



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
WATHELET  
delivered on 29 November 2017<sup>1</sup>

**Case C-518/16**

**‘ZPT’ AD**

**v**

**Narodno sabranie na Republika Bulgaria,  
Varhoven administrativen sad,  
Natsionalna agentsia za prihodite**

(Request for a preliminary ruling from the Sofiyski gradski sad (Sofia City Court, Bulgaria))

(Reference for a preliminary ruling — State aid — Regulation (EC) No 1998/2006 — *De minimis* aid — Article 1(1)(d) — Aid granted in the form of tax relief — Investment in the production of goods intended for export — National legislation excluding investment in the production of goods intended for export from the benefit of the tax relief — Article 35 TFEU)

### I. Introduction

1. This request for a preliminary ruling, lodged at the Court Registry on 4 October 2016 by the Sofiyski gradski sad (Sofia City Court, Bulgaria), concerns the interpretation of Article 35 TFEU and Article 1(1)(d) of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87<sup>2</sup> and 88<sup>3</sup> of the Treaty to *de minimis* aid (‘Regulation No 1998/2006’),<sup>4</sup> and on the validity of the latter provision in the light of Article 35 TFEU.

2. The request has been made in proceedings between ‘ZPT’ AD (‘the applicant’) and the Narodno sabranie na Republika Bulgaria (National Assembly of the Republic of Bulgaria), the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) and the Natsionalna Agentsia za prihodite (National Revenue Agency, Bulgaria) (taken together ‘the defendants’), concerning a tax assessment notice addressed to the applicant in respect of the financial year 2008.

3. By its action, the applicant requested that the referring court order the defendants jointly and severally to pay it compensation for material harm suffered by it as a result of the defendants’ infringements of EU law, in particular the provisions of Regulation No 1998/2006.

<sup>1</sup> Original language: French.

<sup>2</sup> Now Article 107 TFEU.

<sup>3</sup> Now Article 108 TFEU.

<sup>4</sup> OJ 2006 L 379, p. 5. Regulation No 1998/2006 was applicable, pursuant to Article 6 thereof, from 1 January 2007 to 31 December 2013. That regulation replaced Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ 2001 L 10, p. 30). For the current application of the rules of the FEU Treaty to *de minimis* aid, see Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ 2013 L 352, p. 1). Article 1(1)(d) of Regulation No 1998/2006 is almost identical to Article 1(1)(d) of Regulation No 1407/2013.

4. As requested by the Court, this Opinion will focus on the question referred by the referring court<sup>5</sup> concerning the validity of Article 1(1)(d) of Regulation No 1998/2006 in the light of Article 35 TFEU.

## II. Legal context

### A. EU law

5. Article 34 TFEU states:

‘Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.’

6. Article 35 TFEU provides:

‘Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.’

7. Article 36 TFEU states:

‘Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.’

8. Article 2(1) of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles [107 and 108 TFEU] to certain categories of horizontal State aid,<sup>6</sup> entitled ‘*De minimis*’, provides:

‘The Commission may, by means of a Regulation adopted in accordance with the procedure laid down in Article 8 of this Regulation, decide that, having regard to the development and functioning of the common market, certain aids do not meet all the criteria of Article [107(1) TFEU] and that they are therefore exempted from the notification procedure provided for in Article [108(3) TFEU], provided that aid granted to the same undertaking over a given period of time does not exceed a certain fixed amount.’

9. Recital 1 of Regulation No 1998/2006 states:

‘Regulation (EC) No 994/98 empowers the Commission to set out in a Regulation a threshold under which aid measures are deemed not to meet all the criteria of Article [107(1) TFEU] and therefore do not fall under the notification procedure provided for in Article [108(3) TFEU].’

<sup>5</sup> See the third sentence of the third question referred by the referring court and point 26 of the present Opinion.

