

JUDGMENT OF THE COURT
26 September 1996 *

In Case C-241/94,

French Republic, represented by Edwige Belliard, Assistant Director in the Directorate for Legal Affairs, Ministry of Foreign Affairs, and Catherine de Salins, Assistant Director in the same directorate, and Jean-Marc Belorgey, Chargé de Mission in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard du Prince Henri,

applicant,

v

Commission of the European Communities, represented by Jean-Paul Keppenne and Ben Smulders, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission decision SG(94) D/8907 of 27 June 1994 concerning aid to the company Kimberly Clark Sopalin,

* Language of the case: French.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissechet and G. Hirsch (Rapporteur), (Presidents of Chambers), G. F. Mancini, P. J. G. Kapteyn, C. Gulmann, J. L. Murray, L. Sevón and M. Wathelet, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 26 March 1996, at which the French Republic was represented by Catherine de Salins and Jean-Marc Belorgey and the Commission by Ben Smulders and by Xavier Lewis, of its Legal Service, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 7 May 1996,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 2 September 1994, the French Republic brought an action under the first paragraph of Article 173 of the EC Treaty for annulment of Commission Decision SG(94) D/8907 of 27 June 1994 (hereinafter 'the contested decision').
- 2 By the contested decision, the Commission classified as State aid within the meaning of Article 92(1) of the Treaty the financial participation of the Fonds National de l'Emploi (National Employment Fund, hereinafter 'the FNE') in the implementation of a social plan by the company Kimberly Clark Sopalin (hereinafter 'Kimberly Clark').

- 3 Kimberly Clark, whose main business is the manufacture and processing of cellulose wadding, has a manufacturing plant at Sotteville-les-Rouen, which, at the beginning of 1993, employed 465 people. As part of a restructuring operation, Kimberly Clark decided to concentrate solely on the manufacture of paper handkerchiefs, and at the same time to modernize its industrial equipment, reorganized its production system, adopted new working methods and reduced its workforce by 207.
- 4 In accordance with the French regulations on redundancy on economic grounds, Kimberly Clark drew up a social plan comprising a number of measures some of which were jointly financed by the State through the FNE. The cost of the plan was calculated as FF 109.08 million, of which FF 27.25 million — about 25% — was borne by the State.
- 5 On the basis of the information provided by the French authorities by memoranda of 28 January and 10 March 1994, the Commission adopted the contested decision. In it the Commission first noted that, as a result of the agreement concluded between the State (FNE) and Kimberly Clark, the FNE undertook to fund part of the cost of the social plan to the extent of FF 27.25 million. The Commission considered that the FNE intervention constituted State aid, since such agreements are negotiated with undertakings encountering employment problems and the FNE contribution, which is financed out of the State budget, is determined case by case by reference to the financial situation of the undertaking and the latter's own efforts. It also stated that the aid was liable to distort competition and to affect trade between Member States, thereby falling within the scope of Article 92(1) of the EC Treaty.
- 6 The Commission nevertheless declared the aid compatible with the common market since it was intended to facilitate the development of certain activities or of certain economic areas, without, in the terms of Article 92(3)(c) of the EC Treaty, adversely affecting trading conditions to an extent contrary to the common interest. In reaching that conclusion, the Commission attached importance to the reduction of capacity resulting from the restructuring of the undertaking, the fact that the laid-off workers were the main beneficiaries of the aid and the limited amount of aid granted.

