Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 7 February 2013 [1]

Case C-6/12

P Oy

(Request for a preliminary ruling from the Korkein hallinto-oikeus (Finland))

(State aid — Tax advantages — Existing or new aid — Relevant monitoring system and procedural rules)

1. The Court has already examined on a number of occasions whether national tax measures fall within the scope of the European Union prohibition of State aid. [2] In the current matter the Korkein hallinto-oikeus (Supreme Administrative Court), Finland, seeks guidance on whether national rules which govern whether companies can carry forward and offset losses sustained in a given tax period against profits arising in subsequent years are selective for the purposes of the State aid rules. [3]

EU legislation

Systems for monitoring aid granted by Member States

Treaty provisions

2. According to Article 3(1)(b) TFEU, the activities of the European Union include the establishment of the competition rules necessary for the functioning of the internal market. Article 107(1) TFEU states that aid granted by a Member State or through State resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States, is incompatible with the internal market. [4]

3. In order to ensure the effectiveness of that prohibition, Article 108 TFEU requires the Commission to monitor aid and the Member States to cooperate with the Commission in its task. Where the Commission considers that existing aid granted by a State or through State resources may not be compatible with the internal market, it must initiate the procedure provided for in Article 108(2)

1 — Original language: English.

2 — See, for example, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, Case C-295/97 *Piaggio* [1999] ECR I-3735 and Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* [2011] ECR I-7611.

3 — See point 3 and footnote 4 below.

4 — The conditions in Article 107(1) are cumulative and must therefore all be satisfied in order for a measure to constitute State aid (see Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 84 and the case-law cited). Whether a State measure favours certain undertakings or the production of certain goods (that is to say, whether it is selective) is determined by comparison with others which, in the light of the objective pursued by the system in question, are in a comparable legal and factual situation (see *Belgium and Forum 187* v *Commission*, paragraph 119 and the case-law cited). Where the grounds for justification in Article 107 (2) or (3) apply, such measures are considered to be compatible with the internal market and are not, therefore, prohibited State aid: see *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited in footnote 2 above, paragraph 30.

TFEU. Where Member States plan to grant new aid or alter existing aid, they are obliged to notify the Commission under Article 108(3). Following such notification, the Commission starts the procedure provided for in Article 108(2) TFEU. The last sentence of Article 108(3) unequivocally prohibits the Member States from putting any proposed measure into effect until the procedure under Article 108(2) has been completed and the Commission has adopted a decision.[5]

Regulation No 659/99

4. Regulation No 659/99[6] codifies and clarifies the procedural rules that apply to State aid. Article 1(a) of that regulation defines 'aid' as 'any measure fulfilling all the criteria laid down in [Article 107(1) TFEU – formerly Article 92(1) EC]'. Article 1(b) sets out a number of categories of 'existing aid', including:

'(i) without prejudice to Articles 144 … of the Act of Accession of Austria, Finland and Sweden, [7] all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

…

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

…'

5. 'New aid' is defined in Article 1(c) as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

6. The procedure concerning new aid is set out in Articles 2 and 3 of Regulation No 659/99. Article 2 requires Member States to notify the Commission of any plans to introduce new aid. Article 3 states that such aid is not to be put into effect before the Commission takes (or is deemed to take) a decision authorising it ('the standstill obligation'). Such a decision (taken under Article 7 of Regulation No 659/99) is preceded by a request for information (Article 5) and a formal investigation procedure (Article 6).

7. The procedure that applies to existing aid schemes is set out in Articles 17 to 19 of Regulation No 659/99 and differs in important respects from that applicable to new aid. There is no requirement for prior notification and no standstill obligation. Instead, the initiative for supervision of such aid lies entirely with the Commission, which is required, in cooperation with the Member States, to keep existing aid under constant review.[8] Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the internal market, it must inform the Member State concerned and give it an opportunity to reply.[9] Should the Commission conclude, in the light of the information submitted by that Member State, that an existing aid scheme is incompatible with the internal market,

5 — See *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited in footnote 2 above, paragraph 24. See also point 6 below.