<sup>6</sup> OJ 1998 L 142, p. 1. The legal basis for Regulation No 994/98 is Article 94 EC (now Article 109 TFEU). The Court held that ‘in accordance with Article 109 TFEU, the Council of the European Union is authorised to make any appropriate regulations for the application of Article 107 TFEU and Article 108 TFEU and may in particular determine the conditions in which Article 108(3) TFEU is to apply and the categories of aid exempt from the procedure under that provision’: see judgment of 21 July 2016, *Dilly’s Wellnesshotel* (C-493/14, EU:C:2016:577, paragraph 33). Regulation No 994/98 was repealed and replaced by Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ 2015 L 248, p. 1). Article 2(1) of Regulation No 2015/1588 is almost identical to Article 2(1) of Regulation No 994/98.

10. Recital 6 of Regulation No 1998/2006 reads:

‘This Regulation should not apply to *de minimis* export aid or *de minimis* aid favouring domestic over imported products. In particular, it should not apply to aid financing the establishment and operation of a distribution network in other countries. Aid towards the cost of participating in trade fairs, or of studies or consultancy services needed for the launch of a new or existing product on a new market does not normally constitute export aid.’

11. Recital 8 of Regulation No 1998/2006 states:

‘In the light of the Commission’s experience, it can be established that aid not exceeding a ceiling of EUR 200 000 over any period of three years does not affect trade between Member States and/or does not distort or threaten to distort competition and therefore does not fall under Article [107(1) TFEU] ...’

12. Article 1 of Regulation No 1998/2006, entitled ‘Scope’, provides:

‘This Regulation applies to aid granted to undertakings in all sectors, with the exception of:

...

(d) aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity;

(e) aid contingent on the use of domestic over imported goods;

...

13. Article 2 of Regulation No 1998/2006, entitled ‘*De minimis* aid’, states:

‘1. Aid measures shall be deemed not to meet all the criteria of Article [107(1) TFEU] and shall therefore be exempt from the notification requirement of Article [108(3) TFEU], if they fulfil the conditions laid down in paragraphs 2 to 5 of this Article.

2. The total *de minimis* aid granted to any one undertaking shall not exceed EUR 200 000 over any period of three fiscal years. ... These ceilings shall apply irrespective of the form of the *de minimis* aid or the objective pursued ...’

14. Recital 4 of Regulation No 69/2001 provided that ‘[i]n the light of the World Trade Organisation (WTO) Agreement on Subsidies and Countervailing Measures, this Regulation should not exempt export aid or aid favouring domestic over imported products.’

## **B. Treaty law**

15. Article 3(1)(a) of the Agreement on Subsidies and Countervailing Measures annexed to the WTO Agreement provides that ‘shall be prohibited ... subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance.’

16. Annex I to the Agreement on Subsidies and Countervailing Measures annexed to the WTO Agreement sets out an illustrative list of export subsidies.

### ***C. Bulgarian law***

17. The Law on corporation tax<sup>7</sup> ('the fiscal legislation') provides, in the version in force as from 1 January 2007:

'Article 182 ...

2. ... Tax relief representing *de minimis* aid shall not apply to:

...

(7) investment in assets used in activities relating to exports to third countries or Member States. ... Article 184 ... Corporation tax shall be deducted in full for taxable persons on their taxable profit from manufacturing activity carried out, including contract manufacturing, where all of the following conditions are met:

(1) The taxable person has performed the manufacturing activity solely in municipalities where, in the year preceding the present year, the unemployment rate was at least 35% higher than the national average in respect of that period;

(2) ... the conditions set out in:

(a) Article 188 [of the fiscal legislation] are met in cases of *de minimis* aid.

...

Article 188 ...

1. ... Tax relief shall constitute *de minimis* aid where the amount of *de minimis* aid received in the previous three years, including the current year, irrespective of the form or source, is below the equivalent in [Bulgarian lev (BGN)] of EUR 200 000 ...

2. The resources corresponding to the tax reduction referred to in Article 184 must be invested in tangible or intangible assets in accordance with the legislation on accounting before the expiry of a four-year period starting from the year in respect of which the tax is deducted ...'

### **III. The dispute in the main proceedings and the questions referred for a preliminary ruling**

18. The core activity of the applicant, a company registered in Bulgaria, is the manufacture of steel pipes, hollow profiles and related fittings. It engages in three separate and technologically independent manufacturing activities in its manufacturing facilities, namely the manufacture of steel pipes, hollow profiles and protective railings for roads (guardrails), hot-dip galvanisation of components and electroplating or cold-galvanisation of components.

