STATE AIDS (PUBLIC SERVICES): THE ALTMARK CASE

Subject: State aids

Parties: (See below)

Source: Opinion of the Advocate General, dated 14 January 2003, in Case C-280/00 (*Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*)

(Note. An important principle is discussed by the Advocate General in a case before the Court of Justice of the European Communities: he takes the view that the financing of public services constitutes State aid for the purposes of European Community law. It should be noted that the Opinions expressed by Advocates General are of "persuasive", but not binding, effect in law: the Court does not have to follow what the Advocates General recommend. Their function is to propose to the Court, acting with complete independence, a legal solution to the cases assigned to them. The judges of the Court of Justice are now starting their deliberations in the present case. Judgment will be delivered at a later date.)

In the Advocate General's view in this case, Member States must in principle notify their financing plans to the Commission and may not implement them without prior authorisation from the Commission. The Advocate General states that this review machinery is not liable to disrupt the functioning of public services in the Member States. The question of the financing of public services is currently the subject of several cases before the Court of Justice. In view of the importance of the question, the Court, in order to answer a question put by a German court, decided to have recourse to an exceptional procedure.

The case concerns a public bus transport service in the District of Stendal in Germany. In 1994 the District issued transport licences to Altmark and granted it subsidies to cover the costs of discharging its public service obligations. A competing company, NVGA, brought proceedings before the German courts, claiming that the subsidies paid to Altmark were contrary to the Community rules on State aid. The Federal Administrative Court asked the Court of Justice for a ruling on the nature of those subsidies. Altmark and NVGA submitted arguments to the Court at a first hearing in late 2001. However, in view of the importance of the question, the Court decided to arrange a second hearing to request all the Member States and the Council and the Commission to put forward their points of view. Advocate General Léger has now delivered his second Opinion in this case.

The Advocate General considers that State financing of public services constitutes State aid within the meaning of the Treaty. In his view, such financing is normally subject to the Community machinery for review of aid. That means that, in principle, Member States must notify their financing plans to the Commission and that they may not grant that financing without prior

authorisation from the Commission. At the hearing, some Member States submitted that this review machinery could endanger the functioning of public services. They consider that the procedure for examining aid is relatively long and that, for certain kinds of public services, it is difficult to wait for the Commission's authorisation. The Advocate General examines this argument in detail. He explains that , for several reasons, the aid review machinery is not liable to disrupt the functioning of public services.

First, the Advocate General points out that the Treaty rules apply only to aid paid to entities that carry on an economic activity. It follows, in his view, that the financing of certain essential sectors of the State, such as compulsory social security schemes or compulsory education, does not have to be examined by the Commission.

Second, the Advocate General points out that, with respect to financing that does have to be notified, the Commission is obliged to carry out an initial examination of the aid within two months from notification. If it does not react within that period, the Member States may grant the financing without waiting for authorisation. Moreover, in cases of particular urgency, the Treaty provides for a duty of sincere cooperation between the Commission and the Member States, which should make it possible to give priority treatment to such cases.

Third, the Advocate General notes that the Commission could adopt a "regulation for exemption by category". Such regulations define the conditions under which certain categories of aid are compatible with the Treaty. Aid paid in accordance with those regulations is then exempted from the obligation to notify. Consequently, if the Commission were to adopt such a regulation, the Member States could finance public services without having to wait for authorisation from the Commission. In those circumstances, the Advocate General considers that the Community machinery for review of aid (whether by individual decisions or by exemption regulations) is not liable to harm the quality and continuity of public services in the Member States. ■

The Air Lib Case

STATE AIDS (AVIATION): THE AIR LIB CASE

Subject: State aids

Industry: Aviation, airlines

Parties: Air Lib

Source: Commission Statement IP/03/94, 21 January 2003

(Note. Rescue aid by the state is a controversial subject; and there is a fine line between the kinds of state aid that are permissible under the Commission's Guidelines and those that are not. In addition, special rules apply to state aids in

the aviation sector. The present case reflects the difficulties involved in assessing the overall benefits of state aids in these circumstances.)

The Commission has decided to start a formal investigation into the measures taken by France to support Air Lib, in view of France's decision to extend rescue aid to the company for a total of twelve months, France's failure to notify a restructuring plan and the possible existence of other sources of public funding. The Commission doubts whether these measures, which could in particular be used to develop the company's network, are compatible with the competition rules of the European Community. These measures include in particular rescue aid totalling €30.5 million, which was granted following the compulsory liquidation of Swissair, the former shareholder in AOM and Air Liberté, which Air Lib took over in 2001. Following Swissair's bankruptcy petition in the autumn 2001, Air Lib failed to receive €70 million out of the €230 million it was expecting from Swissair.

In addition to the rescue aid package set up in January 2002, which was notified to the Commission after it had been paid and was renewed on several further occasions without a restructuring plan being submitted, the Commission is also planning to investigate the deferment of payment of social security contributions and airport charges million which have been mentioned in the press but have not been notified by France to the Commission. Although competition rules permit the payment of rescue aid to prepare measures to restore a company's viability and of restructuring aid to ensure that these measures are actually introduced, the aid must meet certain conditions, especially in the aviation sector. (See the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ No C 288/1999) and Communication from the European Commission concerning the application of Articles 87 and 88 of the EC Treaty to State aid in the aviation sector (OJ No C 350/1994).) The Commission's investigation will therefore focus on determining whether the measures taken by France to support Air Lib are compatible with the proper functioning of the internal market.

The Commission will therefore focus on: whether Air Lib, as a newly created company, is eligible for rescue and restructuring aid; the extended duration of the rescue aid of twelve months, given the failure to notify a restructuring plan; the fact that aid should be limited to six months and may be renewed only in exceptional cases after the Commission has given prior authorisation; other contributions from public funds to rescue the company in the form of loans, payment periods, guarantees and any other benefits, including tax benefits, which have not been notified to the Commission; and whether these public funds are not already being used by Air Lib to finance restructuring and expansion which could exacerbate its competitors' difficulties.

The investigation will also look at the opening of new national, Community and international routes and the new low-cost fares which the company seems to have introduced. ■