6 — Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), as it stood prior to amendment in 2003 to take account of the 2004 accessions; see in particular, recital 2.

7 — See points 8 and 9 below.

8 — Article 17(1) of Regulation No 659/99 read in conjunction with Article 107(1) TFEU.

9 — Article 17(2) of Regulation No 659/99.

it must then issue a recommendation proposing appropriate measures. Such measures may include, inter alia, the abolition of the aid scheme in question.[10] If the Member State does not accept the measures proposed, only then must the Commission initiate proceedings under Article 108(2) TFEU, applying the detailed procedure set out in Articles 6 and 7 of Regulation No 659/99, *mutatis mutandis*.[11]

The 1994 Act of Accession

8. Finland acceded to the European Union on 1 January 1995.[12] Aid schemes that were put into effect prior to Finland's accession and which continue to apply after entry therefore constitute existing State aid.[13]

9. Article 144 of the Act of Accession forms part of Title VI concerning agricultural products. It states that, in relation to such products, only aid communicated to the Commission by 30 April 1995 will be deemed to be existing aid for the purposes of the Treaty.[14] It has no relevance for non-agricultural aid schemes.

National legal framework

10. Under Paragraph 117 of the Finnish Tuloverolaki (Law on income tax, the 'TVL'), losses in a given tax period may be carried forward to later tax years. Subparagraph 1 of Paragraph 119 of the TVL provides more specifically that losses incurred from business activity during the course of a tax year may be carried forward and offset against income arising from that activity over the following 10 years if a profit arises.

11. Under the first subparagraph of Paragraph 122 of the TVL, losses sustained by a company are not deductible if during the year in which they arise or thereafter more than half of the company's capital has changed ownership.[15]

12. The third subparagraph of Paragraph 122 of the TVL contains an exception to the rule laid down in the first subparagraph of that provision. Following an application, the competent tax office may in special circumstances, when it is necessary in order for a company to continue its activities, authorise the offsetting of losses carried forward despite a change of ownership.

13. In order to clarify the application of the third subparagraph of Paragraph 122 of the TVL, the Finnish authorities issued a guidance letter[16] and a circular.[17] According to the guidance letter, the purpose of Paragraph 122 is to prevent tax avoidance whereby loss-making companies are purchased solely for the purpose of offsetting their losses against the purchaser's taxable profits.

10 — Article 18 of Regulation No 659/99.

11 — Article 19(2) of Regulation No 659/99 read in conjunction with Article 4(4) of that regulation.

12 — The Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments of the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21). Norway did not in fact accede following the result of a referendum in 1994.

13 — See the Act of Accession read in conjunction with Article 1(b)(i) of Regulation No 659/99.

14 — See point 30 and footnote 24 below.

15 — My understanding is that the legislation has been in force since 1979. It has been amended, but the substance of the provisions remains unchanged.

16 — Tax Directorate letter No 634/348/96 of 14 February 1996 ('the guidance letter').

17 — Tax Directorate circular No 2/1999 of 17 February 1999 ('the circular').

14. The guidance letter and the circular explain that a number of situations, such as the transfer of a company within a family from one generation to another or the sale of a company to its workers, might constitute 'special circumstances' for the purposes of granting authorisation to offset losses carried forward, by way of exception to the rule in the first subparagraph of Paragraph 122 of the TVL. [18]

Facts, procedure and questions referred

15. P Oy was established in 1998. The company develops and maintains a system for paying parking fees using mobile phones. Its business is based on the products it has developed and patented. By the end of 2004 its trading losses were in excess of EUR 4 million. Apparently the initial set-up losses are not considered to be unusual in that sector, because they resulted from the initial investment made to develop the products and technology necessary for P Oy's business activities. During the course of 2004 the ownership of P Oy changed. The company continued to trade after the change of ownership. Its business developed and its turnover grew from EUR 498 339 to EUR 866 810 over the period from 2005 to 2007.