19. In its tax declaration for 2008, the applicant declared that it wished to benefit from the corporation tax reduction provided for in Article 184 of the fiscal legislation in the amount of BGN 140 677.51 (approximately EUR 72 000).

<sup>7</sup> DV No 105 of 22 December 2006, as amended.

20. By tax assessment notice of 5 March 2010, the claim for a corporation tax reduction was refused on the ground that the applicant did not meet the condition set out in Article 182(2)(7) of the fiscal legislation, in so far as, during the period up to 2012, it had made investments in its manufacturing facilities from which products were exported.

21. According to the referring court, ‘the tax authority states that Article 182(2)(7) [of the fiscal legislation] [was] considered to be exhaustive and that a partial corporation tax reduction may not be claimed [by the applicant] in any event. The tax relief applies to manufacturing activity performed, including contract manufacturing, and the restrictive condition is linked to the subsequent marketing of the manufactured products and the protection of competition in the EU. Since [the applicant] manufactured products in 2008 which were marketed in Bulgaria, in EU Member States and in third countries, it comes within the scope of the restrictive condition set out in Article 182(2)(7) [of the fiscal legislation] and for that reason may not benefit from the corporation tax reduction in respect of 2008. The corporation tax liability for 2008 was established by the tax authority in the amount of BGN 140 677.51 [approximately EUR 72 000] plus interest payable in the amount of BGN 21 454.22 [approximately EUR 11 000]’.

22. On 21 May 2010, the applicant filed a notice of appeal against the decision of the administrative authority before the Administrativen sad — grad Burgas (Burgas Administrative Court, Bulgaria).

23. By decision of 12 January 2011, the Administrativen sad — grad Burgas (Burgas Administrative Court) annulled the assessment notice, finding that the refusal to grant the tax reduction was not justified since there were no exports associated with the independent electrogalvanisation manufacturing function in which the applicant wished to invest resources and that the four-year period during which the resources corresponding to the corporation tax reduction must be invested had not expired.

24. By judgment of 27 December 2011, which was delivered on appeal and has become final, the Varhoven administrativen sad (Supreme Administrative Court) set aside the judgment of the Administrativen sad — grad Burgas (Burgas Administrative Court) and dismissed the applicant’s appeal against the assessment notice. In so far as it was found that investments had been made in the hot-dip galvanising facility and products were exported from that facility, the Varhoven administrativen sad (Supreme Administrative Court) held that the condition set out in Article 182(2)(7) of the fiscal legislation concerning investment in assets not relating to exports to third countries or to Member States was not satisfied and that, in those circumstances, the tax reduction should be considered to be State aid distorting competition in the internal market of the European Union.

25. The applicant brought an action before the Sofiyski gradski sad (Sofia City Court) asking for the defendants to be held jointly and severally liable for alleged infringements of EU law, in particular Regulation No 1998/2006. The applicant claims that it is entitled to compensation in the amount of the tax reduction refused, plus interest.

26. In those circumstances the Sofiyski gradski sad (Sofia City Court) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Do implementing provisions of EU law such as Regulation No 1998/2006 have direct effect and apply directly, and, if so, does a provision of national law which narrows or restricts the applicable scope of the EU legal provisions infringe those principles?
- (2) Is State aid granted in the form of tax relief compatible with competition in the internal market, where such aid is invested in assets used for the manufacture of products, some of which are exported to third countries or to Member States?

- (3) Does the manufacture of products for export through the use of assets obtained by means of State aid come within the scope of activity directly linked to the quantities exported within the meaning of Article 1(1)(d) of Regulation No 1998/2006? If the answer is in the negative, are Member States entitled to provide in national legislation for additional restrictions on exporters of products manufactured using assets that are the result of tax relief investment? If the answer is in the affirmative, how does that rule relate to the provisions of Article 35 TFEU concerning the prohibition of quantitative restrictions on exports between Member States and all measures having equivalent effect and does it constitute discrimination and infringement of the free movement of goods?
- (4) Does Article 1 of Regulation No 1998/2006 allow a legal person to be refused recognition of the right to *de minimis* financial aid, arising from EU law, before the expiry of the four-year period laid down in national law, in which the investment should be made, solely on the ground that in that period it invested resources in, inter alia, independent, separate structures of its business from which exports were made?’

