



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

7 April 2022*

(Reference for a preliminary ruling – Aid granted by Member States – Aid scheme for the construction of mini-hydroelectric power plants – Alpine and mountain huts without connection to an electricity grid – Authorisation by the European Commission – Expiry)

In Joined Cases C-102/21 and C-103/21,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Administrative Court, Autonomous Section for the Province of Bolzano, Italy), made by decisions of 9 February 2021, received at the Court on 18 February 2021, in the proceedings

KW (C-102/21),

SG (C-103/21)

v

Autonome Provinz Bozen,

THE COURT (Ninth Chamber),

composed of S. Rodin, President of the Chamber, J.-C. Bonichot (Rapporteur) and O. Spineanu-Matei, Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- KW, by S. Pittracher and H. Wild, Rechtsanwälte,
- SG, by M. Durnwalder, Rechtsanwalt,
- the European Commission, by A. Bouchagiar, C. Kovács and C-M. Carrega, acting as Agents,

* Language of the case: German.

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

Judgment

- 1 These requests for a preliminary ruling concern the interpretation of Article 107(3)(c) TFEU and Article 20 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9), and of Commission Decision C(2012) 5048 final of 25 July 2012 on State aid SA.32113 (2010/N) – Italy: Aid scheme for energy savings, district heating and electrification of remote areas in Alto Adige/South Tyrol (OJ 2013 C 1, p. 7) ('the Commission Decision of 25 July 2012').
- 2 The requests have been made in proceedings between KW (Case C-102/21) and SG (Case C-103/21) and the Autonome Provinz Bozen (Autonomous Province of Bolzano, Italy) concerning the repayment of aid for the construction of mini-hydroelectric power plants granted by the Autonomous Province of Bolzano under an aid scheme authorised by the Commission Decision of 25 July 2012 ('the aid scheme at issue').

Legal context

European Union law

Regulation (EU) No 651/2014

- 3 Article 41 of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 [TFEU] (OJ 2014 L 187, p. 1), entitled 'Investment aid for the promotion of energy from renewable sources', provides:

'1. Investment aid for the promotion of energy from renewable energy sources shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty, provided that the conditions laid down in this Article and in Chapter I are fulfilled.

...

7. The aid intensity shall not exceed:

- (a) 45% of the eligible costs if the eligible costs are calculated on the basis of point (6)(a) or point (6)(b);
- (b) 30% of the eligible cost[s] if the eligible costs are calculated on the basis of point (6)(c).

8. The aid intensity may be increased by 20 percentage points for aid granted to small undertakings and by 10 percentage points for aid granted to medium-sized undertakings.

...’

Regulation 2015/1589

4 Recital 28 of Regulation 2015/1589 states:

‘Misuse of aid may have effects on the functioning of the internal market which are similar to those of unlawful aid and should thus be treated according to similar procedures. Unlike unlawful aid, aid which has possibly been misused is aid which has been previously approved by the Commission. Therefore the Commission should not be allowed to use a recovery injunction with regard to misuse of aid.’

5 Article 1 of Regulation 2015/1589, entitled ‘Definitions’, provides:

‘For the purposes of this Regulation, the following definitions shall apply:

...

(b) “existing aid” means:

...

(ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;

...

(c) “new aid” means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

...

(f) “unlawful aid” means new aid put into effect in contravention of Article 108(3) TFEU;

(g) “misuse of aid” means aid used by the beneficiary in contravention of a decision taken pursuant to Article 4(3) or Article 7(3) or (4) 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)] or Article 4(3) or Article 9(3) or (4) of this Regulation;

...’

6 Article 4 of that regulation, entitled ‘Preliminary examination of the notification and decisions of the Commission’, provides, in paragraph 3:

‘Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the internal market of a notified measure, in so far as it falls within the scope of Article 107(1) TFEU, it shall decide that the measure is compatible with the internal market (“decision not to raise objections”). The decision shall specify which exception under the [Treaty on the Functioning of the European Union] has been applied’.

7 Article 13 of that regulation, entitled ‘Injunction to suspend or provisionally recover aid’, provides, in paragraph 2:

‘The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State provisionally to recover any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the internal market (“recovery injunction”), if all the following criteria are fulfilled:

...’

