



Reports of Cases

ORDER OF THE COURT (Sixth Chamber)

6 May 2020*

(Reference for a preliminary ruling — Article 99 of the Rules of Procedure of the Court of Justice — State aid — European Commission decision declaring an aid scheme compatible with the internal market — National legislation precluding the award of aid under the authorised scheme in the event of non-compliance with a condition not provided for in the Commission decision)

In Joined Cases C-415/19 to C-417/19,

REQUEST for three preliminary rulings under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decisions of 4 December 2018, received at the Court on 28 May 2019, in the proceedings

Blumar SpA (C-415/19),

Roberto Abate SpA (C-416/19),

Commerciale Gicap SpA (C-417/19)

v

Agenzia delle Entrate,

THE COURT (Sixth Chamber),

composed of M. Safjan, President of the Chamber, J.-C. Bonichot (Rapporteur), President of the First Chamber, and L. Bay Larsen, Judge,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Blumar SpA and Commerciale Gicap SpA, by G. Mameli, R. Esposito and R. Altieri, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by G. De Socio, avvocato dello Stato,
- the European Commission, by P. Stancanelli and F. Tomat, acting as Agents,

* Language of the case: Italian.

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

- 1 These requests for a preliminary ruling concern the interpretation of Article 108(3) TFEU, the principle of proportionality and Commission Decision C(2008) 380 of 25 January 2008, ‘State aid N 39/2007 — Italy — Tax credit for new investment in less-favoured areas’ (‘the Decision of 25 January 2008’).
- 2 The requests have been made in three sets of proceedings brought by Blumar SpA, Roberto Abate SpA and Commerciale Gicap SpA, respectively, against the Agenzia delle Entrate (Tax Authority, Italy) concerning the latter’s refusal to grant a tax credit to those companies under a State aid scheme authorised by the Decision of 25 January 2008.

Legal context

European Union law

- 3 By the Decision of 25 January 2008, the European Commission took the view that the aid scheme established by legge n. 296 contenente ‘Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2007)’ (Law No 296 on the provisions for drawing up the annual and multiannual budget of the State (Financial Law 2007)) of 27 December 2006 (ordinary supplement to GURI No 299 of 27 December 2006; ‘Law No 296/2006’) establishing a tax credit for the purchase of plant and machinery for production facilities located in certain areas of southern Italy (‘the tax credit at issue’), was compatible with the common market, pursuant to Article 87(3)(a) and (c) EC.

Italian law

- 4 The tax credit at issue was introduced under Article 1(271) to (279) of Law No 296/2006, with effect from the tax period following the tax year ending on 31 December 2006 and until the end of the tax year ending on 31 December 2013.
- 5 The provisions of Article 1(1223) of that law were repealed but reproduced, in identical terms, in Article 16a(11) of legge n. 11 che reca norme generali sulla partecipazione dell’Italia al processo normativo dell’Unione europea e sulle procedure di esecuzione degli obblighi comunitari (Law No 11 laying down general provisions on Italy’s participation in the legislative process of the European Union and on the procedures for the implementation of the Community obligations) of 4 February 2005 (GURI No 37 of 15 February 2005, ‘Law No 11/2005’). According to those provisions:

‘The recipients of aid as referred to in Article 87 EC may benefit from such relief measures only if they declare, in accordance with Article 47 of the consolidated law (referred to in decreto del Presidente della Repubblica n. 445 (Presidential Decree No 445) of 28 December 2000 (ordinary supplement to GURI No 42 of 20 February 2001)) and following the procedure laid down by decree of the President of the Council of Ministers, to be published in the Gazzetta Ufficiale (Official Journal), that they are not among those who have received and subsequently failed to repay, or deposit into a blocked account, aid that has been declared unlawful or incompatible by the European Commission, as identified in the decree referred to in this paragraph.’