#### IV. Procedure before the Court

27. The applicant, each defendant, the Bulgarian Government, the Greek Government, the Italian Government and the Commission submitted written observations.

28. In the light of the ambiguity of the third sentence of the third question referred, the Court has taken two initiatives.

29. First of all, it asked the referring court the following question:

‘Could the referring court clarify which rule it is referring to in the third sentence of the third question, when asking the Court to consider the relationship between “that rule” and Article 35 TFEU?’

Is the referring court asking whether Article 35 TFEU must be interpreted as precluding a rule of national law, such as that provided for in Article 182(2)(7) of the [fiscal] legislation or if it seeks to ascertain whether, in the light of Article 35 TFEU, Article 1(1)(d) of Regulation No 1998/2006 ... is valid?’

30. In its response of 7 July 2017, the referring court stated:

‘The question seeks to ascertain whether Member States are entitled to provide in national legislation for additional restrictions on exporters of products manufactured using assets that are the result of tax relief investment. In the first hypothesis, where the manufacture of products for export does not come within the scope of activity directly linked to the quantities exported within the meaning of Regulation No 1998/2006, the question arises as to whether national legislation may provide for restrictions in cases similar to those set out in Article 182(2)(7) [of the fiscal legislation].

However, if that question is answered in the affirmative, that is to say, the manufacture of products for export through the use of assets obtained by means of State aid comes within the scope of activity directly linked to the quantities exported within the meaning of Regulation No 1998/2006, the question arises as to the relationship between, on the one hand, the restriction provided for in Article 1(1)(d) of Regulation [No 1998/2006] and, on the other, the prohibition of quantitative restrictions on exports between Member States and other measures having equivalent effect.’

31. Secondly, on 13 September 2017, pursuant to Article 61(1) of the Rules of Procedure, the Court invited the parties and the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union to answer the following question at the hearing on 18 October 2017:

‘Does Article 1(1)(d) of Regulation No 1998/2006 ... infringe Article 35 TFEU?’

32. The applicant, the Varhoven administrativen sad (Supreme Administrative Court), the Bulgarian Government and the Commission submitted oral comments at the hearing on 18 October 2017.

## V. Analysis

### A. Preliminary observations

33. With regard to the question contained in the third sentence of the third question referred by the referring court relating to the conformity of Article 1(1)(d) of Regulation No 1998/2006 with Article 35 TFEU,<sup>8</sup> it should be borne in mind that the Court has consistently held that the prohibition of quantitative restrictions and measures having equivalent effect, provided for in Articles 34 and 35 TFEU, applies not only to national measures, but also to measures adopted by the institutions of the European Union.<sup>9</sup>

34. It is settled case-law that the provisions relating to the free movement of goods and those relating to State aid have a common purpose, namely to ensure the free movement of goods between Member States under normal conditions of competition,<sup>10</sup> as Articles 107 and 108 TFEU may in no case be used to frustrate the rules of the FEU Treaty on the free movement of goods.<sup>11</sup>

35. Consequently, I take the view that the FEU Treaty does not establish a hierarchy between its rules prohibiting quantitative restrictions<sup>12</sup> and on State aid.<sup>13</sup> It follows that national measures or measures adopted by the institutions of the European Union must be consistent with both the rules of the FEU Treaty on the prohibition of quantitative restrictions and the rules on State aid.<sup>14</sup>

36. It is clear that Article 1(1)(d) of Regulation No 1998/2006 does not directly place quantitative restrictions on exports. It is therefore necessary to examine whether that provision puts in place measures having effects equivalent to such restrictions.

<sup>8</sup> It is that question, on which this Opinion will focus, that the Court asked participants to address when presenting their oral arguments at the hearing on 18 October 2017. For various reasons, they all supported the compatibility of Article 1(1)(d) of Regulation No 1998/2006 with Article 35 TFEU.

