



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

13 June 2019*

(Reference for a preliminary ruling — State aid — Decision 2009/402/EC — Contingency plans in the fruit and vegetable sector implemented by the French Republic — Finding that the aid is incompatible — Recovery order — Scope of the decision — Economic agricultural committees)

In Case C-505/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 26 July 2018, received at the Court on 30 July 2018, in the proceedings

Copebi SCA

v

Etablissement national des produits de l'agriculture et de la mer (FranceAgriMer),

intervener:

Ministre de l'Agriculture et de l'Alimentation,

THE COURT (Fifth Chamber),

composed of E. Regan (Rapporteur), President of the Chamber, C. Lycourgos, E. Juhász, M. Ilešič and I. Jarukaitis, Judges,

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Copebi SCA, by N. Coutrelis, avocate,
- the French Government, by D. Colas, C. Mosser and A.-L. Desjonquères, acting as Agents,
- the European Commission, by B. Stromsky, X. Lewis and W. Farrell, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

* Language of the case: French.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Commission Decision 2009/402/EC of 28 January 2009 on the ‘contingency plans’ in the fruit and vegetable sector implemented by France (OJ 2009 L 127, p. 11).
- 2 It was submitted in proceedings between Copebi SCA and Établissement national des produits de l’agriculture et de la mer (FranceAgriMer) regarding the annulment of a collection order issued against the former by the latter for the recovery of a sum corresponding to the repayment of public aid paid to the former between 1998 and 2002 and interest thereon.

Legal framework

EU law

Regulation (EC) No 659/1999

- 3 Article 1(h) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), entitled ‘Definitions’, provides:

‘For the purpose of this Regulation:

...

- (h) “interested party” shall mean any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.’

- 4 Article 6(1) of that regulation, headed ‘Formal investigation procedure’, states:

‘The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.’

Decision 2009/402

- 5 Recitals 15, 17, 24 to 27, 29 and 71 of Decision 2009/402 are worded as follows:

‘(15) Eight economic agricultural committees (Rhône-Méditerranée, Grand Sud-Ouest, Corse, Val de Loire, Nord, Nord-Est, Bretagne and Normandie) received public funding for many years, provided mainly by [the Office national interprofessionnel des fruits, des légumes et de l’horticulture (National Fruit, Vegetables and Horticulture Trade Board, France) (‘Oniflhor’)], and used to finance aid known as “contingency plans”, comprising measures both inside and outside the EU aimed at facilitating the marketing of agricultural products harvested in France, particularly in periods of crisis.

...

(17) As far as the exact nature of the measures was concerned, in their letter of 26 December 2002, the French authorities explained that they were aiming to prevent or, in the event of crises, to mitigate the effects of supply temporarily exceeding demand by acting on three levels: external markets, the internal market and processing.

...

(24) In its letter of 26 December 2002, France explained that 30-50% of the funding of these measures was covered by the sectors concerned, with the remainder coming from public funds.

(25) [The Fédération des comités économiques agricoles rattachés à la filière de production des fruits et légumes (Federation of Economic Agricultural Committees connected with the fruit and vegetable production sector, France) ('Fedecom')] explained the funding mechanism for the "contingency plans" in detail, along with the role of the committees. France has not contested these explanations.

(26) According to [Fedecom], the measures to apply were determined exclusively by [Oniflhor] and the economic committees were obliged to apply them. At the time of each contingency plan and for each type of plant, [Oniflhor] took a decision on which measures to take and entrusted the relevant national section with implementing them. [Oniflhor] also decided the sums allocated to the plans in question, as well as the amount of contributions that had to be paid by the economic committees.

(27) The measures were financed from an operational fund managed by the economic committees. This fund worked on the basis of the same principles as those governing Community aid provided for by Article 15 of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables [OJ 1996 L 297, p. 1], in that part of the money came from public funds and part from financial contributions from the member producers (known as sectoral contributions), based on the quantity or value of the fruit and vegetables sold. The sectoral contributions were not made up of contributions for the extension of the rules. Thus they were not compulsory by virtue of a ministerial decree.

...

(29) [A table set out in paragraph 29] gives an overview of the amounts paid, in euro, by [Oniflhor] under the "contingency plans" from 1992 to 2002. These sums are broken down by year and by measure. However, for 1992 and 1993, the table only shows the overall amount of aid paid. France has explained that the [Oniflhor] archives do not allow for a more detailed breakdown for these two years.

...

(71) According to the information available to the Commission, the "contingency plans" provided for measures intended to deal with crises caused by a surplus of French products on the Community market, in particular by subsidising selling prices and providing subsidies for the storage or destruction of part of the harvest and financial incentives to process fresh products. On markets outside the European Union, export subsidies would also have helped to dispose of surplus French products and could have strengthened the operators' competitive position. This aid seems to have been provided on the basis of prices and the quantity produced.'

