

**Judgment of the Court of 17 September 1980. - Philip Morris Holland BV v  
Commission of the European [Union]. - Aid to a cigarette manufacturer. -  
Case 730/79.**

**Keywords**

*1. Aids granted by states - Effect on trade between Member States - Criteria*

*([FEU] Treaty, [Article 107])*

*2. Aids granted by states - Prohibition - Derogations - Aids which may be considered as compatible with the common market - Commission's discretion - Reference to the [Union] context*

*([FEU] Treaty, [Article 107(3)])*

**Summary**

1. When state financial aid 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.

2. In the application of [Article 107(3) TFEU] the Commission has a discretion the exercise of which involves economic and social assessments which must be made in a [Union] context.

The Commission is entitled to regard an aid project as not meeting the requirements of [Article 107(3)(b) TFEU] if such an aid would have permitted the transfer of an investment which could be effected in other Member States in a less favourable economic situation than that of the Member State in which the recipient undertaking is located.

**Parties**

In Case 730/79

Philip Morris Holland B.V., having its registered office at Eindhoven, Represented by B. H. Ter Kuile, advocate at the Hoge Raad (Supreme Court) of the Netherlands, and F. O. W. Vogelaar, advocate at the Hague Bar, with an address for service in Luxembourg at the chambers of J. Loesch, Advocate, 2 Rue Goethe,

applicant,

v

Commission of the European [Union], represented by its legal adviser, D. R. Gilmour, assisted by A. F. De Savornin Lohman, advocate at the Rotterdam Bar, with an address for service in Luxembourg at the office of its legal adviser, M. Cervino, Jean Monnet Building, Kirchberg,

defendant,

## Subject of the case

Application for a declaration that Commission Decision 79/743/EEC OF 27 July 1979 on proposed Netherlands Government assistance to increase the production capacity of a cigarette manufacturer (*Official Journal* L 217 of 25 August 1979, p. 17) is void,

## Grounds

- 1 By an application of 12 October 1979 the applicant asks the Court, pursuant to [Article 263 TFEU], to declare void Commission Decision 79/743/EEC of 27 July 1979 on proposed Netherlands Government assistance to increase the production capacity of a cigarette manufacturer (*Official Journal* 1979, L 217, p. 17).
- 2 The applicant is the Netherlands subsidiary of a major tobacco manufacturer. The Netherlands Government by a letter of 7 October 1978 informed the Commission of its intention to grant the applicant 'the additional premium for major schemes' provided for by the Netherlands Law of 29 June 1978 on the promotion and guidance of investment (*Staatsblad* No 368, 1978). This premium for investment projects having a value exceeding Hfl 30 000 000 depends on the number of jobs created and may account for up to 4% of the investment in question. According to Article 6 of that Law the premium shall not be granted to the extent to which, in the Opinion of the Commission, the grant thereof would be incompatible with the common market under the terms of [Articles 107 to 109 TFEU].
- 3 The aim of the aid in question was to help the applicant to concentrate and develop its production of cigarettes by closing one of the two factories which it owns in the Netherlands and by raising the annual production capacity of the second located at Bergen-op-Zoom in the south of the country to 16 000 million cigarettes, thereby increasing the manufacturing capacity of the subsidiary by 40 % and total production in the Netherlands by about 13%.
- 4 After the Commission had reviewed the proposed aid in accordance with the provisions of [Article 108 TFEU] it adopted the disputed decision, which provides that the Kingdom of the Netherlands shall refrain from implementing its proposal, communicated to the Commission by letter dated 4 October 1978, to grant the 'additional premium for major schemes' to investment made at Bergen-op-Zoom.

## Admissibility of the application

- 5 The Commission does not dispute the applicant's right as a potential recipient of the aid referred to in the decision to bring an action for a declaration that the decision is void even though it is addressed to a Member State.

## Substance

- 6 The applicant puts forward two grounds for declaring the contested decision to be void. In the first place the Commission Decision (a) is in breach of [Article 107(1) TFEU], (b) is in breach of one or more general principles of [Union] law, in particular the principles of good administration, the protection of legitimate expectation and of proportionality, or at least one or more principles of the

Commission's competition policy, (c) is in breach of [Article 296 TFEU] in that the Commission's statement of the reasons on which the decision is based is incomprehensible or contradictory.

- 7 In the second place the decision that the derogating provisions of [Article 107(3) TFEU] do not apply in the circumstances of this case is in breach of the above-mentioned provisions of the Treaty and of the above-mentioned principles of [Union] law.

#### **First submission**

- 8 [Article 107(1) TFEU] provides that:

'Save 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'.

- 9 The applicant maintains, that, in order to decide to what extent specific aid is incompatible with the common market, it is appropriate to apply first of all the criteria for deciding whether there are any restrictions on competition under [Articles 101 and 102 TFEU]. The Commission must therefore first determine the 'relevant market' and in order to do so must take account of the product, the territory and the period of time in question. It must then consider the pattern of the market in question in order to be able to assess how far the aid in question in a given case affects relations between competitors. But these essential aspects of the matter are not found in the disputed decision. The decision does not define the relevant market either from the standpoint of the product or in point of time. The market pattern and moreover for that matter, the relations between competitors resulting therefrom which might in a given case be distorted by the disputed aid, have not been specified at all.
- 10 It is common ground that when the applicant has completed its planned investment it will account for nearly 50% of cigarette production in the Netherlands and that it expects to export over 80% of its production to other Member States. The 'additional premium for major schemes' which the Netherlands Government proposed to grant the applicant amounted to Hfl 6.2 million (2.3 million EUA) which is 3.8% of the capital invested.
- 11 When State financial aid 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 this case the aid which the Netherlands Government proposed to grant was for an undertaking organised for international trade and this is proved by the high percentage of its production which it intends to export to other Member States. The aid in question was to help to enlarge its production capacity and consequently to increase its capacity to maintain the flow of trade including that between Member States. On the other hand the aid is said to have reduced the cost of converting the production facilities and has thereby given the applicant a competitive advantage over manufacturers who have completed or intend to complete at their own expense a similar increase in the production capacity of their plant.
- 12 These circumstances, which have been mentioned in the recitals in the preamble to the disputed decision and which the applicant has not challenged, justify the Commission's deciding that the proposed aid would be likely to affect trade between Member States and would threaten to

distort competition between undertakings established in different Member States.

