



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

17 September 2014*

(Reference for a preliminary ruling — Competition — State aid — Article 107(1) TFEU — Definition of ‘aid’ — Guarantees provided by a public undertaking to a bank to facilitate lending to third party creditors — Guarantees deliberately provided by the director of that public undertaking in disregard of that undertaking’s statutes — Presumption of opposition by the public body that owns that undertaking — Whether the guarantees may be imputed to the State)

In Case C-242/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 26 April 2013, received at the Court on 29 April 2013, in the proceedings

Commerz Nederland NV

v

Havenbedrijf Rotterdam NV,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot and A. Arabadjiev (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 13 March 2014,

after considering the observations submitted on behalf of:

- Commerz Nederland NV, by R. Wesseling, advocaat,
- Havenbedrijf Rotterdam NV, by E. Pijnacker Hordijk and A. Kleinhout, advocaten,
- the Netherlands Government, by M. Noort and M. Bulterman, acting as Agents,
- the European Commission, by P.-J. Loewenthal and S. Noë, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2014,

* Language of the case: Dutch.

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 107(1) TFEU.
- 2 The request has been made in proceedings between Commerz Nederland NV ('Commerz Nederland') and Havenbedrijf Rotterdam NV ('Havenbedrijf Rotterdam'), a port authority wholly owned by the municipality of Rotterdam (the Netherlands), concerning, in particular, the validity of guarantees provided on behalf of Havenbedrijf Rotterdam and in disregard of that undertaking's statutes by that undertaking's sole director to Commerz Nederland, to enable the latter to make credit facilities available to third party borrowers.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 3 By contract dated 5 November 2003, Commerz Nederland made a credit facility of EUR 25 million, intended to finance the manufacture of an armoured vehicle, available to RDM Vehicles BV ('RDM Vehicles'). On the same day, the director of Gemeentelijk Havenbedrijf Rotterdam ('GHR'), a port authority which is a service department of the municipality of Rotterdam, provided a guarantee whereby GHR agreed to act as guarantor for the discharge of RDM Vehicles's liabilities to Commerz Nederland arising from the credit so provided.
- 4 On 1 January 2004, the port authority was incorporated into Havenbedrijf Rotterdam, of which the municipality of Rotterdam was, at the material time, the sole member.
- 5 On 4 June 2004, the former director of GHR and the sole director of Havenbedrijf Rotterdam provided, on behalf of the latter, a guarantee in favour of Commerz Nederland in respect of the credit provided to RDM Vehicles. In exchange for that guarantee, Commerz Nederland waived its rights under the guarantee provided by GHR.
- 6 Commerz Nederland was provided with 'legal opinions', dated 10 November 2003 and 4 June 2004, by a law firm, according to which the guarantees provided by GHR and Havenbedrijf Rotterdam, in respect of the credit provided to RDM Vehicles, constituted 'valid, binding and enforceable obligations' as regards the guarantor.
- 7 By agreements of 27 February 2004, Commerz Nederland made available to RDM Finance I B.V. ('RDM Finance I') and RDM Finance II B.V. ('RDM Finance II') credit facilities of EUR 7.2 million and EUR 6.4 million, respectively, intended to finance military material ordered from RDM Technology BV.
- 8 On 2 March 2004, the director of Havenbedrijf Rotterdam provided guarantees whereby that undertaking stood guarantor, vis-à-vis Commerz Nederland, for the liabilities of RDM Finance I and RDM Finance II arising from the credit provided to the two latter companies.
- 9 On 3 March 2004, the law firm referred to in paragraph 6 above provided Commerz Nederland with a 'legal opinion' similar to those referred to in paragraph 6 above.
- 10 By letters of 29 April 2004, Commerz Nederland cancelled the credit provided to RDM Finance I and RDM Finance II and demanded repayment of the amounts outstanding. No payment having been made, Commerz Nederland requested Havenbedrijf Rotterdam, under the guarantee provided in respect of the credit, to pay the sums of EUR 4 869 and EUR 14 538.24 respectively, and also the amount of the ancillary claims. Havenbedrijf Rotterdam did not respond favourably to that request.