16. By an application to the Finnish tax authorities dated 3 September 2008, P Oy sought authorisation to carry forward and offset the losses that had arisen in earlier tax periods. The tax authorities rejected that application by decision of 24 October 2008.

17. P Oy challenged that decision before the Helsingin hallinto-oikeus (Administrative Tribunal, Helsinki), which dismissed the application. P Oy has therefore appealed to the Korkein hallinto-oikeus, the referring court, which asks:

'(1) In the context of an authorisation procedure, such as that in the third subparagraph of Paragraph 122 of [the TVL], must the criterion of selectivity in Article 107(1) TFEU be interpreted as precluding the authorisation of the deduction of losses in the case of changes of ownership if the procedure referred to in the last sentence of Article 108(3) TFEU is not observed?

(2) In the interpretation of the criterion of selectivity, in particular in order to determine the reference group, is it necessary to take into account the general rule on the deductibility of established losses in Paragraphs 117 and 119 of [the TVL] or the provisions concerning changes of ownership?

(3) If the criterion of selectivity in Article 107 TFEU is a priori regarded as being fulfilled, may the system resulting from Paragraph 122(3) of [the TVL] be regarded as justified by the fact that it is a mechanism inherent in the tax system itself which is necessary for example in order to prevent tax evasion?

(4) When assessing possible justification and whether the system is a mechanism inherent in the tax system, what importance must be given to the extent of the discretion of the tax authorities? Is it necessary, as regards the mechanism inherent in the tax system itself, that the body applying the law has no discretion and that the conditions for the application of the derogation are set out precisely in the legislation?'

18 — In this Opinion, I refer to the third subparagraph of Paragraph 122 of the TVL, the guidance letter and the circular as 'the measures at issue'. Both P Oy and the Finnish Government have also referred to a decision of the national courts in case KHO 2010:21. In that case the Korkein hallinto-oikeus held that a continuation of business activities after a change of ownership constituted 'special circumstances' for the purposes of the measures at issue.

18. Written observations have been submitted by P Oy, Finland, Germany and the European Commission, all of whom made oral submissions at the hearing on 22 November 2012.

Assessment

Preliminary observations

19. This is a curious case. State aid litigation usually arises either because the recipient of a benefit does not wish it to be prohibited or because two companies are in competition and only one has received the disputed benefit. Here, if the measures at issue are classified as prohibited State aid, that will not benefit P Oy. Rather, the company would be denied the very tax advantage that it is seeking. It would not be able to obtain authorisation to carry forward and offset losses sustained in 2004 against profits arising in later years.

20. How does it then come about that the present reference is before the Court?

21. So far as I can ascertain from the order for reference, the national court has proceeded on the assumption that (i) the measures at issue are 'aid'; (ii) because not all companies are allowed to carry forward losses and offset them against future profits, the system applied may be 'selective' and hence unlawful (because it 'favour[s] certain undertakings or the production of certain goods'); (iii) the measures at issue have not been notified to the Commission and (iv) Finland has not observed the standstill obligation inasmuch as the measures at issue are in force without having received prior authorisation from the Commission. The national court then asks a series of detailed questions aimed at elucidating, *against that background*:

— whether the authorisation procedure in the third subparagraph of Paragraph 122 of the TVL is lawful notwithstanding the failure to respect the standstill obligation (question 1);

— how the reference group for determining whether the system established by the measures at issue is unlawfully selective is to be determined (question 2);

— whether, if the system is selective, it is nevertheless justified as a mechanism inherent in the tax system itself which is necessary to prevent tax evasion (question 3); but, if so,

— whether the discretion enjoyed by the tax authorities affects the question of justification explored in the third question (question 4).

22. As will be apparent from the legislative provisions to which I have referred at the start of this Opinion, the arrangements for monitoring existing aid and new aid differ significantly.[19] Before analysing whether the third subparagraph of Paragraph 122 of the TVL, read in conjunction with the guidance letter and the circular, in fact create a system that unlawfully and selectively favours certain undertakings ('the selectivity issue'), the prior question arises as to whether we are looking at (presumed) existing aid or (presumed) new aid.

