the net job creation requirement as defined in the Community guidelines on aid to employment.

The workforce employed by a firm shall be calculated without taking account of jobs resulting from the conversion and jobs created through fixed-term contracts or not guaranteeing sufficiently stable employment.

2. Aid for the conversion of training and work experience contracts into open-ended contracts which does not satisfy the requirement laid down in paragraph 1 is incompatible with the common market.

4 By judgment of 7 March 2002, *Italy* v *Commission* (C-310/99, EU:C:2002:143), the Court rejected an action for annulment by the Italian Republic against Decision 2000/128. By judgment of 1 April 2004, *Commission* v *Italy* (C-99/02, EU:C:2004:207), the Court declared that, by not adopting within the time limit prescribed all measures necessary for the recovery from the recipients of the aid which was found, according to Decision 2000/128, to be unlawful and incompatible with the common market, the Italian Republic has failed to fulfil its obligations under Articles 3 and 4 of that decision.

5 See question referred at point 12 below.

Article 3

Italy shall take all necessary measures to recover from the recipients the aid which does not satisfy the conditions of Articles 1 and 2 and has already been unlawfully paid.

Repayment shall be made in accordance with the procedures of Italian law. The amounts to be repaid shall bear interest from the date on which the aid was paid until the date on which it is effectively recovered. The interest shall be calculated on the basis of the reference rate used to calculate the net grant equivalent of regional aid.'

The main proceedings and the question referred for a preliminary reference

6. Between November 1995 and May 2001,[6] ANM hired personnel for vocational training purposes and then integrated them into the company. These recruitments were carried out in the form of training and work contracts, within the meaning of Italian Law 863/1984, as amended by Italian Laws 407/1990, 169/1991 and 451/1994. Subsequently, ANM transformed certain training and work contracts into 'open-ended' contracts (employment contracts for an indefinite period) in accordance with Italian Law 451/1994.

7. The national provisions in question established a total exemption from social security charges for a two-year training period for companies operating in areas where the unemployment rate was higher than the national average. The exemption was extended by one year in the event of transformation of training and work contracts into open-ended contracts. ANM benefited from these exemptions in respect of the training and work contracts in question and their subsequent transformation.

8. By Decision 2000/128, the Commission declared that national regulation to be partially incompatible with the prohibition laid down in Article 107(1) TFEU.

9. The INPS, as the body entrusted with the implementation of Decision 2000/128, sent ANM two payment requests, one for EUR 7 429 436.76, in respect of training and work contracts for the period 1997 to 2001, and another for EUR 2 266 014.05, in respect of the subsequent transformation of such contracts and relating to the period 1999 to 2001.

10. ANM brought an action before the Tribunale di Napoli (District Court, Naples, Italy) in respect of the decision of the INPS to seek to recover such sums. ANM's action was upheld by that court on the basis that Decision 2001/128 did not have direct effect as it was not sufficiently precise and unconditional.

11. The INPS brought an appeal to the Corte d'appello di Napoli (Court of Appeal, Naples, Italy) which upheld the ruling of the Tribunale di Napoli (District Court, Naples) but which based its decision on other grounds. The Corte d'appello di Napoli (Court of Appeal, Naples) considered that Decision 2000/128 is part of the Italian legal order but that it was not applicable in the present case as the reduction in social security contributions granted to ANM did not affect trade between Member States and was not liable to distort competition given that that company provided local public transport services on a non-competitive basis.

6 These dates are not entirely certain.

12. The INPS appealed the ruling of the Corte d'appello di Napoli (Court of Appeal, Naples) to the Corte suprema di cassazione, Sezione Lavoro (Supreme Court of Cassation, Labour Division, Italy), which referred the following question to the Court:

'Is [Decision 2000/128] applicable also to employers operating local public transport services — on a substantially non-competitive basis, given the exclusive nature of the service carried out — which have benefited from reductions in contributions after entering into training and work experience contracts since Law No 407 of 1990 came into force, with reference, in the present case, to the period from [May] 1997 to May 2001?'