- 7 In support of its application, the French Government puts forward only one plea in law, namely that the Commission erred in law. It considers that the mechanism put into effect by the FNE does not fall within the category of aid for undertakings with which Article 92 of the Treaty is concerned but constitutes a general measure for the benefit of employees intended to combat unemployment. In that regard, it contends that, in general, FNE intervention does not benefit 'certain undertakings or the production of certain goods' within the meaning of Article 92(1) of the Treaty. Moreover, Kimberly Clark did not, in its view, obtain any advantage: the FNE mechanisms do not alleviate the burdens of undertakings, since their implementation does not help them to meet their legal obligations, the beneficiaries are the employees and the intervention taken does not have the effect of improving the competitive situation of the undertakings concerned.
- 8 The French rules provide that, in the event of redundancies on economic grounds (Article L 321-1 of the Code du Travail — Labour Code), the employer must pay to the laid-off employees compensation as prescribed by law or by a collective agreement, the former constituting the minimum compensation (Article L 122-9 of the Code du Travail). Moreover, the employer must without fail grant the employees concerned 're-recruitment priority' for a period of one year (Article L 321-14) and offer them the possibility of access to a training-leave agreement (Article L 321-5) if they have two years' service, or less than that if more favourable provisions of a collective agreement apply, and if they are aged less than 57.
- 9 Over and above that minimum requirement, the French legislation provides for a social plan, which must be drawn up and implemented in undertakings with 50 or more employees where the number of redundancies envisaged is 10 or more within a single period of 30 days, as in the Kimberly Clark case. The purpose of such a plan is to avoid laying off employees or to limit the number laid off and facilitate redeployment of those employees whom it is impossible to avoid laying off, in particular those who are older and those whose social circumstances or qualifications are such that it would be particularly difficult for them to find other employment.
- 10 Every social plan is designed, as a minimum, to allow redeployment of employees who lose their jobs and for that purpose it must incorporate alternatives to training-leave agreements. However, those alternatives are not defined by statute or regulation.

11 It is apparent from the documents before the Court that a national court before which proceedings are brought may, by declaring redundancies inoperative, condemn a plan which does not ensure that genuine action for the redeployment of those who lose their jobs. The measures which the social plan may involve include FNE intervention.

12 That intervention takes place by means of agreements negotiated and signed between the undertaking and the State. Depending on their type, those agreements pursue one of three aims: short-time working as an alternative to redundancy, enhancement of the possibilities of redeployment, and retirement for older employees on better terms than those applicable to the unemployed.

13 The State's participation in the implementation of social plans derives from provisions laid down by statute and regulations which are applicable to all undertakings and varies according to the social objectives pursued by the State. FNE assistance is subject to ceilings established by the Code du Travail for each type of agreement, which apply to all undertakings.

14 The extent to which the assistance contributed may vary within the prescribed maximum limits is laid down by circulars and depends, first, on the size of the undertaking, since the costs of preventive measures and redundancy arrangements are extremely high, and, secondly, in most cases on the quality of the social plan adopted.

15 In certain cases, application of the rule requiring joint financing may be waived, in particular in the case of undertakings that are the subject of composition proceedings or are being wound up under court supervision, for which there are exemptions, and, in very exceptional cases, where the undertaking is in very serious financial difficulties.

16 The French Government contends, first, that the FNE mechanisms, which pursue a purely social objective, are applicable to all undertakings without exception. It considers that the criteria according to which the State allows or rejects conclusion of an agreement with the FNE at the request of an undertaking are objective and are limited to the circumstances laid down by the statutes and regulations concern-

ing such agreements (for example the age of the worker or his suitability for redeployment). FNE agreements are thus in no way linked with any specific kind of undertaking, production sector or region.

- 17 Regarding the limits imposed by the legislation, the French Government refers to the provisions of the Code du Travail concerning FNE intervention. The participation of undertakings and employees in the financing of the FNE special pre-retirement allowances is directly determined by regulations. Failure to observe those limits is penalized by the courts as being in contravention of the law.
- 18 As regards the limits fixed by the administration itself, the French Government states that they derive from circulars or directions that are available to the public, their purpose being to define, within the bounds of the discretion granted by the regulations, the general approach to be taken by the administration. In that context, the French Government emphasizes that the assessment made by the public authority in the case of FNE assistance certainly does not have the effect of favouring the undertaking that receives it at the expense of its competitors but is intended on the contrary to ensure that strict equality of treatment is maintained.
- 19 It must be borne in mind that Article 92(1) of the Treaty provides that 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 is incompatible with the common market.
- 20 According to settled case-law, Article 92(1) does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects (Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 13).
- 21 The social character of the FNE assistance is not therefore sufficient to exclude it outright from being categorized as aid for the purposes of Article 92 of the Treaty.