6 Article 1 of that decision states:

‘The State aid paid under the “contingency plans” for French fruit and vegetable producers which France unlawfully put into effect between 1992 and 2002 in breach of Article [108(3) TFEU] is incompatible with the common market.’

7 Article 2 of that decision provides:

‘1. France shall take all necessary measures to recover the incompatible aid referred to in Article 1 from its beneficiaries.

2. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery.

...’

8 In accordance with Article 5 of the decision:

‘This Decision is addressed to the French Republic.’

The main proceedings and the question referred for a preliminary ruling

9 Oniflhor, the predecessor in title of FranceAgriMer, is a public industrial and commercial institution under the supervision of the French State which has the task, inter alia, of strengthening the economic efficiency of the fruit and vegetable sector.

10 Between 1998 and 2002, Oniflhor introduced a short-term incentive for the conclusion of supply contracts with industries processing what are known as ‘whiteheart’ cherries, intended for industrial uses, in the form of financial assistance for each marketing year concerned.

11 That aid was intended for producer groups which made deliveries, in respect of the relevant harvest of whiteheart cherries, to processing factories under multi-annual contracts concluded pursuant to an inter-trade agreement.

12 The aid paid by Oniflhor passed through the comité économique bigarreau industrie (Economic Committee for the Whiteheart Cherry Industry) (‘CEBI’) which transferred the funds to its members, including Copebi, which received a total of EUR 2 823 708.83.

13 Following a complaint, the Commission, by Decision 2009/402 concerning aid allocated, in particular by Oniflhor, within the framework of the ‘contingency plans’ in the fruit and vegetable sector implemented by the French Republic, stated that the aid paid to the French fruit and vegetable sector was intended to facilitate the sales of French produce by manipulating the sales price or the quantities available on the markets. It concluded that such interventions constituted State aid introduced in breach of EU law and required its recovery.

14 That decision was confirmed by two judgments of the General Court of the European Union of 27 September 2012, *France v Commission* (T-139/09, EU:T:2012:496) and *Fedecom v Commission* (T-243/09, not published, EU:T:2012:497).

15 Following those judgments, the French Republic undertook to recover the aid unlawfully paid to producers of whiteheart cherries for industrial uses, including Copebi, against which FranceAgriMer issued a collection order on 29 March 2013 for the recovery of EUR 5 042 768.78 corresponding to the repayment of public aid paid between 1998 and 2002 and interest accrued.

- 16 By judgment of 20 January 2015, the tribunal administratif de Nîmes (Administrative Court, Nîmes, France) rejected Copebi's application for the annulment of that collection order.
- 17 By judgment of 18 April 2016, the cour administrative d'appel de Marseille (Administrative Court of Appeal, Marseilles, France) dismissed the appeal against the judgment of 20 January 2015 filed by Copebi.
- 18 Copebi then brought an appeal against the judgment of 18 April 2016 before the Conseil d'État (Council of State, France).
- 19 The Council of State notes that, although Decision 2009/402 is generally concerned with the market for fruit and vegetables, which is covered by the common organisation of fruit and vegetables, governed at the material time by Council Regulation (EEC) No 1035/72 of 18 May 1972 (OJ, English Special Edition, First Series 1972(II) p. 437) and then by Council Regulation (EC) No 2200/96 of 28 October 1996 (OJ 1996 L 297, p. 1), both of which relate to the common organisation of the fruit and vegetables market to which the sector of whiteheart cherries for industrial uses belongs, and although it is clear from the judgment of 12 February 2015, *Commission v France* (C-37/14, not published, EU:C:2015:90), that CEBI received the aid at issue in the main proceedings in order to facilitate the sales of French produce by manipulating the sales price or the quantities available on the market, CEBI is not one of the eight economic agricultural committees mentioned in paragraph 15 of Decision 2009/402.
- 20 According to the referring court, it is also apparent from that decision that the aid at issue in the main proceedings, unlike the financing mechanism described in paragraphs 24 to 28 of the decision, is not financed by voluntary contributions from producers, known as 'sectoral contributions', but only by subsidies paid by Oniflor.
- 21 The referring court observes that although the annual amounts of aid paid by Oniflor to producers of whiteheart cherries for industrial uses through CEBI are included in the table set out in paragraph 29 of Decision 2009/402, those amounts were communicated by the French authorities and there is nothing in that decision to suggest that they were formally endorsed by the Commission, which mentions only eight economic committees, excluding CEBI, in recital 15 of the decision. That table appears only in the section describing the aid in question, not the section dealing with the recovery procedure.
- 22 The referring court therefore questions the lawfulness of the collection order issued by FranceAgriMer against Copebi, based on the recovery of the aid referred to in Decision 2009/402. The lawfulness of that collection order depends, in particular, on whether that decision is to be interpreted as covering aid paid by Oniflor to CEBI and allocated to producers of whiteheart cherries for industrial uses by the producer groups which are members of that committee, even though CEBI is not one of the eight economic agricultural committees mentioned in paragraph 15 of that decision and the method of financing that aid was significantly different.
- 23 In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:
- 'Is ... Decision [2009/402] to be interpreted as covering aid paid by Oniflor to CEBI and allocated to producers of whiteheart cherries for industrial uses by the producer groups which are members of that committee, even though CEBI is not one of the eight economic agricultural committees referred to in paragraph 15 of the decision and the aid in question, unlike the financing mechanism described in paragraphs 24 to 28 of that decision, was financed only by subsidies from Oniflor and not also by voluntary contributions from producers, known as sectoral contributions?'