Procedure before the Court

13. Written observations were submitted by the INPS, ANM, the Italian Government and the Commission.

14. At the end of the written part of the procedure, the Court considered that it was necessary to request clarification from the referring court in accordance with Article 101 of the Rules of Procedure of the Court of Justice on three matters. That request was sent to the referring court on 13 December 2018. After a number of extensions to the time to reply were granted, the referring court lodged its reply to that request at the Registry of the Court on 13 March 2019.

15. The referring court was requested to clarify firstly the terms 'substantially non-competitive basis, given the exclusive nature of the service carried out' referred to in the preliminary question. In particular, the referring court was requested to specify whether it referred to the direct allocation to the ANM of the local transport services in question and whether the Municipality of Naples could legally have awarded such services to other providers. Secondly, the referring court was requested to indicate whether or not the Italian local public transport market was at the material time open, in whole or in part, to competition and, if so, to what extent. Thirdly, the referring court was requested to indicate all the activities exercised by ANM at the material time.

16. In addition, in accordance with Article 61 of its Rules of Procedure, the Court invited the parties to take a position at the hearing on the reply of the referring court to the request for clarification and to concentrate their oral pleadings on the three matters in question and any impact which the reply may have on the preliminary question referred.

17. The INPS, ANM, the Italian Government and the Commission submitted observations at the hearing on 3 April 2019.

Preliminary remarks

18. It should be recalled that, according to the Court's settled case-law, classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition.[7]

19. It is the second and fourth criteria laid down in Article 107(1) TFEU which are the subject matter of the preliminary reference.[8]

7 Judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505, paragraph 82 and the case-law cited).

8 The second and fourth criteria laid down in Article 107(1) TFEU are two distinct but affiliated criteria.

20. At the outset I would note that there is no suggestion in the file before the Court, subject to verification by the referring court, that the exemptions from social security granted to ANM were in compensation for the provision of a public service or a service of general economic interest.[9] A State measure is not caught by Article 107(1) TFEU[10] if it is regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them. For such compensation to escape classification as State aid in a particular case, the conditions laid down in paragraphs 88 to 93 of the judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415), must be satisfied.[11]

21. The aid in question in Decision 2000/128 was a scheme or programme which applied to multiple sectors and regions rather than to a particular entity. In accordance with Article 3 of that decision, Italy was required to take all necessary measures to recover from the recipients the illegal aid.

22. In the case of an aid programme, the Commission may merely study the characteristics of the programme at issue in order to assess, on the grounds for its decision, whether, by reason of the arrangements provided for under the programme, the latter gives an appreciable advantage to beneficiaries in relation to their competitors and is likely to benefit particular undertakings engaged in trade between Member States. Thus, in a decision which concerns such a programme, the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned.[12] In that regard, it is for the Member State to verify the individual situation of each undertaking concerned by such a recovery operation.[13]

23. The Commission found at recitals 64 to 66 and 98 of Decision 2000/128 that the aid in question distorts competition and affects trade between Member States or is likely to do so 'where the recipient firms export some of their products to other Member States; equally, even where such firms do not export their goods, national production is favoured because firms established in other Member States have less chance of exporting their products to the Italian market'.[14]

9 Indeed both the Italian Government and the Commission stated at the hearing on 3 April 2019 that the measures in question were not made in compensation for the provision of a public service or a service of general economic interest. ANM claimed in its written observations that it has a legitimate expectation that the reduction in social security charges was definitive. This question was not raised by the referring court. It is thus beyond the scope of the question referred.

10 In order to classify a State measure as State aid, the first criteria of Article 107(1) TFEU requires that there is an advantage conferred on an undertaking.

11 See judgment of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission* (C-66/16 P to C-69/16 P, EU:C:2017:999, paragraph 44 to 46). This is not to suggest that ANM may not be entitled to receive compensation for the discharge of a public service or a service of general economic interest on some other basis.

12 Judgment of 9 June 2011, *Comitato "Venezia vuole vivere" and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraphs 63 and 130).

13 Judgment of 9 June 2011, *Comitato "Venezia vuole vivere" and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 64).