- 6 The decreto del Presidente del Consiglio dei ministri (Decree of the President of the Council of Ministers) of 23 May 2007 (GURI No 160 of 12 July 2007) lays down the procedure for drawing up the declaration ‘in lieu of a notarised document’, referred to in the previous paragraph (‘the sworn declaration’). Article 4(1) of that decree provides that that declaration ‘relates to aid the recovery of which has been ordered by the European Commission pursuant to the following decisions:
- (a) Commission Decision of 11 May 1999 ... concerning aid schemes implemented by Italy to promote employment in the form of benefits in respect of the conclusion of training and employment contracts ...
- (b) Commission Decision of 5 June 2002 ... on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding ...
- (c) Commission Decision of 30 March 2004 ... on the State aid scheme put into effect by Italy providing for urgent measures to assist employment ...
- (d) Commission Decision of 20 October 2004 ... on the aid scheme implemented by Italy for firms investing in municipalities seriously affected by natural disasters in 2002 ...’
- 7 Article 2 of decreto legge n. 97 (Legislative Decree No 97) of 3 June 2008, converted into law and amended by legge n. 129 (Law No 129) of 2 August 2008 (GURI No 180 of 2 August 2008), fixes the upper limits for the resources available annually and lays down the procedure for obtaining the tax credit at issue, by providing, in particular, that, for investment projects already implemented by the date of entry into force of that legislative decree, applicants must send to the Tax Authority a form which serves as the application for ‘entitlement to the relief’ within a set deadline, failing which the relief is not available.

The disputes in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

- 8 The facts pertaining to the three sets of proceedings are, *mutatis mutandis*, identical in Cases C-415/19 to C-417/19 and may be summarised as follows.
- 9 The applicants in the main proceedings each applied to the Tax Authority for entitlement to the tax credit at issue.
- 10 The Tax Authority rejected their respective applications on the ground that they had not appended the sworn declaration to their application.
- 11 The actions brought by the applicants against those decisions were dismissed both at first instance and on appeal.
- 12 In their respective appeals before the referring court, namely the Corte suprema di cassazione (Supreme Court of Cassation, Italy), the applicants alleged infringement of Article 108(3) TFEU, the Decision of 25 January 2008 and the principle of proportionality.
- 13 The referring court raises the question of the compatibility of the Italian legislation at issue in the main proceedings with EU law in that, first, the award of the tax credit at issue may be refused on the sole ground that the applicant has received aid that has been declared incompatible with the internal market by the Commission, without requiring that it has formally been subject to a recovery order, and, second, it is not a mere suspension of new aid but a definitive refusal. In this respect, the referring court also raises the question of the compatibility of national law with the principle of proportionality.

- 14 In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling, written in identical terms in the three cases in the main proceedings:

‘Are Article 1(1223) of Law [No 296/2006] (now Article 16a(11) of Law [No 11/2005]) and the Decree of the President of the Council of Ministers of 23 May 2007 compatible with EU law, with reference to Article 108(3) TFEU as interpreted in [the judgment of 15 May 1997, *TWD v Commission* (C-355/95 P, EU:C:1997:241)], [the] Decision [of 25 January 2008] and the [EU-] law principle of proportionality?’

- 15 By decision of the President of the Court of 28 June 2019, Cases C-415/19 to C-417/19 were joined for the purposes of the written procedure and the order.