<sup>9</sup> Judgments of 11 June 2015, *Pfeifer & Langen* (C-51/14, EU:C:2015:380, paragraph 37 and the case-law cited), and of 22 June 2017, *E.ON Biofor Sverige* (C-549/15, EU:C:2017:490, paragraph 45).

<sup>10</sup> Judgment of 5 June 1986, *Commission v Italy* (103/84, EU:C:1986:229, paragraph 19).

<sup>11</sup> See, by analogy, judgments of 5 June 1986, *Commission v Italy* (103/84, EU:C:1986:229, paragraph 19); of 20 March 1990, *Du Pont de Nemours Italiana* (C-21/88, EU:C:1990:121, paragraphs 19 to 22); and of 23 April 2002, *Nygård* (C-234/99, EU:C:2002:244, paragraph 57).

<sup>12</sup> See, in particular, Articles 34 to 36 TFEU.

<sup>13</sup> See, in particular, Articles 107 and 108 TFEU.

<sup>14</sup> See, by analogy, judgment of 15 June 1993, *Matra v Commission* (C-225/91, EU:C:1993:239, paragraphs 41 and 42), in which the Court ruled that ‘while the procedure provided for in Articles [107 and 108 TFEU] leaves a wide discretion to the Commission, and under certain conditions to the Council, in coming to a decision on the compatibility of a system of State aid with the requirements of the common market, it is clear from the general scheme of the Treaty that that procedure must never produce a result which is contrary to the specific provisions of the Treaty ... The Court has also held that those aspects of aid which contravene specific provisions of the Treaty other than Articles [107 and 108 TFEU] may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately ... *That obligation on the part of the Commission to ensure that Articles [107 and 108 TFEU] are applied consistently with other provisions of the Treaty is all the more necessary where those other provisions also pursue ... the objective of undistorted competition in the common market.*’ (emphasis added).

37. The conditions laid down by the Court's case-law relating to Article 35 TFEU correspond to those set out in Article 34 TFEU. Consequently, national measures or measures adopted by the institutions of the European Union which are capable of hindering, directly or indirectly, actually or potentially, trade within the European Union are to be considered as measures having an effect equivalent to quantitative restrictions within the meaning of Articles 34<sup>15</sup> and 35 TFEU.

38. Indeed, the Court held in its judgment of 21 June 2016, *New Valmar* (C-15/15, EU:C:2016:464, paragraphs 36, 40 and 43), that a national measure applicable to all traders active in the national territory liable to have a greater effect on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of that Member State is covered by the prohibition laid down in Article 35 TFEU.

39. It should be noted that, in the judgment of 21 June 2016, *New Valmar* (C-15/15, EU:C:2016:464), the Court made no mention of its judgment of 8 November 1979, *Groenveld* (15/79, EU:C:1979:253) ('the *Groenveld* case-law'), in which it held that Article 35 TFEU 'concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the State in question at the expense of the production or of the trade of other Member States'.<sup>16</sup>

40. In my view,<sup>17</sup> in the judgment of 21 June 2016, *New Valmar* (C-15/15, EU:C:2016:464), the Court departed from the more limited and stricter conditions laid down by the *Groenveld* case-law based, in particular, on the existence of a difference in treatment or discrimination between the domestic trade of a Member State and its export trade, preferring instead more 'flexible'<sup>18</sup> conditions based on the existence of a restriction or barrier to trade between Member States.<sup>19</sup>

41. In that regard, it should be borne in mind that, according to the Court, any restriction, *even minor*, of one of the fundamental freedoms enshrined by the FEU Treaty is prohibited by it.<sup>20</sup> It follows that, contrary to State aid rules under Regulation No 1998/2006,<sup>21</sup> there is no threshold under which national measures or measures adopted by the institutions of the European Union are deemed not to meet all the criteria of Articles 34 and 35 TFEU. By contrast, national measures or measures adopted by the institutions of the European Union cannot be regarded as capable of hindering trade within the European Union if the restrictive effects of that legislation are too indirect or too uncertain.<sup>22</sup>

<sup>15</sup> See judgment of 21 September 2016, *Etablissements Fr. Colruyt* (C-221/15, EU:C:2016:704, paragraph 33) relating to Article 34 TFEU.