14 See recital 66 of Decision 2000/128. In my view, the production and export of goods referred to in recital 66 is purely exemplificative. This is clear from the judgment of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraphs 65 to 69). See point 24 below.

24. Before proceeding to the recovery of an advantage, the national authorities must however verify, in each individual case, whether the advantage granted was, in the hands of its beneficiary, capable of distorting competition and affecting intra-Union trade. That additional verification is essential to the classification of individual advantages received as State aid. [15]

25. In the present context, it was thus when the INPS sought to recover aid granted to a specific beneficiary such as ANM that the question of whether trade between Member States was affected and competition distorted by that particular grant arose and a decision finding such an effect could be challenged before the national courts. [16]

Analysis

Applicable case-law and principles

26. The answer to the question referred to the Court can in my view, at least at first glance, be found in the consistent case-law of the Court. These principles were most recently re-stated and applied in the field of local urban transport in the judgment of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9). This case concerned the practice of Transport for London of permitting London taxis (Black Cabs) to use bus lanes on public roads during the hours when the traffic restrictions relating to those lanes are operational, while prohibiting private hire vehicles (minicabs) from using those lanes, except in order to pick up and set down passengers who have pre-booked such vehicles.

27. At paragraphs 65 to 69 of that judgment the Court found that it is settled case-law that for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is *liable* to affect such trade and distort competition. [17] In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid. In that regard, it is not necessary that the beneficiary undertakings are themselves involved in intra-Union trade. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced. Further, according to the Court's case-law, there is no *ex ante* threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively

15 See to that effect, judgment of 9 June 2011, *Comitato "Venezia vuole vivere" and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 115). At paragraph 120 of that judgment, the Court held that 'the verification to be carried out by the national authorities of the individual situation of each beneficiary concerned must be carried out sufficiently within the framework of the Commission decision concerning an aid scheme which is accompanied by a recovery order. First, … such a decision must allow its scope to be clearly identified. Secondly, … such a decision must contain in itself all the matters essential for its implementation by the national authorities, thereby excluding the possibility that the actual content of that decision is not established until afterwards, by means of an exchange of letters between the Commission and the national authorities.' In the judgment of 13 February 2014, *Mediaset* (C-69/13, EU:C:2014:71, paragraph 35), the Court stated that given that, in its decision on a state aid regime, the Commission had not identified the individual recipients of the aid in question or fixed the precise amounts of the aid to be recovered, it was for the national court, if the matter was brought before it, to rule on the amount of aid which the Commission had ordered to be recovered. Where there were difficulties, the national court could contact the Commission for assistance in accordance with the principle of cooperation in good faith laid down in Article 4(3) TEU.

16 It is possible that ANM may have had the capacity to bring an action before the General Court of the European Union challenging the validity of Decision 2000/128 in that it was directly and individually concerned by that decision by reason of detriment caused to its legal situation by the order for recovery of the aid concerned contained in its Article 3. See by analogy, judgment of 9 June 2011, *Comitato "Venezia vuole vivere" and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 51). Given that it would appear from the file before the Court, subject to verification by the referring court, that ANM is not challenging the validity of Decision 2000/128 per se but rather whether the aid granted to it affects trade between Member States as required by Article 107(1) TFEU, I do not consider that the rule on the admissibility of the preliminary reference in judgment of 9 March 1994, *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90, paragraphs 13 to 18), is applicable and ANM was not required to bring an action for annulment of Decision 2000/128 before the General Court.