19 — See for example, Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117, paragraph 14, Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 10, and *Piaggio*, cited in footnote 2 above, paragraphs 48 and 49. See also points 3 to 7 above.

23. That prior question goes to the heart of the issue before the national court and before this Court. The powers and responsibilities conferred upon the Commission, the Member States and the national courts are different, depending on whether what is under examination is (presumed) existing aid or (presumed) new aid. [20]

24. So far as existing aid is concerned, it is settled law that the Commission's role under Article 108(1) TFEU is to make a finding (subject to review by the Court) as to whether existing aid is compatible or incompatible with the internal market, after applying the appropriate procedure which it is the Commission's responsibility to set in motion. [21] Unless and until the Commission has taken such action, there is no presumption that national measures are unlawful under the EU's State aid rules or that a national court must intervene to disapply them.

25. A different procedure applies to new aid. Article 108(3) provides that the Commission is to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. The Commission then makes an initial examination of the planned new aid. If the Commission considers, on that basis, that what is proposed is incompatible with the internal market having regard to Article 107(1), it must then start the contentious review procedure laid down in Article 108(2) TFEU. National courts' involvement stems from the direct effect of the last sentence of Article 108(3) TFEU, which prohibits the Member State concerned, in the case of plans to grant or alter aid, from putting the proposed measures into effect before the review procedure has resulted in a final Commission decision. That standstill obligation applies to new aid – but not to existing aid.

26. Both the Treaty and the detailed arrangements set in place by Regulation No 659/99 make provision for a careful, detailed and extensive examination by the Commission of any existing or proposed scheme that may fall to be considered to be State aid. The basic prohibition of State aid in Article 107(1) TFEU is neither absolute nor unconditional, as Article 107(2) and (3) TFEU immediately make clear. Thus, Article 108(3) TFEU confers on the Commission a wide discretion to declare certain aid compatible with the internal market by way of derogation from the general prohibition laid down in Article 107(1) TFEU. The Member State concerned is likewise afforded ample opportunity to explain and defend its arrangements. It is only in the case of unnotified new aid that has simply been put into effect (that is, where the Member State has failed to respect the standstill obligation for new aid) that the national court is required to step in to disapply existing national rules.

Are the measures at issue existing aid or new aid?

27. The national court itself has not expressly indicated whether it considers the measures at issue to be (presumed) existing aid or (presumed) new aid. It explains that those measures were in force prior to Finland's accession to the European Union, but that they were not notified as existing aid at that time. The national court states that it has no information as to whether the Finnish authorities have made a subsequent notification.

28. Finland explained both in its written observations and subsequently at the hearing that it did not notify the measures at issue as aid upon its accession because it did not (and still does not) consider them to constitute State aid. [22]

20 — The system for monitoring State aids established by the Treaty and the respective roles of the Commission and the national courts in applying that system are explained in detail in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited in footnote 2 above, paragraphs 21 to 32. See also, as regards new aid, Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* [1991] ECR I-5505, paragraphs 8 to 14.

21 — *Namur-Les Assurances du Crédit*, cited in footnote 19 above, paragraph 15.

22 — See points 8 and 9 and footnote 13, above.

29. Whether aid is to be classified as new aid or as alteration of existing aid must be determined by reference to the provisions providing for it.[23] At the hearing, it was clear from the submissions made in reply to questions put by the Court under Article 54a of the Rules of Procedure that it is common ground that the third subparagraph of Paragraph 122 of the TVL was in force before Finland joined the (then) European Communities and became bound by the EC Treaty. Accordingly, those presenting observations before the Court were in agreement that it should be considered as (presumed) existing aid.