<sup>16</sup> Judgment of 8 November 1979, *Groenveld* (15/79, EU:C:1979:253, paragraph 7).

<sup>17</sup> I would note, however, that the Commission takes the view in its written observations that Article 35 TFEU 'applies to discriminatory measures with regard to certain goods', adding that that principle is established by the *Groenveld* case-law.

<sup>18</sup> See the Opinion of Advocate General Mengozzi in *Kakavetsos-Fragkopoulos* (C-161/09, EU:C:2010:531, point 49).

<sup>19</sup> In its judgment of 3 March 2011, *Kakavetsos-Fragkopoulos* (C-161/09, EU:C:2011:110, paragraph 27), the Court held that any measure likely to impede, directly or indirectly, actually or potentially, intra-Community trade constitutes a measure having equivalent effect to a quantitative restriction on exports. However, it should be noted that the product at issue in the case which gave rise to the judgment of 3 March 2011, *Kakavetsos-Fragkopoulos* (C-161/09, EU:C:2011:110, paragraph 27) was currants covered by the common organisation of the markets provided for in Article 40 TFEU. In his Opinion in that case (C-161/09, EU:C:2010:531, point 49), Advocate General Mengozzi stated that 'where the case relates to a common organisation of the markets, the Court adopts a more flexible view of the conditions which must be satisfied for the existence of a measure having equivalent effect to a quantitative restriction on exports. In that case, there is no longer any requirement that the measure be discriminatory'. It is my view that, following the judgment of 21 June 2016, *New Valmar* (C-15/15, EU:C:2016:464), there is no distinction, for the purposes of Article 35 TFEU, between goods covered by the common organisation of the markets provided for in Article 40 TFEU and those which are not covered.

<sup>20</sup> Judgment of 21 June 2016, *New Valmar* (C-5/15, EU:C:2016:464, paragraph 37).

<sup>21</sup> See Recital 1 of Regulation No 1998/2006.

<sup>22</sup> Judgment of 21 June 2016, *New Valmar* (C-15/15, EU:C:2016:464, paragraph 45).

## **B. Application *ratione loci* of Article 35 TFEU**

42. It should be observed that Article 1(1)(d) of Regulation No 1998/2006 concerns exports *towards third countries or Member States*. However, Article 35 TFEU, which prohibits quantitative restrictions on exports and all measures having equivalent effect, applies only to the free movement of goods between Member States.<sup>23</sup> It follows that, in principle, trade with third countries does not fall within the scope *ratione loci* of Article 35 TFEU. Consequently, I will confine my analysis in this Opinion to the internal aspect of Article 1(1)(d) of that regulation, namely trade between Member States.

## **C. The existence in Article 1(1)(d) of Regulation No 1998/2006 of a restriction falling within the scope of Article 35 TFEU**

43. In accordance with Article 2 of Regulation No 1998/2006, read in the light of Recital 8 thereof, aid not exceeding a ceiling of EUR 200 000 over any period of three years is deemed not to affect trade between Member States and not to distort or threaten to distort competition; such measures are therefore excluded from the concept of ‘State aid’.<sup>24</sup> They are therefore exempt from the obligation to notify laid down in Article 108(3) TFEU.<sup>25</sup>

44. In its judgment of 7 March 2002, *Italy v Commission* (C-310/99, EU:C:2002:143, paragraph 94), the Court held that ‘the *de minimis* rule is intended to reduce the administrative burden on both the Member States and the Commission, which must be able to concentrate its resources on cases that are genuinely important at Community level’.<sup>26</sup>

45. However, in accordance with Article 1(1)(d) of Regulation No 1998/2006, aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current expenditure linked to the export activity is excluded from the scope of that regulation and therefore from the benefit of the *de minimis* exemption.<sup>27</sup>

46. It follows that even if such aid is below the threshold set out in Article 2 of Regulation No 1998/2006, it is deemed not to meet all the criteria of Article 107(1) TFEU and therefore does not benefit from the *de minimis* exemption under that regulation and must be notified to the Commission in accordance with the procedure provided for in Article 108(3) TFEU.