17 It must be stressed that INPS is not required to prove that the exemptions in question granted to ANM had a real effect on trade between Member States or that competition is in fact distorted.

small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected. Consequently, the condition that the aid must be capable of affecting trade between Member States does not depend on the local or regional character of the transport services supplied or on the scale of the field of activity concerned.[18]

28. The Court considered that it was conceivable that the effect of the bus lanes policy was to render less attractive the provision of minicab services in London, with the result that the opportunities for undertakings established in other Member States to penetrate that market were thereby reduced.[19]

29. With regard to the condition concerning distortion of competition, in principle, aid intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities distorts the conditions of competition.[20]

30. It is clear from the above case-law that the threshold for finding that a State measure is liable to affect trade and distort competition is low.[21] This is subject to the caveat that the State aid in question is not *de minimis*, in which case the aid is deemed not to have any effect on trade between Member States and not to distort or threaten to distort competition.[22] Given that the value to ANM of the State measure in question in the main proceedings was approximately EUR 10 million and was granted over a five year period, it could thus not, in principle, be considered *de minimis* irrespective of which EU State aid *de minimis* rules may have been applicable *ratione temporis*.[23]

31. I therefore consider that ANM's claim that, as it was set up expressly for the purposes of running public transport services in the Municipality of Naples, it does not fall within the scope of Decision 2000/128 given the local nature of the services in question cannot, in principle, be sustained.

32. In order, however, for the second and fourth criteria contained in Article 107(1) TFEU to apply in the main proceedings, it is imperative in the context of the main proceedings that the INPS demonstrate that ANM competes with other undertakings on markets which are not *de jure*[24] closed to competition.

18 See also, judgments of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraphs 77 to 82); of 21 July 2005, *Xunta de Galicia* (C-71/04, EU:C:2005:493, paragraph 41); and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraphs 78 and 79). In its judgment of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraph 77), the Court stated that it is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States.

19 Judgment of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 70).

20 Judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 80), and of 21 July 2005, *Xunta de Galicia* (C-71/04, EU:C:2005:493, paragraph 44).

21 At paragraphs 42 and 43 of the judgment of 21 July 2005, *Xunta de Galicia* (C-71/04, EU:C:2005:493), the Court stated that 'a relatively small amount of aid may affect such trade where there is strong competition in the sector in which the undertakings that receive it operate'. 'Thus, where a sector has a large number of small companies, aid potentially available to all or a very large number of undertakings in that sector can, even if individual amounts are small, have an impact on trade between Member States.'

22 For the current rules on *de minimis* State aid, see, for example, Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ 2013 L 352, p. 1). I would note that the transport sector was excluded from the scope of 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 (OJ 2001 L 10, p. 30). The transport sector was not excluded from the scope of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ 2006 L 379, p. 5). However, the general *de minimis* ceiling was adapted in order to take account of the average small size of undertakings active in the road freight and passengers transport sector. This lower ceiling is no longer applicable to the road passenger transport sector pursuant to Regulation No 1407/2013.

23 In order to have some idea of the scale of ANM's operations, it is worth noting that according to the Commission, the urban public transport system operated by ANM served approximately 1 million inhabitants at the relevant time. It is however ultimately for the referring court to determine whether and to what extent the rules on *de minimis* are applicable.

24 The fact that the market is de facto closed to competition as ANM has exclusive rights following the direct award of the particular concession in question relating to the management of the urban transport services network of the Municipality of Naples is not relevant.

33. In my view, if the market for the provision of transport services in the Municipality of Naples was at the material time potentially open to some degree of competition [25] and thus not subject to a legal monopoly or, if ANM was active on other markets open to some degree of competition, it is likely that the State measure in question was capable of distorting competition and affecting trade between Member States, despite the local nature of the transport services provided which were confined to the Municipality of Naples.

34. For the purposes of clarity, I believe that it is important to define the concept 'legal monopoly' in the present context. In that regard, one could not, I think, improve on the definition provided in footnote 272 of the Commission's Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (C/2016/2946) [26] which states that 'a legal monopoly exists where a given service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator to provide such service (not even to satisfy a possible residual demand from certain customer groups). However, the mere fact that the provision of a public service is entrusted to a specific undertaking does not mean that such undertaking enjoys a legal monopoly'. In addition, it goes without saying that the legal monopoly reserved by law must be in compliance with EU law, in particular, the rules on public procurement.