- 22 It must also be noted that FNE intervention is not limited sectorially or territorially or by reference to a restricted category of undertakings.
- 23 However, as the Commission has rightly pointed out, the FNE enjoys a degree of latitude which enables it to adjust its financial assistance having regard to a number of considerations such as, in particular, the choice of beneficiaries, the amount of the financial assistance and the conditions under which it is provided. The French Government itself concedes that the administration may depart from its own guidelines where particular circumstances justify that course of action.
- 24 In those circumstances, it must be held that, by virtue of its aim and general scheme, the system under which the FNE contributes to measures accompanying social plans is liable to place certain undertakings in a more favourable situation than others and thus to meet the conditions for classification as aid within the meaning of Article 92(1) of the Treaty.
- 25 The French Government's argument on that point cannot therefore be upheld.
- 26 The French Government maintains, secondly, that the FNE mechanisms do not mitigate the charges borne by undertakings since their implementation does not help undertakings to meet their legal obligations and calls for additional efforts on their part over and above the cost to them of strictly complying with the requirements of the ordinary law. In its view, undertakings which are required to draw up a social plan are entitled, when planning redundancies, to decline to use the FNE mechanisms. The aim of the social plan, namely redeployment, could be attained by the undertaking by its own methods, without recourse to FNE agreements. Those agreements are intended to enable undertakings to do more than the minimum necessary to discharge their legal obligations regarding social plans.
- 27 The French Government states that since FNE agreements do not constitute a legal obligation for undertakings, the charges which they must bear as a result are of an optional nature. The State does not therefore help undertakings to meet their legal obligations. The financial impact of concluding one or more FNE agreements

moreover represents for them in most cases a significant cost, particularly since, more often than not, the State is a minority contributor, in particular where large undertakings are concerned. Kimberly Clark is a good example.

- 28 If Kimberly Clark had contented itself with laying off the staff initially regarded as surplus to requirements (312 persons) and offering each employee concerned a training-leave agreement, thus meeting its general obligation under the ordinary law, the cost for Kimberly Clark would have been FF 45 million at most, the average unit cost of severance allowances under collective agreements for the staff affected by the restructuring being around FF 140 000 and Kimberly Clark's contribution to financing of the training-leave agreements being FF 4 500 (FF 45 million = $312 \times 140\,000 + 312 \times 4\,500$). In order to simulate a situation in which Kimberly Clark had prepared a social plan enabling it broadly to meet its legal requirements out of its own resources, it would be necessary to add a further FF 7 million for additional measures. The total cost of the plan would thus have been FF 52 million (45 million plus 7 million).
- 29 In contrast, the social plan put into effect by Kimberly Clark, including the FNE assistance, cost it FF 81.83 million and cost the State FF 27.25 million. The FNE assistance thus entailed a substantially higher cost for Kimberly Clark than it would have had to bear if it had introduced, using its own resources, a plan enabling it to meet its legal obligations in full.
- 30 The Commission observes that the fact that the assistance covers expenses incurred by the beneficiary by choice is not sufficient to exclude the possibility that it constitutes aid. It has consistently taken the view that assistance for certain undertakings or for the production of certain goods is to be classified as aid even if it is used to finance costs incurred voluntarily by the undertaking concerned. In any event, where the establishment of a social plan is compulsory, as in the Kimberly Clark case, it is not correct to say that the FNE assistance never covers any cost which is compulsory for the undertaking: since the latter is required to bear, in addition to compulsory expenses in the strict sense (severance payments, and so on), the additional costs of implementing the social plan (under the supervision of the court), the FNE assistance covers a variable proportion of a body of costs which are, to an indeterminate extent, compulsory; it could therefore cover compulsory costs.