8 Article 16 of that regulation, entitled ‘Recovery of aid’, provides, in paragraph 1:

‘Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (“recovery decision”). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.’

9 Article 20 of Regulation 2015/1589, entitled ‘Misuse of aid’, provides:

‘Without prejudice to Article 28, the Commission may, in cases of misuse of aid, initiate the formal investigation procedure pursuant to Article 4(4). Articles 6 to 9, 11 and 12, Article 13(1) and Articles 14 to 17 shall apply *mutatis mutandis*’.

Italian law

10 The aid scheme at issue is based on the Landesgesetz nr. 9, Bestimmungen im Bereich der Energieeinsparung, der erneuerbaren Energiequellen und des Klimaschutzes (Provincial Law No 9 laying down provisions in the field of energy savings, renewable energy sources and climate action) of 7 July 2010, which provides, inter alia, for the grant of subsidies, up to a limit of 80% of the investment costs, for the construction of mini-hydroelectric power plants for the generation of electrical energy from renewable energy sources for own consumption, where connection to the electricity grid is not feasible without disproportionate effort in technical and financial terms as a result of the geographical location.

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

11 On 17 December 2010, the Italian Republic notified the Commission of the aid scheme at issue under Article 108(3) TFEU. By its decision of 25 July 2012, the Commission authorised that scheme.

Case C-102/21

12 KW owns an alpine pasture situated in a mountainous area of the Autonomous Province of Bolzano, which is not connected to the public electricity grid because of its geographical location.

13 By decree of 29 January 2018, the Autonomous Province of Bolzano granted KW a subsidy of EUR 144 634, corresponding to 80% of the eligible costs of a project for the construction of a mini-hydroelectric power plant for her personal supply of electricity under the aid scheme at issue.

- 14 Subsequently, the Autonomous Province of Bolzano informed KW that, since the aid scheme at issue had expired on 31 December 2016, the award of a subsidy for her project had to comply with Regulation No 651/2014, which limits the authorised level of aid to 65% of the eligible costs.
- 15 By decree of 27 January 2020, the Autonomous Province of Bolzano withdrew in part its decision to grant KW a subsidy and reduced the amount of that subsidy to EUR 113 257.09 pursuant to Regulation No 651/2014.
- 16 On 14 February 2020, the Autonomous Province of Bolzano requested KW to repay the amount of the excess aid, plus interest.
- 17 KW brought an action before the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Administrative Court, Autonomous Section for the Province of Bolzano, Italy) for annulment of those measures.
- 18 That court considers that the dispute in the main proceedings raises the question of whether the subsidy granted to KW constitutes ‘existing’ aid within the meaning of EU law on State aid. In order to answer that question, that court’s view is that it is necessary to determine whether, on the date that subsidy was granted, the authorisation for the aid scheme at issue resulting from the Commission Decision of 25 July 2012 was still in force.
- 19 The referring court considers that, if that is not the case, the subsidy granted to KW constitutes a case of misuse of aid and that it is then necessary to determine whether Article 20 of Regulation 2015/1589 must be interpreted as meaning that it was for the Commission to order the recovery of that aid.
- 20 It adds that it is also necessary to examine whether the subsidy granted to KW may be regarded as compatible with the internal market under Article 107(3)(c) TFEU.
- 21 It is in that context that the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Administrative Court, Autonomous Section for the Province of Bolzano) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Did the aid authorised by the Commission Decision [of 25 July 2012] to cover 80% of the costs of the construction of mini-hydroelectric power plants for the generation of electrical energy for own consumption from renewable energy sources for the benefit of mountain huts and hostels in high alpine areas, for which connection to the electricity grid is not feasible without disproportionate effort in technical and financial terms, expire on 31 December 2016?
- (2) If that question is answered in the affirmative:
- (a) Is Article 20 of Regulation [2015/1589] to be interpreted as meaning that, in the case where aid is misused, the Commission must issue a recovery decision before the public authorities intervene?
- (b) Is the abovementioned aid compatible with the internal market within the meaning of Article 107(3)(c) TFEU on the ground that it serves to facilitate the development of certain economic areas, or is it liable to distort competition and affect trade between Member States?’