- 11 By letter of 20 August 2004, Commerz Nederland cancelled the credit provided to RDM Vehicles and demanded repayment of the amount outstanding. No payment having been made, Commerz Nederland requested Havenbedrijf Rotterdam, under the guarantee provided in respect of the credit, to pay EUR 19 843 541.80, and also the amount of the ancillary claims. Havenbedrijf Rotterdam did not accede to that request either.
- 12 On 20 December 2004, Commerz Nederland brought an action against Havenbedrijf Rotterdam before the Rechtbank Rotterdam (District Court, Rotterdam), in which it demanded payment of the amount due in respect of the guarantee provided by Havenbedrijf Rotterdam to facilitate the provision of credit to RDM Vehicles. By judgment of 24 January 2007, the Rechtbank Rotterdam dismissed that action, on the grounds that that guarantee constituted aid, within the meaning of Article 107(1) TFEU, that ought to have been notified to the European Commission in accordance with Article 108(3) TFEU and that, consequently, that guarantee was void, pursuant to Article 3:40(2) of the Netherlands Civil Code.
- 13 Commerz Nederland brought an appeal against that judgment before the Gerechtshof 's-Gravenhage (Regional Court of Appeal, the Hague) and supplemented the form of order sought, by requesting, in addition, that Havenbedrijf Rotterdam should be ordered to pay the amounts due in respect of the guarantees it had provided in order to facilitate the provision of credit to RDM Finance I and RDM Finance II. By judgment of 1 February 2011, that court upheld the judgment of the Rechtbank Rotterdam and dismissed the claims of Commerz Nederland, as amended on appeal.
- 14 In particular, the Gerechtshof 's-Gravenhage considered that examination of the facts, in the light of the criteria set out in the judgment of *France v Commission* (C-482/99, EU:C:2002:294), led to the conclusion that the provision of the guarantees at issue in the main proceedings had to be imputed to the Netherlands public authorities.
- 15 In that regard, the Gerechtshof 's-Gravenhage relied on the facts that the municipality of Rotterdam owns all the shares in Havenbedrijf Rotterdam, that the members of that undertaking's management and supervisory board are nominated by the general meeting of shareholders and thus by the municipality, that the municipal councillor in charge of the port chairs the supervisory board, that, according to Havenbedrijf Rotterdam's statutes, the approval of the supervisory board is required for the provision of guarantees such as those at issue in the main proceedings and that the object assigned to Havenbedrijf Rotterdam by its statutes is not comparable to that of a purely commercial undertaking, in view of the prominent place given to the public interest.
- 16 The Gerechtshof 's-Gravenhage concluded from this that the municipality of Rotterdam exerts, on the facts, a strong influence on Havenbedrijf Rotterdam and that, therefore, the factual context of the case in the main proceedings may be distinguished from that of the case giving rise to the judgment in *France v Commission* (EU:C:2002:294). That conclusion is not altered by the fact that the director of Havenbedrijf Rotterdam acted arbitrarily, by deliberately keeping the provision of the guarantees secret and by failing to seek the approval of the supervisory board of that undertaking.
- 17 Moreover, the Gerechtshof 's-Gravenhage rejected Commerz Nederland's argument that the guarantees in question conferred no advantage on RDM Financial Vehicles I or RDM Finance I or on RDM Finance II either, for they were provided pursuant to a contract between RDM Holding NV and GHR from 28 December 2002, by which RDM Holding NV had undertaken not to supply any submarine technology to Taiwan and GHR in return gave guarantees to the creditors of the RDM group of companies for a minimum sum of EUR 100 million ('the submarines agreement'). This previous commitment would not prevent those guarantees being 'advantages' for the purposes of Article 107(1) TFEU.

