Reports of Cases

ORDER OF THE COURT (Seventh Chamber)

11 January 2024*

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – State aid – Support for renewable energy – Obligation to supply electricity from renewable energy sources – Aid compatible with the internal market – Prior notification of the aid – Article 108(3) TFEU – Possibility of imposing a pecuniary penalty for a breach of the supply obligation that occurred before that notification)

In Case C-220/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Apelacyjny w Warszawie Wydział Gospodarczy i Własności Intelektualnej (Court of Appeal, Commercial and Intellectual Property Division, Warsaw, Poland), made by decision of 22 March 2022, received at the Court on 5 April 2023, in the proceedings

R. sp. z o.o.

v

Prezes Urzędu Regulacji Energetyki,

THE COURT (Seventh Chamber),

composed of A. Prechal (Rapporteur), President of the Second Chamber, acting as President of the Seventh Chamber, N. Wahl and L. Arastey Sahún, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

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

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of the last sentence of Article 108(3) TFEU, together with Article 4(3) TEU.

* Language of the case: Polish.

2 The request has been made in proceedings between R. sp. z o.o and the Prezes Urzędu Regulacji Energetyki (Chairperson of the Office for the Regulation of Energy, Poland) ('the Chairperson of the URE') concerning a pecuniary penalty imposed on R. for failing to comply with its obligations to obtain and submit certificates of origin under a support scheme for producers of electricity from renewable sources located in Poland.

Polish law

3 Article 9a of the ustawa – Prawo energetyczne (Law on Energy) of 10 April 1997, in the version applicable to the dispute in the main proceedings ('the Law on energy'), provides:

'1. The energy sector companies, final customers and commodity brokerage firms or brokerage houses referred to in paragraph 1a shall, to the extent defined in the provisions adopted on the basis of paragraph 9:

(1) obtain and submit to the Chairperson of the URE, for the purpose of their removal, certificates of origin … issued for electricity produced from [renewable] sources located in the territory of the Republic of Poland or

(2) pay a replacement levy within the period prescribed in paragraph 5, calculated in accordance with the procedures defined in paragraph 2.

1a. The following are required to comply with the obligation referred to in paragraphs 1 and 8:

(1) any company in the energy sector involved in electricity production or trading and which sells electricity to final customers;

…

5. The replacement levies referred to in paragraph 1(2) … shall constitute revenue for the National Fund for Environmental Protection and Water Management and shall be paid into the Fund's bank account by 31 March of each year, for the previous calendar year.

…

9. The Minister for the Economy shall determine, by order, the detailed scope of the obligations referred to [in paragraph 1] …

…'

4 Article 56(1)(1a) of the Law on energy provides:

'Any failure to obtain and submit to the Chairperson of the URE, for the purpose of their removal, certificates of origin or certificates of origin for biogas, or to pay the replacement levy, shall incur a financial penalty'.

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

5 In 2005, the Republic of Poland introduced a certificates of origin system to support producers of electricity from renewable sources ('green electricity'). The certificates are issued free of charge to those producers in proportion to their production of green electricity. Other companies in the energy sector, in particular those selling electricity to final customers, have an obligation to purchase those certificates from those producers and to submit them, for the purpose of their removal, to the Chairperson of the URE in a quantity corresponding to a certain percentage of their volumes of electricity sold.

6 In 2013, R., an undertaking involved in electricity trading and subject to the obligation provided for in Article 9a(1)(1) of the Law on energy to obtain and submit certificates of origin relating to its volumes of transacted electricity, sold electricity to H. S.A., a company producing ferro-alloys, as well as to other customers.

7 To fulfil its obligation regarding the volumes of electricity sold to final customers in 2013, R. submitted certificates of origin corresponding to those volumes to the Chairperson of the URE. However, the certificates did not cover the volume of electricity supplied to H.

8 R. considered that the electricity supplied to H. was not intended for H.'s own consumption, such that H. was not a final customer for that volume of electricity. Therefore, the volume supplied to that company was not subject to the obligation provided for in Article 9a(1)(1) of the Law on energy.

9 By decision of 20 December 2018, the Chairperson of the URE, finding that the volume of electricity sold to H. was indeed intended for its own consumption and was therefore covered by that obligation, concluded that R. had neither complied with that obligation nor paid the replacement levy. It therefore fined R., pursuant to Article 56(1)(1a) of that law, 19 898 182.35 Polish zlotys (PLN) (approximately) EUR 4 476 096.12) for the non-compliance.

10 R. brought an action before the Sąd Okręgowy w Warszawie – Sąd Ochrony Konkurencji i Konsumentów (Regional Court for the Protection of Competition and Consumers, Warsaw, Poland), which partially upheld the action by annulling the decision in so far as it imposed a pecuniary penalty.