Case C-103/21

- 22 SG owns an alpine pasture situated in a mountainous area of the Autonomous Province of Bolzano, which is not connected to the public electricity grid because of its geographical location.
- 23 By decree of 31 August 2018, the Autonomous Province of Bolzano granted SG a subsidy of EUR 115 011, corresponding to 80% of the eligible costs of a project for the construction of a mini-hydroelectric power plant for his personal supply of electricity under the aid scheme at issue.
- 24 By decree of 27 April 2020, the Autonomous Province of Bolzano withdrew in part its decision to grant SG a subsidy on the ground that the aid scheme at issue had expired on 31 December 2016. It recalculated the amount of the subsidy which SG could claim on the basis of the award criteria laid down in Regulation No 651/2014, namely the sum of EUR 92 604, and requested SG to repay the excess amount which he had received, plus interest.
- 25 SG brought an action before the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Administrative Court, Autonomous Section for the Province of Bolzano) for annulment of those measures.
- 26 That court considers that the case raises legal questions identical to those in Case C-102/21.
- 27 In those circumstances, the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Administrative Court, Autonomous Section for the Province of Bolzano) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Did the aid authorised by the Commission Decision [of 25 July 2012] to cover 80% of the costs of the construction of mini-hydroelectric power plants for the generation of electrical energy for own consumption from renewable energy sources for the benefit of mountain huts and hostels in high alpine areas, for which connection to the electricity grid is not feasible without disproportionate effort in technical and financial terms, expire on 31 December 2016?
- (2) If that question is answered in the affirmative:
- (a) Is it then necessary to assess whether Article 20 of Regulation [2015/1589] is to be interpreted as meaning that, in the case where aid is misused, the Commission must issue a recovery decision before the public authorities intervene?
- (b) Is it necessary to assess whether the abovementioned aid is compatible with the internal market within the meaning of Article 107(3)(c) TFEU on the ground that it serves to facilitate the development of certain economic areas, or whether it is liable to distort competition and affect trade between Member States?’

The joinder of Cases C-102/21 and C-103/21

- 28 By decision of the President of the Court of 17 March 2021, Cases C-102/21 and C-103/21 were joined for the purposes of the written and oral parts of the procedure and the judgment.

Consideration of the questions referred for a preliminary ruling

Preliminary observations

- 29 It should be noted, as a preliminary point, that the questions referred by the referring court start from the premiss that the aid at issue in the cases in the main proceedings is State aid within the meaning of Article 107(1) TFEU and that the aid also complies in part with Regulation No 651/2014. That court also seems to start from the principle that there is no need to apply the *de minimis* rule to the aid, which it is for that court to verify.

The first question

- 30 By its first question in Cases C-102/21 and C-103/21, the referring court asks, in essence, whether the authorisation for the aid scheme at issue resulting from the Commission Decision of 25 July 2012 was still in force when the Autonomous Province of Bolzano granted subsidies to KW and to SG ('the aid at issue in the main proceedings').
- 31 The Commission Decision of 25 July 2012 states, in point 2.2, entitled 'Duration and budget', that, under the aid scheme at issue, a total amount of EUR 187.25 million would be granted over 'the period 2011-2016'. In addition, the summary of that decision published in the *Official Journal of the European Union* of 4 January 2013 states that the 'duration' of that scheme is until 31 December 2016.
- 32 It follows that the aid scheme at issue was no longer authorised by the Commission Decision of 25 July 2012 with effect from 1 January 2017.
- 33 It is also apparent from the file before the Court that that aid scheme was not the subject of a new authorisation by the Commission after that date.
- 34 Furthermore, it is common ground that the Autonomous Province of Bolzano granted the aid at issue in the main proceedings after 31 December 2016.
- 35 The answer to the first question is therefore that the authorisation for the aid scheme at issue resulting from the Commission Decision of 25 July 2012 was no longer in force when the Autonomous Province of Bolzano granted the aid at issue in the main proceedings.