<sup>23</sup> See, by analogy, judgments of 15 June 1976, *EMI Records* (51/75, EU:C:1976:85, paragraphs 10 and 11), and of 9 February 1982, *Polydor and RSO Records* (270/80, EU:C:1982:43, paragraph 18).

<sup>24</sup> Judgments of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 82), and of 8 May 2013, *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 81). With regard to the rules on competition, the Court held in its judgment of 23 November 2006, *Asnef-Equifax and Administración del Estado* (C-238/05, EU:C:2006:734, paragraph 50) that ‘an agreement will, however, fall outside the prohibition in Article [101 TFEU] if it has only an insignificant effect on the market’.

<sup>25</sup> The Court has held that the obligation of prior notification of each measure intended to grant or alter new aid, which is incumbent on the Member States, is one of the fundamental features of the system of monitoring in the field of State aid: see judgment of 21 July 2016, *Dilly’s Wellnesshotel* (C-493/14, EU:C:2016:577, paragraph 36). Consequently, as a qualification of the general obligation to notify State aid laid down in Article 108(3) TFEU, Regulation No 1998/2006 and the conditions laid down by it must be interpreted strictly: see, by analogy, judgment of 21 July 2016, *Dilly’s Wellnesshotel* (C-493/14, EU:C:2016:577, paragraph 37). Furthermore, in order to benefit from the exemption in question, a given aid scheme must fulfil all the relevant conditions of that regulation. See, by analogy, judgment of 21 July 2016, *Dilly’s Wellnesshotel* (C-493/14, EU:C:2016:577, paragraphs 45 to 52).

<sup>26</sup> See also judgment of the General Court of the European Union of 20 September 2011, *Regione autonoma della Sardegna and Others v Commission* (T-394/08, T-08/08, T-453/08 and T-54/08, EU:T:2011:493, paragraph 304).

<sup>27</sup> I note that the refusal to grant the exemption does not apply to all export activities. Indeed, the Commission observes in its written observations that ‘this is a question of aid directly linked to the quantities exported, as defined in Article 1[(1)(d)] of the *de minimis* Regulation, where measures are granted by the State in the form of programmes aimed at helping businesses expand into and offer their goods to foreign markets. The aid is subject to the quantities exported and the undertaking relies on it in support of its export strategy. The aid thus leads to a gradual increase in export quantities produced and it is precisely on that basis that the government grants it’. It adds that ‘the manufacture of goods for export through the use of assets obtained by means of State aid does not come within the scope of activity directly linked to the quantities exported within the meaning of Article 1(1)(d) of the *de minimis* Regulation’. In that regard, the Greek Government observes that ‘the mere fact that aid is granted to an exporting company is not sufficient for it to constitute export aid’. I note that these subtle differences are inconsistent with the objective of simplification of the *de minimis* rule.

47. In the light of the foregoing, I consider that Article 1(1)(d) of Regulation No 1998/2006 has a greater effect on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of that Member State.<sup>28</sup> While it is true that Article 1(1)(d) of that regulation relates only to certain State aid linked to export activity, I take the view that the effects of that provision cannot be considered to be indirect or uncertain, in so far as the aid in question is excluded from the scope of application of the *de minimis* exemption. That provision thus discriminates between economic activities according to whether or not they are intended for export.<sup>29</sup>

#### *D. The existence of a justification*

48. Articles 34 and 35 TFEU nonetheless do not preclude prohibitions or restrictions justified on one of the public interest grounds listed in Article 36 TFEU or by overriding requirements.<sup>30</sup>

49. According to settled case-law, national measures or measures adopted by the institutions of the European Union restricting the exercise of the fundamental freedoms guaranteed may be allowed only if it pursues a legitimate objective in the public interest,<sup>31</sup> is appropriate to ensuring the attainment of that objective and does not go beyond what is necessary to attain the objective pursued.<sup>32</sup>

50. I consider that Article 1(1)(d) of Regulation No 1998/2006 is *de jure* discriminatory, in so far as it is specifically directed at certain exports. Consequently, such discriminatory treatment of exports must be justified on one of the public interest grounds listed in Article 36 TFEU,<sup>33</sup> namely grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.