11 The court held that, although the Chairperson of the URE was in principle justified, in the light of Article 56(1)(1a) of the Law on energy, in imposing a pecuniary penalty on R. for non-compliance with the obligation to submit certificates of origin in respect of the volume of electricity supplied to H., Article 108(3) TFEU precluded that.

12 According to that court, it was clear from Commission Decision C(2016) 4944 final of 2 August 2016 on State aid SA.37345 (2015/NN) – Poland – Polish certificates of origin system to support renewables and reduction of burdens arising from the renewables certificate obligation for energy intensive users (OJ 2016 C 471, p. 1; 'the final decision of 2 August 2016'), that the Polish certificates of origin system constituted State aid. However, although the European Commission, by that decision, had declared the system compatible with the internal market, the fact remains that its implementation prior to the decision was contrary to Article 108(3) TFEU.

13 The Chairperson of the URE appealed against the judgment before the Sąd Apelacyjny w Warszawie Wydział Gospodarczy i Własności Intelektualnej (Court of Appeal, Commercial and Intellectual Property Division, Warsaw, Poland), alleging, inter alia, an infringement of Article 108(3) TFEU.

14 On the basis of the final decision of 2 August 2016, the referring court finds that the provisions laying down the obligation regarding certificates of origin were introduced into the Polish legal system in breach of Article 108(3) TFEU.

15 However, the referring court considers that the question whether it is possible to impose a pecuniary penalty on an undertaking on the basis of national provisions relating to an aid scheme implemented in breach of Article 108(3) TFEU has not yet been decided by the case-law of the Court of Justice, particularly where that aid scheme has subsequently been declared compatible with the internal market.

16 In that regard, according to the referring court, it is conceivable that, just as the beneficiary of non-notified aid must take into account the need to repay it, an undertaking subject to the obligations arising from such an aid scheme and convinced of the absence of notification of that scheme must be able to expect not to be penalised for breaching those obligations.

17 The effectiveness of the prohibition set out in Article 108(3) TFEU leads to the same conclusion, as does the fact that the proceeds from the replacement levy, referred to in Article 9a(1)(2) and (5) of the Law on energy, and from penalties for non-payment of that levy are used to finance the aid, the replacement levy being – contrary to the assertions of the Chairperson of the URE – an integral part of the aid.

18 In those circumstances, the Sąd Apelacyjny w Warszawie Wydział Gospodarczy i Własności Intelektualnej (Court of Appeal, Commercial and Intellectual Property Division, Warsaw) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is Article 108(3) [TFEU], in conjunction with Article 4(3) [TEU], to be interpreted as meaning that the failure to notify State aid to the [Commission], even though the Commission subsequently found in a decision that that aid was compatible with the internal market, precludes the imposition of a pecuniary penalty on an undertaking which has not complied with an obligation arising from a national provision implementing [that] aid in the period prior to the Commission’s decision?’

Consideration of the question referred

19 Pursuant to Article 99 of the Rules of Procedure of the Court of Justice, where, inter alia, the reply to a question referred for a preliminary ruling may be clearly deduced from existing case-law, 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.

20 It is appropriate to apply that provision in the present case.

21 By its single question, the referring court seeks to ascertain, in essence, whether the last sentence of Article 108(3) TFEU, together with Article 4(3) TEU, must be interpreted as precluding a pecuniary penalty being imposed on an undertaking for breaching an obligation forming part of a State aid measure implemented before the Commission adopted the final decision in which it found that aid to be compatible with the internal market, where the breach in question occurred before that decision was adopted.

22 It follows from the order for reference that the question arises in relation to a Polish certificates of origin system introduced in 2005 to support producers of electricity from renewable sources in Poland. Although constituting a State aid scheme falling under Article 108(3) TFEU, according to the Commission, the scheme was notified to it by the Polish authorities only in 2013, the Polish authorities having initially assumed that such a scheme could not be classified as State aid. By its final decision of 2 August 2016, the Commission declared the scheme compatible with the internal market, despite criticising its premature implementation.

23 Therefore, as formulated by the referring court, the question referred relates to the compliance with EU law of a pecuniary penalty imposed on an undertaking for failing to comply, inter alia, with its obligation to obtain and submit certificates of origin for all its electricity sales – an obligation that, on the basis of the final decision of 2 August 2016, indisputably arises from its participation in that State aid scheme.

24 That stated, it must first be recalled that Article 108(3) TFEU establishes a prior control of plans to grant new aid. The aim of that system of prior control is therefore that only compatible aid may be implemented. In order to achieve that aim, the implementation of planned aid is to be deferred until doubt as to its compatibility is resolved by the Commission's final decision (judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 84 and the case-law cited).