The second question

- 36 By its second question in Cases C-102/21 and C-103/21, the referring court asks, in essence, whether Article 20 of Regulation 2015/1589 must be interpreted as meaning that, in the event of misuse of aid, the Commission is required to request the Member State to recover that aid.
- 37 As the Commission has argued, it should be noted that individual aid granted under an aid scheme after the expiry of a Commission decision authorising that scheme does not constitute 'misuse of aid' within the meaning of Article 1(g) of Regulation 2015/1589.

- 38 Article 1(g) of Regulation 2015/1589 refers to situations in which aid is used by the beneficiary in contravention of a decision taken pursuant to Article 4(3) or Article 9(3) or (4) of that regulation or Article 4(3) or Article 7(3) or (4) of Regulation No 659/1999, which relate, respectively, to decisions not to raise objections, positive decisions and conditional decisions of the Commission.
- 39 In the present case, it follows from the answer to the first question that the Commission Decision of 25 July 2012 was no longer applicable after 31 December 2016 and that the aid scheme at issue was not the subject of a new authorisation after that date.
- 40 That fact is sufficient for a finding that the aid at issue in the main proceedings cannot be regarded as having been misused by its recipients.
- 41 It is important to add that the fact the aid scheme at issue was extended beyond 31 December 2016, assuming that be proved, is not decisive because the extension of an existing aid scheme creates a new aid which is distinct from the scheme which was extended (see, to that effect, judgment of 4 December 2013, *Commission v Council*, C-111/10, EU:C:2013:785, paragraph 58).
- 42 Consequently, aid such as that at issue in the main proceedings must be regarded as new aid, which, having been granted in breach of the last sentence of Article 108(3) TFEU, constitutes ‘unlawful aid’ within the meaning of Article 1(f) of Regulation 2015/1589.
- 43 In order to provide a useful answer to the referring court, it is therefore necessary to reformulate the second question to the effect that it relates in reality to the question of whether Article 108(3) TFEU must be interpreted as meaning that the Commission is required to request the Member State to recover unlawful aid within the meaning of Article 1(f) of Regulation 2015/1589.
- 44 In that regard, it follows from settled case-law that the prohibition on implementation of planned aid laid down in the last sentence of Article 108(3) TFEU has direct effect and that the immediate enforceability of the prohibition on implementation referred to in that provision extends to all aid which has been implemented without being notified (see, to that effect, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 88 and the case-law cited).
- 45 The Court has concluded that it is the task of the national courts to ensure that all appropriate action is taken, in accordance with their national law, to address the consequences of an infringement of the last sentence of Article 108(3) TFEU, particularly as regards both the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision, the essence of their task being, consequently, to adopt the appropriate measures to remedy the unlawfulness of implementation of the aid, so that the aid does not remain freely available to the beneficiary until such time as the Commission’s decision is made (judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 89 and the case-law cited).
- 46 It must be added that any provision of EU law that satisfies the conditions required to have direct effect is binding on all the authorities of the Member States, that is to say, not merely the national courts but also all administrative bodies, including decentralised authorities, and those authorities are required to apply it (see, to that effect, judgments of 22 June 1989, *Costanzo*, 103/88, EU:C:1989:256, paragraph 31, and of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 90 and the case-law cited).