The question referred for a preliminary ruling

- 24 By its question, the referring court asks, in essence, whether Decision 2009/402 must be interpreted as covering aid paid by Oniflhor to CEBI and allocated to producers of whiteheart cherries for industrial uses by the producer groups which are members of that committee, even though, first, CEBI is not one of the eight economic agricultural committees mentioned in that decision and, secondly, that aid, unlike the financing mechanism described in that decision, was financed only by subsidies from Oniflhor and not also by voluntary contributions from producers.
- 25 As regards, in the first place, the fact that CEBI is not mentioned in Decision 2009/402, it is not disputed that the applicant in the main proceedings received aid between 1998 and 2002 paid by Oniflhor through CEBI.
- 26 Nor is it disputed that CEBI is of the same legal nature as the eight other economic agricultural committees referred to in paragraph 15 of Decision 2009/402, is governed by the same national provisions, and, as the referring court pointed out, did in fact receive aid paid by the same public body, namely Oniflhor, with the aim of facilitating the sales of French products by manipulating the sales price or the quantities available on the markets.
- 27 Furthermore, it must be borne in mind that under Article 1 of Decision 2009/402, ‘the State aid paid under the “contingency plans” for French fruit and vegetable producers which France unlawfully put into effect between 1992 and 2002 in breach of Article [108(3) TFEU] is incompatible with the common market.’ Therefore, as the Commission states in its written observations, the operative part of Decision 2009/402 is not limited to the eight economic agricultural committees mentioned in recital 15 of that decision.
- 28 It follows from the Court’s settled case-law that decisions on the recovery of State aid are addressed to the Member State responsible, not to the recipients of the aid, and no special role is reserved to the recipient of aid, among all the interested parties, by any provision of the procedure for reviewing State aid (see, in particular, judgment of 24 September 2002, *Falck and Acciaierie di Bolzano v Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraphs 81 and 83).
- 29 Thus, Decision 2009/402 is addressed, according to Article 5 thereof, specifically to the French Republic, not to a particular economic committee. It was therefore for that Member State, in accordance with Article 2 of that decision, to take the measures necessary to recover the aid found to be incompatible by the decision from the recipients and thus to determine the bodies which had received that aid.
- 30 The Court has also made clear that, in the case of an aid programme, the Commission may confine itself to examining the characteristics of the programme in question in order to determine, in the grounds of its decision, whether, by reason of the terms of the programme, it gives an appreciable advantage to recipients in relation to their competitors and is likely to benefit in particular undertakings engaged in trade between Member States (judgment of 7 March 2002, *Italy v Commission*, C-310/99, EU:C:2002:143, paragraph 89).
- 31 Thus, the Commission’s decision finding aid incompatible with the internal market need not include an analysis of the aid granted in individual cases on the basis of the scheme. It is only at the stage of recovery of the aid that it is necessary to look at the individual situation of each undertaking concerned (see, to that effect, judgment of 7 March 2002, *Italy v Commission*, C-310/99, EU:C:2002:143, paragraph 91).
- 32 That is particularly the case where, as the Commission states, it is unable to obtain from the Member State concerned a satisfactory body of information on the exact way in which those measures were applied.