25 In that regard, the notification requirement is one of the fundamental features of the system of control put in place by the FEU Treaty in the field of State aid. Within that system, Member States are under an obligation, first, to notify to the Commission each measure intended to grant new aid or to alter aid within the meaning of Article 107(1) TFEU and, second, not to implement such a measure, in accordance with Article 108(3) TFEU, until that EU institution has taken a final decision on that measure (judgment of 24 November 2020, *Viasat Broadcasting UK*, C-445/19, EU:C:2020:952, paragraph 19 and the case-law cited).

26 The prohibition laid down by Article 108(3) TFEU is designed to ensure that aid cannot become operational before the Commission has had a reasonable period in which to study the proposed measures in detail and, if necessary, to initiate the procedure provided for in Article 108(2) TFEU (judgment of 24 November 2020, *Viasat Broadcasting UK*, C-445/19, EU:C:2020:952, paragraph 20 and the case-law cited).

27 In the context of the system of State aid control, the national courts, on the one hand, and the Commission, on the other, have complementary but distinct roles., the national courts ensuring, in particular, the safeguarding, until the final decision of the Commission, of the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by Article 108(3) TFEU (judgment of 15 September 2016, *PGE*, C-574/14, EU:C:2016:686, paragraphs 30 and 31).

28 The application of those rules is based on an obligation of sincere cooperation, in the context of which national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under EU law and refrain from those which may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU (see, to that effect, judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 41).

29 In the second place, it follows from well-established case-law that an aid measure which is put into effect in infringement of the obligations arising from Article 108(3) TFEU is unlawful (judgment of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 28 and the case-law cited).

30 Furthermore, in a situation where the Commission has, in relation to aid implemented in breach of Article 108(3) TFEU, adopted, as in the present case, a final decision finding that that aid is compatible with the internal market pursuant to Article 107 TFEU, that decision does not have the effect of regularising, retrospectively, implementing measures which were invalid because they had been taken in disregard of the prohibition on implementation laid down by the last sentence of Article 108(3) TFEU. Any other interpretation would have the effect of according a favourable outcome to the non-observance, by the Member State concerned, of that provision and would deprive it of its effectiveness (judgment of 24 November 2020, *Viasat Broadcasting UK*, C-445/19, EU:C:2020:952, paragraph 21).

31 It follows that aid which was implemented before the adoption of the final decision finding it compatible with the internal market must be considered unlawful under Article 108(3) TFEU during the period prior to the adoption of that decision (see, to that effect, judgment of 15 December 2022, *Veejaam and Espo*, C-470/20, EU:C:2022:981, paragraph 54).

32 In the third place, the Court has also held, without limiting that finding to a particular area of EU law, that a system of penalties which provides for fines or other coercive measures to ensure compliance with national rules that are recognised as being contrary to EU law must be held, from that fact alone, to be contrary to EU law (judgment of 11 September 2003, *Safalero*, C-13/01, EU:C:2003:447, paragraph 45 and the case-law cited).

33 Consequently, penalties for non-compliance with an obligation which is contrary to the last sentence of Article 108(3) TFEU, in that it is part, as noted in paragraph 31 of the present order, of a State aid scheme implemented before the adoption of the final decision finding it compatible with the internal market, are themselves contrary to that provision, where they are imposed for a breach of that obligation during the period prior to the adoption of that decision.

34 In the present case, it follows from the findings made by the referring court that (i) the obligation provided for in Article 9a(1)(1) of the Law on energy to obtain certificates of origin and submit them to the Chairperson of the URE for the purpose of their removal is part of a State aid scheme introduced into the Polish legal system contrary to the last sentence of Article 108(3) TFEU, in so far as that scheme was implemented before the Commission adopted the final decision finding it compatible with the internal market; (ii) therefore, such an obligation was, during the period preceding the adoption of that decision, contrary to the last sentence of Article 108(3) TFEU; and (iii) the penalty imposed on R. was for an infringement committed in the period during which the aid was unlawful.

35 In those circumstances, which it is for the referring court to ascertain, as the case may be, a penalty such as that imposed on R. should, in the light of the case-law referred to in paragraphs 24 to 32 of the present order, be held to be contrary to the last sentence of Article 108(3) TFEU.

36 In the light of the foregoing considerations, the answer to the question referred must be that the last sentence of Article 108(3) TFEU, together with Article 4(3) TEU, must be interpreted as precluding a pecuniary penalty being imposed on an undertaking for breaching an obligation forming part of a State aid measure implemented before the Commission adopted the final decision in which it found that aid to be compatible with the internal market, where the breach in question occurred before that decision was adopted.

Costs

37 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.

On those grounds, the Court (Seventh Chamber) hereby orders:

The last sentence of Article 108(3) TFEU, together with Article 4(3) TEU,

must be interpreted as precluding a pecuniary penalty being imposed on an undertaking for breaching an obligation forming part of a State aid measure implemented before the European Commission adopted the final decision in which it found that aid to be compatible with the internal market, where the breach in question occurred before that decision was adopted.

[Signatures]