Consideration of the question referred

- 16 Pursuant to Article 99 of the Rules of Procedure of the Court of Justice, where the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.
- 17 That provision should be applied in the present cases.
- 18 By its question, the referring court asks, in essence, whether Article 108(3) TFEU, the Decision of 25 January 2008 and the principle of proportionality must be interpreted as precluding legislation of a Member State pursuant to which the award of State aid, under an aid scheme established by that Member State and authorised by that decision, is subject to a declaration by the applicant that it has not received aid that has been considered unlawful and incompatible by the Commission, which it has failed to repay or deposit into a blocked account, even though it is not the subject of a request for repayment and despite the fact that that decision does not explicitly provide for such a requirement.
- 19 It follows from the case-law of the Court resulting from the judgment of 15 May 1997, *TWD v Commission* (C-355/95 P, EU:C:1997:241), to which the referring court refers in its orders for reference and in its question, that the Commission is entitled to make the payment of new aid subject to the recovery of aid declared unlawful and incompatible with the internal market. The Court has held that the Commission, first, has the power to take into consideration any cumulative effect of the earlier unlawful aid that has not been repaid and the new aid, and, second, can find new aid to be compatible with the internal market only where the information available to it enables it to reach that conclusion (see, to that effect, order of 21 January 2010, *Iride and Iride Energia v Commission*, C-150/09 P, not published, EU:C:2010:34, paragraph 70).
- 20 In the present case, it is apparent from the file submitted to the Court that, in its Decision of 25 January 2008, the Commission took account of the fact that the national legislation at issue in the main proceedings precludes the grant of the tax credit at issue to an applicant who has benefited from aid declared unlawful and incompatible by the Commission, where the applicant is the subject of a request for repayment but the aid has not been repaid or deposited into a blocked account.
- 21 It should be noted that that national legislation, although intended to ensure compliance with the conditions referred to by the Court in the judgment of 15 May 1997, *TWD v Commission* (C-355/95 P, EU:C:1997:241), nevertheless lays down more restrictive conditions since it provides for the payment of State aid to be refused on the sole ground that the applicant has not produced the sworn declaration, irrespective of whether it has actually benefited from aid declared unlawful and incompatible or, as the case may be, whether there is a request for repayment of that aid.

- 22 Such a requirement does not, however, adversely affect the obligations referred to in that judgment or alter the aid scheme authorised by the Decision of 25 January 2008. It is therefore not capable of calling into question the compatibility of that scheme with the internal market and therefore cannot be considered contrary to that decision.
- 23 Furthermore, as the Commission submits in its written observations, although Article 108(3) TFEU requires Member States to notify their State aid plans to the Commission before they are put into effect, it does not, however, require them to grant aid, even if it forms part of an aid scheme approved by a decision of that institution. The sole object and effect of such a decision is to authorise an aid scheme by declaring it compatible with the internal market, and not to impose it on the Member State concerned (see, to that effect, judgments of 20 November 2008, *Foselev Sud-Ouest*, C-18/08, EU:C:2008:647, paragraph 16, and of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraph 52, and order of 30 May 2018, *Yanchev*, C-481/17, not published, EU:C:2018:352, paragraph 22).
- 24 Consequently, the Commission's decision approving a State aid scheme does not preclude the Member State concerned from retaining the right to refuse to grant aid under that scheme (see, to that effect, order of 30 May 2018, *Yanchev*, C-481/17, not published, EU:C:2018:352, paragraph 22).
- 25 In the present case, the fact that, in view of the system set up for processing applications and the capping of available resources, the refusal to grant the tax credit at issue on the basis of the absence of a sworn declaration may be definitive cannot call into question the foregoing considerations.
- 26 In those circumstances, such a requirement cannot be considered contrary to the principle of proportionality.
- 27 Consequently, the answer to the question referred for a preliminary ruling is that Article 108(3) TFEU, the Decision of 25 January 2008 and the principle of proportionality must be interpreted as not precluding legislation of a Member State pursuant to which the award of aid, under an aid scheme established by that Member State and authorised by that decision, is subject to a declaration by the applicant that it has not received aid declared unlawful and incompatible by the Commission, which it has failed to repay or deposit into a blocked account, even though it is not the subject of a request for repayment and despite the fact that that decision does not explicitly provide for such a requirement.

Costs

- 28 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 (Sixth Chamber) hereby orders:

Article 108(3) TFEU, Commission Decision C(2008) 380 of 25 January 2008, 'State aid N 39/2007 — Italy — Tax credit for new investment in less-favoured areas', and the principle of proportionality must be interpreted as not precluding legislation of a Member State pursuant to which the award of aid, under an aid scheme established by that Member State and authorised by that decision, is subject to a declaration by the applicant that it has not received aid declared unlawful and incompatible by the European Commission, which it has failed to repay or deposit into a blocked account, even though it is not the subject of a request for repayment and despite the fact that that decision does not explicitly provide for such a requirement.

[Signatures]