- 18 Commerz Nederland asks the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) to set aside the judgment of the Gerechtshof 's-Gravenhage. It argues, in particular, that the circumstances taken into consideration by the Gerechtshof 's-Gravenhage are not good grounds for its conclusion that the municipality of Rotterdam has been involved in the provision of the guarantees at issue in the main proceedings. Commerz Nederland also states that, if the municipality of Rotterdam had been informed, it would not have accepted these guarantees, that the director concerned had to resign from his position within the Havenbedrijf Rotterdam and that he was convicted of criminal offences for his actions in relation to this case. Finally, Commerz Nederland disputes the assessment by the appeal court in relation to the effects of the submarines agreement on the classification of the guarantees at issue in the main proceedings as 'advantages'.
- 19 In that regard, the Hoge Raad der Nederlanden considers that the Gerechtshof 's-Gravenhage correctly held that the provision of a guarantee is an independent legal act even if it is done in order to perform a contractual obligation. This is particularly so because the submarine agreement stipulates neither the companies for which the guarantees were to be provided nor the amounts to be covered.
- 20 As to whether those guarantees may be imputed to the State, the referring court considers that the judgment in *France v Commission* (EU:C:2002:294) can be interpreted to the effect that such imputability depends on whether it may be inferred from a body of evidence that the public authority must be regarded as involved in the adoption of the measure concerned, it being understood that that involvement should be real and based in fact. In the present case, that interpretation would mean that the provision of those guarantees could not be imputed to the municipality of Rotterdam.
- 21 However, the judgment in *France v Commission* (EU:C:2002:294) could also be interpreted to the effect that it is sufficient, in order for it to be held that the public authority is involved in the measure concerned, that it may be inferred from a body of evidence that that public authority determines in general the decision-making process within the public undertaking when measures such as those concerned in the main proceedings are adopted or in fact exerts a strong, dominant influence thereon. The fact that, in the circumstances, the measure concerned was not brought to the notice of the public authorities by the director of the public undertaking and that the statutes were deliberately disregarded, with the result that the guarantees were provided against the will of the supervisory bodies and of the municipality of Rotterdam and of the State, would therefore not necessarily preclude the imputability of the measures to the public authorities.
- 22 In those circumstances, the Hoge Raad der Nederlanden has decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) Is the imputability — required for the purposes of classification as State aid within the meaning of Articles 107 [TFEU] and 108 TFEU — to the public authorities of a guarantee provided by a public undertaking necessarily precluded in a situation in which that guarantee, as in the present case, was provided by the (sole) director of the public undertaking who, while admittedly having the power to do so under civil law, acted arbitrarily, deliberately kept the provision of the guarantee secret and disregarded the statutes of the public undertaking by failing to seek the approval of the supervisory board, and in which, furthermore, it must be assumed that the public body concerned (in the present case, the municipality of Rotterdam) did not wish the guarantee to be provided?
- (2) If the circumstances described do not necessarily preclude imputability to the public authorities, are those circumstances then irrelevant for the purpose of answering the question whether the provision of the guarantee may be imputed to the public authorities, or must the court consider the matter in the light of the other factors arguing for or against imputability to the public authorities?'

The application for reopening of the oral procedure

- 23 The oral procedure was closed on 8 May 2014 after the Advocate General had delivered his Opinion.
- 24 By letter of 5 July 2014, received at the Court the same day, Commerz Nederland asked the Court to order the reopening of the oral procedure.
- 25 In support of that application, it is claimed that the Advocate General's Opinion, first, sets out an inadequate account of the facts and, subsequently, does not shed sufficient light on the consequences of one of the alternative interpretations proposed by the referring court and, lastly, is grounded on legal considerations on which the parties to the proceedings could not have adequately exchanged views.
- 26 In that regard, it should be observed that the Court may at any moment, having heard the Advocate General, order the reopening of the oral procedure under Article 83 of its Rules of Procedure if, inter alia, it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties or the parties concerned referred to in Article 23 of the Statute of the Court of Justice of the European Union (judgment in *United Kingdom v Council*, C-431/11, EU:C:2013:589, paragraph 27 and the case-law cited).
- 27 In the present case, the Court, having heard the Advocate General, takes the view that it has all the information necessary to answer the questions referred and that that information has been the subject of debate before it.
- 28 Consequently, Commerz Nederland's application to reopen the oral procedure must be rejected.

Consideration of the questions referred

- 29 By its questions, which it is appropriate to examine together, the referring court asks in essence whether, on a proper construction of Article 107(1) TFEU, for the purposes of determining whether or not the guarantees provided by a public undertaking are imputable to the public authority controlling that undertaking, the following circumstances are relevant: first, that the sole director of the undertaking providing those guarantees acted improperly, deliberately kept the provision of those guarantees secret and disregarded that undertaking's statutes and, second, that that public authority would have opposed the provision of the guarantees, had it been informed of it. The referring court also asks whether those circumstances exclude such imputability, in a situation such as that at issue in the main proceedings.
- 30 As a preliminary point, it is common ground that, in the case in the main proceedings, the provision by Havenbedrijf Rotterdam of guarantees covering the credit provided to RDM Vehicles, RDM Finance I and RDM Finance II involves the commitment of State resources, within the meaning of Article 107(1) TFEU, given that those guarantees carry a sufficiently real economic risk capable of resulting in costs for Havenbedrijf Rotterdam and that the latter was wholly owned, at the material time, by the municipality of Rotterdam.
- 31 As regards imputability to the State, for the purposes of Article 107(1) TFEU, of the provision of those guarantees, it should be noted that that may not be inferred from the mere fact that they have been provided by a public undertaking controlled by the State. Even if the State is in a position to control a public undertaking and to exercise a decisive influence over its operations, actual exercise of that control in a particular case cannot be automatically presumed. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures (see, to that effect, judgment in *France v Commission*, EU:C:2002:294, paragraphs 50 to 52).