30. I can only agree with that analysis. Since the third subparagraph of Paragraph 122 of the TVL predates Finland's accession, it can only (*if* it constitutes aid at all) fall to be classified as existing aid. That is the clear sense of Article 1(b)(i) of Regulation No 659/99.[24]

31. Even where national measures do not constitute State aid at the time that they are introduced, but subsequently become State aid (due to the evolution of the common market), Article 1(b)(v) of Regulation No 659/99 provides that such measures are still deemed to constitute existing aid.[25] Thus, if the measures at issue were not notified because at the time of Finland's accession they were not considered to be State aid, any change (for example, the evolution of the Court's case-law in this area) that might mean that those measures are now, or perhaps may now be, State aid would not alter their legal classification as (presumed) *existing* aid.

32. I conclude that the measures at issue are to be classified as (presumed) existing aid. Therefore, it is the monitoring system and procedures relevant to *existing aid* that apply to them.

The consequences of classification as existing aid

33. The first question referred by the national court essentially asks whether, given that the standstill obligation in Article 108(3) TFEU was not observed, the measures at issue are precluded by the prohibition on selectivity in Article 107(1) TFEU.

34. As I have already explained,[26] the standstill obligation applies to new aid but not to existing aid. If and to the extent that the measures at issue *are* State aid – as to which I express no view – they are existing aid.

35. The answer to the first question should therefore be that, in so far as the measures at issue constitute State aid, they should be classified as presumed existing aid for the purposes of Article 108(1) TFEU. As such, they can be interpreted and applied by the national court as long as the Commission has not adopted a decision under Article 13 of Regulation No 659/1999.

36. What should be the Court's approach to answering questions 2, 3 and 4 (which are all concerned with the proper interpretation of the prohibition on selectivity)?

37. In their written observations, all concerned devoted the greater part of their submissions to the selectivity issue.

23 — *Namur-Les Assurances du Crédit*, cited in footnote 19 above, paragraphs 13 and 28, and Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 19.

24 — Article 1(b)(i) cross-refers to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden. Put shortly: there was a specific obligation to notify aid concerning agricultural products under Article 144. Since P Oy does not produce such products, those provisions are irrelevant to the outcome of the present case.

25 — Case C-89/08 P *Commission* v *Ireland and Others* [2009] ECR I-11245, paragraphs 70 and 71.

26 — See points 6 and 25 above.

38. The Commission considers that the measures at issue are selective. The Finnish and German Governments disagree and contend that there is no State aid. P Oy contends that the measures at issue should be interpreted by the national court in a manner that ensures that they are not applied selectively. It submits that if such an approach is followed, no issue of illegal aid arises (and it would then be afforded the benefit of being able to carry forward and offset its losses).

39. Were we (quod non) dealing here with *non-notified new aid*, it would indeed be for the national court to enforce the directly effective standstill obligation in Article 108(3) TFEU.[27] Only the Commission can rule on whether aid is incompatible with the internal market, but national courts can none the less apply the concept of aid in Article 107(1) TFEU in order to determine whether contested national measures should have been subject to the standstill obligation. In that context national courts may have to decide whether a particular national measure is selective;[28] and they may legitimately refer questions to the Court concerning the correct interpretation of the concept of State aid.[29]

40. However, the procedural rules and the system for monitoring non-notified new aid cannot apply to existing aid. More particularly, national courts do not have the same role to play, because existing aid is subject to the Commission's exclusive competence under Article 108(1) TFEU. Therefore, in so far as the measures at issue here are (presumed) *existing aid*, there is no basis under Article 108(3) TFEU for the national court to make any determination on the selectivity issue, or to seek guidance from this Court as to how to interpret the Treaty rules on selective aid.

41. Finland, Germany and the Commission are in agreement that it follows that there is no need for the Court to answer questions 2, 3 and 4 posed by the national court.

42. I too agree with that view, for the following reasons.

43. First, the function entrusted to the Court in the context of the preliminary reference procedure (as well, of course, as ensuring the uniform interpretation and application of EU law),[30] is to contribute to the administration of justice in the Member States; it is not to give opinions on general or hypothetical questions.[31]

44. It follows from the classification of the measures at issue as presumed existing aid that such aid may be implemented as long as the Commission has not found it to be incompatible with the internal market.[32] The national court is therefore free to interpret and apply the national measures and to decide whether P Oy should or should not be granted authorisation to benefit from the tax advantage. Any view expressed by this Court on the selectivity issue would not be binding in the national proceedings and would be hypothetical in nature.