- 33 Therefore, it cannot be inferred from the fact that CEBI is not one of the eight economic agricultural committees mentioned in Decision 2009/402 that that decision does not cover aid paid by Oniflhor through that economic agricultural committee and allocated to Copebi.
- 34 In addition, it cannot be argued that Decision 2009/402 was taken in breach of the right of the applicant in the main proceedings to be heard. It should be recalled that the Court has also held that the concept of ‘interested party’ within the meaning of Article 1(h) of Regulation No 659/1999 covers an indeterminate group of addressees (see, to that effect, judgment of 27 October 2011, *Austria v Scheucher-Fleisch and Others*, C-47/10 P, EU:C:2011:698, paragraph 132) and that, in consequence, that provision does not require individual notice to be given to particular persons (see, to that effect, judgment of 14 November 1984, *Intermills v Commission*, 323/82, EU:C:1984:345, paragraph 17).
- 35 Its sole purpose is to oblige the Commission to take steps to ensure that all persons who may be concerned are notified and given an opportunity to put forward their arguments. Under those circumstances, the publication of a notice in the *Official Journal of the European Union* is an appropriate means in the field of State aid control of informing all the interested parties that a procedure has been initiated (see, to that effect, judgments of 14 November 1984, *Intermills v Commission*, 323/82, EU:C:1984:345, paragraph 17, and of 24 September 2002, *Falck and Acciaierie di Bolzano v Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 80).
- 36 As regards, in the second place, the fact that the aid received by Copebi, unlike the financing mechanism described by the Commission in Decision 2009/402, was financed only by subsidies from Oniflhor and not also by voluntary contributions from producers, it is apparent from that decision that 30 to 50% of the funding of the ‘contingency plans’ was covered by the sectors concerned. That sectoral contribution was supplemented by funding from public authorities, via Oniflhor. The sectoral contributions were demanded by the economic agriculture committees and failure to pay them was, in principle, tantamount to a rejection of aid from Oniflhor.
- 37 Although the aid received by Copebi was financed only by subsidies from Oniflhor, without any contribution from the sector concerned, the fact remains that that aid was granted through State resources.
- 38 That circumstance cannot, therefore, prevent the aid received by Copebi from being regarded as ‘State aid’ for the purpose of Article 107(1) TFEU and, accordingly, exclude it from the scope of Decision 2009/402.
- 39 In addition, in so far as non-payment of the sectoral contributions justifies the exclusion of all payments of aid by Oniflhor, it should be pointed out that the Court has previously held that the question of whether the benefit allowed to the undertakings concerned was in accordance with domestic law or, on the contrary, constituted tax avoidance or evasion cannot affect the obligation of the Member State in question to recover the aid within the prescribed time limits (judgment of 5 May 2011, *Commission v Italy*, C-305/09, EU:C:2011:274, paragraph 42).
- 40 Therefore, the fact that Copebi managed to secure the benefit of the contingency plans without having to contribute to them and thus enjoyed a more advantageous arrangement than the other beneficiaries is not capable of removing it from the scope of Decision 2009/402.
- 41 Lastly, in the third place, the applicant in the main proceedings submits that unlike the ‘contingency plans’ referred to in Decision 2009/402, the inter-trade mechanism for aid to the sector of whiteheart cherries for industrial uses was linked to a structural plan, in the form of short-term and specific aid, which was not intended to mitigate temporary supply surpluses.

- 42 It must be observed, however, that it is apparent from the request for a preliminary ruling that the aid paid by Oniflhor to CEBI took the form of financial assistance for each marketing year concerned which was intended to address the difficulties faced by that sector due to strong competitive pressure from the Italian and Spanish processing industries and from raw materials imported from Central European countries. It is also apparent from the documents before the Court that that aid was calculated every year on the basis of the harvesting method used and the intended use of the produce up to a given quantity of fruit.
- 43 In the light of the foregoing, the answer to the question referred is that Decision 2009/402 must be interpreted as covering aid paid by Oniflhor to CEBI and allocated to producers of whiteheart cherries for industrial uses by the producer groups which are members of that committee, even though, first, CEBI is not one of the eight economic agricultural committees mentioned in that decision and, secondly, that aid, unlike the financing mechanism described in that decision, was financed only by subsidies from Oniflhor and not also by voluntary contributions from producers.

Costs

- 44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Fifth Chamber) hereby rules:

Commission Decision 2009/402/EC of 28 January 2009 on the ‘contingency plans’ in the fruit and vegetable sector implemented by France must be interpreted as covering aid paid by the Office national interprofessionnel des fruits, des légumes et de l’horticulture (Oniflhor) (National Fruit, Vegetables and Horticulture Trade Board) to the comité économique bigarreau industrie (CEBI) (Economic Committee for the Whiteheart Cherry Industry) and allocated to producers of whiteheart cherries for industrial uses by the producer groups which are members of that committee, even though, first, CEBI is not one of the eight economic agricultural committees referred to in that decision and, secondly, that aid, unlike the financing mechanism described in that decision, was financed only by subsidies from Oniflhor and not also by voluntary contributions from producers.

[Signatures]