- 32 On that point, it cannot be demanded that it should be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures concerned. The imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken (judgment in *France v Commission*, EU:C:2002:294, paragraphs 53 and 55).
- 33 Specifically, any indication, in the particular case, either, on the one hand, of the involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains, or, on the other hand, the absence of those authorities' involvement in the adoption of that measure is relevant (judgment in *France v Commission*, EU:C:2002:294, paragraphs 56 and 57).
- 34 In the light of that case-law, it is for the referring court to determine whether, in the present case, imputability to the State of guarantees provided by Havenbedrijf Rotterdam may be inferred from the body of evidence arising from the circumstances of the case in the main proceedings and the context in which they were provided. To that end, it is necessary to determine whether that evidence demonstrates, in the circumstances, that the public authorities were involved or that it was unlikely that they were not involved in the provision of those guarantees.
- 35 In that regard, as Havenbedrijf Rotterdam and the Commission, in particular, have submitted, and as the Advocate General observes in points 78 and 79 of his Opinion, the existence, in the present case, of organisational links between Havenbedrijf Rotterdam and the municipality of Rotterdam, as described in paragraph 15 above, tend to demonstrate, in principle, that the public authorities were involved or that it was unlikely that they were not involved in the provision of such guarantees.
- 36 In addition, it is to be considered that the fact that the sole director of the public undertaking acted improperly does not, of itself, exclude such involvement. Indeed, as observed by the referring court itself and by the Advocate General, in paragraphs 90 and 91 of his Opinion, the effectiveness of the rules on state aid would be considerably weakened if their application could be excluded, merely because a director of a public undertaking disregarded that undertaking's statutes.
- 37 Nevertheless, in the present case, the referring court points out that the sole director not only acted improperly and disregarded that undertaking's statutes, but also deliberately kept the provision of the guarantees at issue in the main proceedings secret, because, in particular, of the fact that there are grounds for presuming that the public authority concerned, namely, the municipality of Rotterdam, would have opposed the provision of those guarantees, had it been informed of it. According to the referring court, those facts tend to show that those guarantees were provided without the involvement of the municipality of Rotterdam.
- 38 It is for the referring court to examine whether, in the light of all the relevant evidence, those factors are such as either to establish or exclude the involvement of the municipality of Rotterdam in the provision of those guarantees.
- 39 In the light of the foregoing, the answer to the questions referred is that, on a proper construction of Article 107(1) TFEU, for the purposes of determining whether or not the guarantees provided by a public undertaking are imputable to the public authority controlling that undertaking, the following are relevant, together with the body of evidence arising from the circumstances of the case in the main proceedings and from the context in which they took place: on the one hand, that the sole director of the company providing those guarantees acted improperly, deliberately kept the provision of those guarantees secret and disregarded the undertaking's statutes and, on the other, that that public authority would have opposed the provision of those guarantees, had it been informed of it. In a situation such as that at issue in the main proceedings, those circumstances could not however, in themselves, exclude such imputability.

Costs

- ⁴⁰ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

On a proper construction of Article 107(1) TFEU, for the purposes of determining whether or not the guarantees provided by a public undertaking are imputable to the public authority controlling that undertaking, the following are relevant, together with the body of evidence arising from the circumstances of the case in the main proceedings and from the context in which they took place: on the one hand, that the sole director of the company providing those guarantees acted improperly, deliberately kept the provision of those guarantees secret and disregarded the undertaking's statutes and, on the other, that that public authority would have opposed the provision of those guarantees, had it been informed of it. In a situation such as that at issue in the main proceedings, those circumstances could not however, in themselves, exclude such imputability.

[Signatures]