45. Second, the present matter is distinguishable from cases such as *Paint Graphos and Others*,[33] which concerned presumed new aid. There, the ruling of this Court had direct implications for the dispute in the national proceedings: the contested measures could not be applied if they were categorised as aid and accordingly subject to the directly effective standstill provisions.[34] The position is, however, quite different in respect of the existing aid at issue in the present case.

27 — *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited in footnote 2 above, paragraphs 26 and 27.

28 — Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraphs 50 to 52.

29 — Case C-140/09 *Fallimento Traghetti del Mediterraneo* [2010] ECR I-5243, paragraph 24 and the case-law cited.

30 — See Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 27, concerning the Court's jurisdiction under Article 267 TFEU in relation to the uniform interpretation of EU law and Case C-458/06 *Gourmet Classic* [2008] ECR I-4207, paragraph 20 and the case-law cited.

31 — Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 32 and the case-law cited.

32 — *Banco Exterior de España*, cited in footnote 23 above, paragraph 20.

33 — See amongst many examples *Piaggio* and *Paint Graphos*, both cited in footnote 2.

34 — See for example *Piaggio*, cited in footnote 2 above, paragraphs 48 and 49.

46. Third, the national court has made reference to a Commission decision [35] concerning certain German tax measures considered to be incompatible with the State aid rules. [36] Unlike the present matter, that case concerns non-notified new aid (the legislation in question was adopted in July 2009 with retroactive effect to 1 January 2008).

47. Fourth, given that the standstill period under Article 108(3) TFEU is irrelevant to the present proceedings, that the question whether P Oy is able to carry forward and offset the losses at issue involves the interpretation and application of national law, rather than EU law. Both P Oy and the Finnish Government refer to a national judgment, in which the term 'special circumstances' in the third subparagraph of Paragraph 122 of the TVL was examined. [37] They explain that, if that decision were applied to the present matter, P Oy might be afforded the benefit of the tax advantage. That is entirely a matter of national law which is for the national court to determine.

48. Finally, I observe that the Court has relatively little detailed material before it about the measures at issue, the margin of discretion afforded to the tax authorities in granting or refusing authorisation under the third subparagraph of Paragraph 122 of the TVL or, indeed, the surrounding policy considerations. This is in stark contrast to the very detailed examination that would be conducted by the Commission were it to take action under Article 108(2) TFEU and Articles 17 to 19 of Regulation No 659/1999, if necessary applying Articles 6, 7 and 9 thereof mutatis mutandis. Such a procedure, if initiated, is one that respects fully the Member State's right to explain and defend its arrangements. In such circumstances, it seems to me that it would be inappropriate for the Court to enter into an analysis here of the selectivity issue.

49. For those reasons, I consider that the Court should not answer questions 2, 3 and 4 referred by the national court.

Conclusion

50. I am therefore of the opinion that the Court should answer the Korkein hallinto-oikeus to the following effect:

In so far as the measures at issue constitute State aid, they should be classified as presumed existing aid for the purposes of Article 108(1) TFEU. As such, they can be interpreted and applied by the national court as long as the Commission has not adopted a decision and instituted the contentious procedure laid down in Article 108(2) TFEU.

35 — Commission Decision of 26 January 2011 on State aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany – Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (*Sanierungsklausel*) (OJ 2011 L 235, p. 26). That decision is currently being challenged before the General Court in a number of cases: see Case T-205/11.

36 — Like the national measures at issue in the present case, the German legislation makes provision for the carrying forward of losses which may be offset against taxable profits. It allows ailing companies to benefit from that system despite a change of ownership of the undertaking in question.

37 — See point 14 and footnote 18 above.