13 It follows from the foregoing considerations that the first submission must be rejected in substance and also as far as concerns the inadequacy of the statement of reasons on which the decision was based.

#### **Second submission**

14 The applicant's second submission criticises the decision for being based on the inapplicability in this case of the derogations referred to in [Article 107(3) TFEU] and in particular in subparagraphs (a), (b) and (c) thereof.

15 That Article provides that the following may be considered to be compatible with the common market:

- (a) 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest ...'.

16 According to the applicant it is wrong for the Commission to lay down as a general principle that aid granted by a Member State to undertakings only falls within the derogating provisions of [Article 107(3) TFEU] if the Commission can establish that the aid will contribute to the attainment of one of the objectives specified in the derogations, which under normal market conditions the recipient firms would not attain by their own actions. Aid is only permissible under [Article 107(3) TFEU] if the investment plan under consideration is in conformity with the objectives mentioned in subparagraphs (a), (b) and (c).

17 This argument cannot be upheld. On the one hand it disregards the fact that [Article 107(3) TFEU], unlike [Article 107(2) TFEU], gives the Commission a discretion by providing that the aid which it specifies 'may' be considered to be compatible with the common market. On the other hand it would result in Member States' being permitted to make payments which would improve the financial situation of the recipient undertaking although they were not necessary for the attainment of the objectives specified in [Article 107(3) TFEU].

18 It should be noted in this connexion that the disputed decision explicitly states that the Netherlands Government has not been able to give nor has the Commission found any grounds establishing that the proposed aid meets the conditions laid down to enforce derogations pursuant to [Article 107(3) TFEU].

19 The applicant maintains that the Commission was wrong to hold that the standard of living in the Bergen-op-Zoom area is not 'abnormally low' and that this area does not suffer serious 'under-employment' within the meaning of [Article 107(3)(a) TFEU]. In fact in the Bergen-op-Zoom region the under-employment rate is higher and the *per capita* income lower than the

national average in the Netherlands.

- 20 As far as concerns [Article 107(3)(b) TFEU] the applicant disputes the Commission's assertion that the system of an 'additional premium' cannot be compared to aid intended to 'remedy a serious disturbance in the economy of a Member State', and that to take any other view would allow the Netherlands in the context of an economic downturn and large-scale unemployment throughout the whole [Union] to effect to their advantage investments likely to be made in other Member States in a less favourable situation.
- 21 In the applicant's view it is impossible to answer the question whether there is a serious disturbance in the economy of a Member State and, if so, whether a specific national aid remedies that disturbance by considering, as the Commission has done, whether the investment by the undertaking to which the aid from the particular Member State relates may if necessary be effected in other Member States in a less favourable situation than that Member State.
- 22 Finally the applicant challenges the Commission's statement in the decision that an examination of the cigarette manufacturing industry in the [Union] and in the Netherlands shows that market conditions alone and without state intervention seem apt to ensure a normal development and that the disputed aid cannot therefore be considered as facilitating the development within the meaning of [Article 107(3)(c) TFEU].
- 23 The applicant takes the view that, in principle, the question whether 'without state intervention' market conditions alone are such as to ensure a normal development of production in a Member State and in the [Union] is irrelevant. The only thing that matters is to ascertain whether the aid facilitates development or not. Furthermore the statement of the reasons on which the decision is based is incomprehensible and contradictory.
- 24 These arguments put forward by the applicant cannot be upheld. It should be borne in mind that the Commission has a discretion the exercise of which involves economic and social assessments which must be made in a [Union] context.
- 25 That is the context in which the Commission has with good reason assessed the standard of living and serious under-employment in the Bergen-op-Zoom area, not with reference to the national average in the Netherlands but in relation to the [Union] level. As far as concerns the applicant's argument based on [Article 107(3)(b) TFEU] the Commission could very well take the view as it did, that the investment to be effected in this case was not 'an important project of common European interest' and that the proposed aid could not be likened to aid intended 'to remedy a serious disturbance in the economy of a Member State', since the proposed aid would have permitted the transfer to the Netherlands of an investment which could be effected in other Member States in a less favourable economic situation than that of the Netherlands where the national level of unemployment is one of the lowest in the [Union].
- 26 As far as concerns [Article 107(3)(c) TFEU] the arguments submitted by the applicant are not relevant. The compatibility with the Treaty of the aid in question must be determined in the context of the [Union] and not of a single Member State. The Commission's assessment is based for the most part on the finding that the increase in the production of cigarettes envisaged would be exported to the other Member States, in a situation where the growth of consumption has slackened and this did not permit the view that trading conditions would remain unaffected by this aid to an extent contrary to the common interest. This assessment is justified. The finding

that market conditions in the cigarette manufacturing industry seem apt, without state intervention, to ensure a normal development, and that the aid cannot therefore be regarded as 'facilitating' the development is also justified when the need for aid is assessed from the standpoint of the [Union] rather than that of a single Member State.

27 The application is therefore dismissed.

#### **Decision on costs**

28 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs; as the applicant has been unsuccessful it must be ordered to pay the costs.

#### **Operative part**

On those grounds,

the Court

hereby:

1. Dismisses the application.
2. Orders the applicant to pay the costs.