- 31 As regards the contested decision, the information provided by letter from the French authorities of 28 January 1994 was not such as to rule out the possibility that part of the compulsory costs had been borne by the FNE.
- 32 That being so, the Commission considers that the 'simulation' carried out by the French Government in order to assess whether the FNE assistance for Kimberly Clark involved any advantage for that company does not add anything new. That exercise is based on hypothetical elements and does not explain why Kimberly Clark agreed, without thereby obtaining any advantage, to assistance which allegedly caused it to incur considerably greater costs than it would have done had it introduced a plan covered by its own resources that would have enabled it to meet its legal obligations in full. The simulation shows above all that if Kimberly Clark had been exempted from payment of its part of the cost of the plan — an exemption which the FNE is entitled to grant — the net benefit would have been undeniable and it would have been clear that the FNE assistance covered compulsory costs.
- 33 It must be borne in mind, as a preliminary point, that, as the Court has held, the legality of a decision concerning aid is to be assessed in the light of the information available to the Commission when the decision was adopted (Case 234/84 *Commission v Belgium* [1986] ECR 2263, paragraph 16).
- 34 It must next be observed that the concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking (Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraphs 12 and 13).
- 35 In that regard, it is important to note that, in view of the number of redundancies envisaged, Kimberly Clark was under an obligation to draw up a social plan. As is apparent from the memorandum from the French Government of 10 March 1994, the social plan adopted included, for the employees not laid off, several aspects involving FNE participation, such as short-time agreements, aid for transition to half-time working, and so on. As regards the 207 employees laid off, it is apparent from the plan that the costs relating to severance payments under collective agreements, which were paid in full by Kimberly Clark, amounted to FF 37.6 million. Kimberly Clark also undertook to increase that compensation by FF 22.44 million.

- 36 To enable it to assess the compatibility with the common market of the measures in question, the Commission, by letter of 4 February 1994, asked the French Government, among other things, what the costs of the plan would have been if it had been limited to the minimum prescribed by French legislation. The French Government replied that no minimum social plan existed for which a figure could easily be arrived at. It was only in its reply that the French Government clarified this point, stating in particular that Kimberly Clark initially intended laying off 312 members of its workforce of 465 employees and that it contented itself with laying off 207 after negotiations with the FNE resulting in the latter's subsequent involvement in the social plan.
- 37 Since the Commission was thus unable, despite making a specific request, to assess the nature and effects of the measures concerned, it was entitled to conclude that, in drawing up a social plan in collaboration with the State under which Kimberly Clark contributed FF 81.83 million and the State contributed FF 27.25 million, Kimberly Clark had received State aid within the meaning of Article 92 of the Treaty.
- 38 Consequently, the French Government's second argument must also be rejected.
- 39 The French Government claims, thirdly, that the FNE agreements, the aim of which is to limit the social repercussions of redundancy for the employees affected, are for the direct benefit of the employees and in no way improve the undertaking's competitive position.
- 40 In view of the foregoing considerations, it need merely be stated that, on the basis of the information available to it when it adopted the contested decision, the Commission was entitled to consider that, as a result of the FNE intervention, Kimberly Clark had been relieved of certain legal obligations *vis-à-vis* its employees and that, accordingly, it was put in a more favourable position than that of its competitors.

41 Since none of the French Government's arguments has been upheld, the application must be dismissed.

Costs

42 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the French Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;
2. Orders the French Republic to pay the costs.

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|--------------------|----------|---------|------------|
| Rodríguez Iglesias | Kakouris | Edward | Puissochet |
| Hirsch | Mancini | Kapteyn | Gulmann |
| Murray | Sevón | | Wathelet |

Delivered in open court in Luxembourg on 26 September 1996.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President