51. According to the Commission, ‘the exclusion of export aid from the scope of Regulation [No 1998/2006] is based, on the one hand, on the EU’s commitments to the [WTO] and, on the other, on the fact that export aid, which facilitates market penetration for commercial reasons, clearly affects trade between Member States.’<sup>34</sup> It follows that the rationale of that regulation (according to which the criteria governing the existence of State aid were not met) is not applicable’.<sup>35</sup>

52. So far as concerns the first objective of Article 1(1)(d) of Regulation No 1998/2006 invoked by the Commission, namely the exclusion of aid to export-related activities towards third countries from the *de minimis* exemption in accordance with the EU’s commitments to the WTO, I consider that this is not relevant in the present case, since Article 35 TFEU is not applicable *ratione loci* to such exports.<sup>36</sup> Consequently, there is no scope for criticism of the exclusion of aid to export-related activities towards third countries pursuant to Article 1(1)(d) of that regulation in the light of Article 35 TFEU.

<sup>28</sup> See point 50 of this Opinion.

<sup>29</sup> I see no reason to grant the benefit of the *de minimis* exemption provided for in Article 2 of Regulation No 1998/2006 to the establishment and operation of a distribution network at national level and to refuse it for the establishment of a similar export network.

<sup>30</sup> See, to that effect, judgment of 22 June 2017, *E.ON Biofor Sverige* (C-549/15, EU:C:2017:490, paragraph 46).

<sup>31</sup> Listed in Article 36 TFEU or the overriding requirements.

<sup>32</sup> Judgment of 21 June 2016, *New Valmar* (C-15/15, EU:C:2016:464, paragraph 48).

<sup>33</sup> Indeed, only the relevant non-discriminatory restrictions may be justified on one of the public interest grounds listed in Article 36 TFEU *and by the overriding requirements*. See, *a contrario*, judgment of 26 April 2012, *van Putten* (C-578/10 to C-580/10, EU:C:2012:246, paragraph 44) in which the Court held that a difference in treatment may be justified by an overriding reason.

<sup>34</sup> See footnote 27 of this Opinion.

<sup>35</sup> I note that the establishment of a distribution network at a purely national level may also affect trade between the Member States, in particular, by making access to that national market more difficult for foreign undertakings. Furthermore, it is difficult to see how export activities not covered by the exclusion laid down in Article 1(1)(d) of Regulation No 1998/2006 do not affect trade between Member States. Lastly, it must not be forgotten that the *de minimis* rule in reality authorises measures which, if they were to exceed the relevant amounts, would meet all the conditions to be qualified as State aid, including affecting trade between Member States.

<sup>36</sup> See point 42 of this Opinion.

53. With regard to the second objective of Article 1(1)(d) of Regulation No 1998/2006 relied on by the Commission,<sup>37</sup> I consider that even though it may constitute a legitimate objective, it is not covered by any of the public interest grounds listed in Article 36 TFEU. Consequently, that objective is not such as to justify discrimination prohibited by Article 35 TFEU. Nor do I see any grounds that might justify the difference in treatment at issue here.

54. In the light of the foregoing, I take the view that Article 1(1)(d) of Regulation No 1998/2006, which has a greater effect on goods leaving the market of the exporting Member State than on the marketing of goods in the domestic market of that Member State, is not justified on any of the public interest grounds listed in Article 36 TFEU.

55. Consequently, the third sentence of the third question referred by the referring court must be answered to the effect that Article 1(1)(d) of Regulation No 1998/2006 is invalid in that it establishes within the *de minimis* rule a difference in treatment between economic activities which are purely national and those relating to exports to Member States.

## VI. Conclusion

56. In the light of the foregoing, I propose that the Court should answer the third sentence of the third question referred by the Sofiyski gradski sad (Sofia City Court, Bulgaria) as follows:

Article 1(1)(d) of Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid is invalid in that it establishes within the *de minimis* rule a difference in treatment between economic activities which are purely national and those relating to exports to Member States.

<sup>37</sup> See point 51 of this Opinion.