35. In such circumstances and in the light of the judgments of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraph 78), and of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraphs 66 to 70), if the market for the provision of transport services in the Municipality of Naples was at the material time *de jure* open to some degree of competition and thus not subject to a legal monopoly, it is not unrealistic to assume that the supply of transport services by an entity such as ANM may have been maintained or increased due to the State measure in question with the result that undertakings established in other Member States would have had less chance of providing their transport services in the Municipality of Naples. Moreover, even if the market for the provision of transport services in the Municipality of Naples was at the material time *de jure* closed to competition, [27] if ANM's activities were nonetheless not confined to that particular service and geographical market, the State measure in question could have facilitated its expansion to other markets open to competition [28] unless any possibility of cross-subsidisation between the market on which ANM may have enjoyed a legal monopoly and any other market(s) on which it may have operated was effectively and transparently excluded by means of separate accounting in relation to the various activities. [29]

Application of case-law and principles to facts in main proceedings

36. The key questions, therefore, which must be addressed by the referring court are, firstly, whether the market in question was *de jure* open to some degree of competition during the relevant period in question and, secondly, whether ANM operated during that period on other markets (geographical and/or product/service) open to some degree of competition and, if it did, whether any possibility of cross-subsidisation was excluded.

25 See by analogy, judgment of 11 June 2009, *ACEA* v *Commission* (T-297/02, EU:T:2009:189, paragraph 90). See also judgment of 29 April 2004, *Italy* v *Commission* (C-298/00 P, EU:C:2004:240, paragraph 66), which refers to the opening-up of the market to partial competition. At paragraph 65 of the judgment of 26 October 2016, *Orange* v *Commission* (C-211/15 P, EU:C:2016:798), the Court stated that 'the fact that an economic sector has been the subject of liberalisation at EU level may serve to determine that the aid in question has a real or potential effect on competition and affects trade between Member States'.

26 OJ 2016 C 262, p. 1.

27 And thus subject to a legal monopoly.

28 See by analogy, judgment of 11 June 2009, *ACEA* v *Commission* (T-297/02, EU:T:2009:189, paragraph 94).

29 See judgment of 23 January 2019, *Fallimento Traghetti del Mediterraneo* (C-387/17, EU:C:2019:51, paragraph 42).

37. As regards the first question, in its response to the request for clarification addressed to it by the Court, the referring court indicated that, according to ANM's submissions on the matter, the terms 'substantially non-competitive basis, given the exclusive nature of the service carried out' refer to the fact that, in practice, there were no competitive conditions in the market in question as the entire network of urban transport services in the Municipality of Naples was not subject to a competitive tender procedure [30] but rather was subject to a direct award. ANM indicated that the direct award in question was in conformity with both EU and national law. [31] ANM confirmed that it had an exclusive right in respect of all scheduled transport services in the territory in question such that there was no other similar service to it and it could not be replaced by a similar service.

38. In my view, the mere fact that the direct award in question may have been in conformity with EU and national public procurement law does not also exclude the fact that there may have been a distortion of potential competition or that trade between Member States may have been affected. The question which must instead be addressed was whether ANM enjoyed a legal monopoly in respect of the management of urban transport in the Municipality of Naples or whether under national law the concession in question, or part thereof, could have been awarded to another entity by means, inter alia, of a competitive tender procedure. If there was a possibility of using a competitive tender procedure, [32] then there could have been some competition for the market in question and the direct award itself could have contributed to or exacerbated the distortion of potential competition or could have affected trade between Member States. [33]

39. At the hearing before the Court on 3 April 2019, there was considerable divergence between ANM and the other parties with regard to the true scope and import of Italian law on the matter, in particular, Article 18 of Legislative Decree No 422/1997. It does not fall within the competence of the Court to interpret national law. I therefore consider, on the basis of the observations of the INPS, ANM, the Italian Government and the Commission at the hearing on 3 April 2019, that the referring court must verify, not only whether Article 18 of Legislative Decree No 422/1997 and/or other provisions of national law permitted the direct award of the concession in question to ANM, but in fact *mandated* it. It would seem plausible, [34] from a cursory reading of Article 18(2) of Legislative Decree No 422/1997, that some degree of competition in respect of the market in question may have been possible at the material time. [35] The purpose of this exercise is to determine whether ANM had a legal monopoly in respect of the relevant market.