- 47 In accordance with the Court's settled case-law, both the administrative authorities and the national courts that are called upon, within the exercise of their respective powers, to apply provisions of EU law are under a duty to give full effect to those provisions (judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 91 and the case-law cited).
- 48 It follows that, where a national authority finds that aid has been granted in breach of the last sentence of Article 108(3) TFEU, it is the duty of that authority to recover on its own initiative the aid that was unlawfully granted (see, to that effect, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 92).
- 49 It should be added that, in such a case, there is nothing to prevent, in principle, the Member State concerned from taking the view that only the part of the aid which does not satisfy the criteria laid down by Regulation No 651/2014 must be repaid.
- 50 Furthermore, it must be noted that, within the system established by the Treaty for supervision of State aid, the national courts and the Commission fulfil complementary but separate roles (judgment of 2 May 2019, *A-Fonds*, C-598/17, EU:C:2019:352, paragraph 45 and the case-law cited).
- 51 Thus, the Commission cannot require recovery of aid on the sole ground that the aid is unlawful and must therefore carry out a full assessment of the compatibility of that aid with the internal market, whether or not the prohibition on implementation without prior authorisation has been complied with (see, to that effect, judgment of 14 February 1990, *France v Commission*, C-301/87, EU:C:1990:67, paragraphs 17 to 23). However, Article 13(2) of Regulation 2015/1589 permits the Commission to order the provisional recovery of aid paid unlawfully until it makes a decision on whether the aid is compatible with the internal market.
- 52 It follows from the foregoing that the answer to the second question is that Article 108(3) TFEU must be interpreted as meaning that the Commission is not required to request the Member State to recover unlawful aid within the meaning of Article 1(f) of Regulation 2015/1589.

The third question

- 53 By its third question in Cases C-102/21 and C-103/21, the referring court asks, in essence, whether the aid at issue in the main proceedings is compatible with the internal market within the meaning of Article 107(3)(c) TFEU, on the ground that it 'facilitates the development of certain economic areas' or whether it is 'liable to distort competition and affect trade between Member States'.
- 54 However, it is not clear from the wording of that question whether, by its reference to the question of whether the aid at issue in the disputes in the main proceedings is 'liable to distort competition and affect trade between Member States', the referring court is making reference to Article 107(1) TFEU, which prohibits, in principle, State aid, or to Article 107(3)(c) TFEU, which states that aid intended to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the internal market, provided that it 'does not adversely affect trading conditions to an extent contrary to the common interest'.
- 55 In any event, the file provided to the Court in these cases does not provide it with the factual details necessary to enable it to provide useful guidance to the referring court on the application of the criteria relating to the distortion of competition and the effect on trade between Member States laid down in Article 107(1) TFEU, in the cases in the main proceedings, since the only

circumstance mentioned in the order for reference in Case C-102/21, according to which the electricity produced by the funded mini-power plant will be used only for the personal supply of a private individual, does not, in any event, in itself, enable a finding to be made as to whether or not those criteria are satisfied.

56 It follows that such a question must be regarded as inadmissible.

57 As regards Article 107(3)(c) TFEU, it should be noted that the justification for making a request for a preliminary ruling is not for advisory opinions to be delivered on general or hypothetical questions, but rather that it is necessary for the effective resolution of a dispute concerning EU law (judgment of 3 October 2019, *A and Others*, C-70/18, EU:C:2019:823, paragraph 73 and the case-law cited).

58 In accordance with settled case-law, national courts do not have jurisdiction to rule on a State aid's compatibility with the internal market (see, to that effect, judgment of 26 October 2016, *DEI and Commission v Alouminion tis Ellados*, C-590/14 P, EU:C:2016:797, paragraph 96 and the case-law cited).

59 The assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, subject to review by the European Union Courts, whereas it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to the last sentence of Article 108(3) TFEU has been infringed (see, to that effect, judgment of 2 May 2019, *A-Fonds*, C-598/17, EU:C:2019:352, paragraph 46 and the case-law cited).

60 It follows that the question of whether the aid at issue in the cases in the main proceedings is compatible with the internal market under Article 107(3)(c) TFEU does not appear necessary in order to resolve the disputes in the main proceedings and that question must therefore be regarded as inadmissible.

Costs

61 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 (Ninth Chamber) hereby rules:

1. The authorisation for the aid scheme for the construction of mini-hydroelectric power plants resulting from Commission Decision C(2012) 5048 final of 25 July 2012 on State aid SA.32113 (2010/N) – Italy: Aid scheme for energy savings, district heating and electrification of remote areas in Alto Adige/South Tyrol was no longer in force when the Autonome Provinz Bozen (Autonomous Province of Bolzano, Italy) granted subsidies to KW and SG.

2. Article 108(3) TFEU must be interpreted as meaning that the European Commission is not required to request the Member State to recover unlawful aid within the meaning of Article 1(f) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.

[Signatures]