30 Despite the existence of local or regional monopolies, where the competent regional and local authorities grant these monopolies via procurement procedures, competition may be distorted and trade between Member States impaired by State aid granted to an undertaking which competes for the grant of such a monopoly as that undertaking's financial position is strengthened vis-à-vis other potential candidates. Judgment of 16 July 2014, *Germany* v *Commission* (T-295/12, not published, EU:T:2014:675, paragraph 154).

31 In its response to the request for clarification addressed to it by the Court, the referring court indicated that according to ANM, with regard to the progressive liberalisation of the market for transport services subject to public service obligations, the obligation to award contracts pursuant to the new rules under Article 5 of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1) was applicable according to the transitional rules laid down in Article 8 of that regulation as from 3 December 2019. In its written observations ANM stated that during the period 1997 to 2001, the provisions of Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ English Special Edition 1969(I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1) were applicable to the concession in question. ANM claimed that that regulation provided for the conclusion of public service contracts in respect of obligations relating to the performance of local public transport services, without, however, specifying the terms on which such contracts are to be concluded, or whether the market for public transport services should be opened up to competition. ANM also stated that in accordance with Article 18 of Legislative Decree No 422/1997, the system of concessions was replaced by the opening-up of the market to competition from 31 December 2005.

32 Even in respect of part of the market in question.

33 See by analogy, judgment of 11 June 2009, *ACEA* v *Commission* (T-297/02, EU:T:2009:189, paragraph 92), where the General Court found that the very existence of an aid scheme for certain recipients may have 'encouraged the municipalities to entrust them directly with the services instead of granting licences by open tender procedure'.

34 Subject to verification by the referring court.

35 See Article 18(2)(a) of Legislative Decree No 422/1997 which refers to the possibility of a tender procedure and Article 18(2)(b) which, *in the event of* direct award of the market, places limits on operating outside a geographic area.

40. As regards the second question, ANM confirmed in its written observations that it did not operate outside the Province [36] of Naples during the relevant period. ANM also claimed that in accordance with its statutes (which were in force from 27 June 1995 to 2001) it operated solely in the Municipality of Naples. Moreover, it claimed that in accordance with national case-law it could not operate outside the province of Naples. I would note, however, that in accordance with Article 3(2) and Article 3(3) of its statutes dated 6 April 1992, ANM could, in certain circumstances, operate outside that municipality.

41. ANM also claims that it did not engage in any activity other than the operation of an urban public transport system until 1 January 2013 when it merged with another company, Napolipark, which manages car parking facilities. Given the date in question and the considerable lapse of time since the State measure was granted, I do not consider that this activity is of temporal relevance for the purposes of assessing the actual or potential impact on competition or trade between Member States of the measure in question. I would note, however, that in accordance with Article 4 of the *contratto di servizio* (contract for services) of 27 June 1997 between the Municipality of Naples and ANM, the object of the concession is more than merely the management of urban transport, but also includes the management of parking lots.

42. In the light of these considerations, the referring court must, accordingly, verify whether ANM operated outside the Municipality of Naples or on another product/service market during the relevant period and, if so, whether any possibility of cross-subsidisation was excluded.

Conclusion

43. I would accordingly propose that the question referred by the Corte suprema di cassazione, Sezione Lavoro (Supreme Court of Cassation, Labour Division, Italy) be answered as follows:

Decision 2000/128/EC of 11 May 1999 concerning aid granted by Italy to promote employment is applicable to an employer such as Azienda Napoletana Mobilità SpA which operated local public transport services and which benefited during the period May 1997 to May 2001 from reductions in social security contributions after entering into training and work experience contracts following the entry into force of Law No 407 of 1990, unless it benefited from a legal monopoly which reserved by law or regulatory measures, in compliance with Union law, the provision of those services to an exclusive provider to the exclusion of any other operator and provided that it did not operate on any other geographic or product/service market.

36 I would note that at times reference is made to the Province of Naples and at others to the Municipality of Naples. It is unclear from the file before the Court whether those terms refer to a single geographic area in respect of the relevant period.