Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

23 January 2019*

(Reference for a preliminary ruling — State aid — Existing aid and new aid — Classification — Regulation (EC) No 659/1999 — Article 1(b)(iv) and (v) — Principles of legal certainty and protection of legitimate expectations — Applicability — Subsidies granted before the liberalisation of a market initially closed to competition — Action for damages against the Member State brought by a competitor of the beneficiary company)

In Case C-387/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decision of 10 April 2017, received at the Court on 28 June 2017, in the proceedings

Presidenza dei Consiglio dei Ministri

v

Fallimento Traghetti del Mediterraneo SpA,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, Vice-President of the Court, acting as President of the First Chamber, A. Arabadjiev (Rapporteur), E. Regan, C.G. Fernlund and S. Rodin, Judges,

Advocate General: N. Wahl,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 7 June 2018,

after considering the observations submitted on behalf of:

– Fallimento Traghetti del Mediterraneo SpA, by M. Contaldi, P. Canepa, V. Roppo and S. Sardano, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and G. De Bellis, avvocato dello Stato,

– the French Government, by J. Bousin and by P. Dodeller, D. Colas and R. Coesme, acting as Agents,

– the European Commission, by P. Stancanelli and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2018,

* Language of the case: Italian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(b)(iv) and (v) 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), of Article 93(3) of the EEC Treaty (subsequently, after amendment, Article 88(3) EC, now Article 108(3) TFEU) and the principles of legal certainty and protection of legitimate expectations.

2 The request has been made in proceedings between the Presidenza del Consiglio dei Ministri (Presidency of the Council of Ministers, Italy) and Fallimento Traghetti del Mediterraneo SpA ('FTDM') concerning a claim for compensation for the damage it suffered due to the grant, during the years 1976 to 1980, of subsidies to Tirrenia di Navigazione SpA ('Tirrenia'), a competitor of FTDM.

Legal context

EU law

3 Article 1 of Regulation No 659/1999, headed 'Definitions', provided:

'For the purposes of this Regulation:

…

(b) "existing aid" shall mean:

…

(iv) aid which is deemed to be existing aid pursuant to Article 15;

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;

…'

4 Article 15 of that regulation, entitled 'Limitation period', provided:

'1. The powers of the Commission to recover aid shall be subject to a limitation period of 10 years.

2. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid, shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

3. Any aid with regard to which the limitation period has expired, shall be deemed to be existing aid.'

Italian law

5 The subsidies at issue in the main proceedings were granted to Tirrenia, a shipping company which was a competitor of FTDM, under legge n. 684 — Ristrutturazione dei servizi marittimi di preminente interesse nazionale (Law No 684 on the restructuring of shipping services of major national interest), of 20 December 1974, (GURI No 336 of 24 December 1974) ('Law No 684').

6 Article 7 of Law No 684 provides as follows:

'The Minister for Merchant Shipping is authorised to grant subsidies for the provision of the services referred to in the preceding article, by concluding annual ad hoc agreements, in consultation with the Minister for the Treasury and the Minister for State Investments.

The subsidies referred to in the preceding paragraph must provide, over a period of three years, for operation of the services under conditions of economic equilibrium. On a prospective basis, such subsidies are to be determined by reference to net income, the amortisation of investments, operating costs, organisational costs and financial burdens.

…'

7 Article 8 of Law No 684 provides:

'The services linking the larger and smaller islands, referred to in Article 1(c), and any extensions which are technically and economically necessary, must satisfy requirements relating to the economic and social development of the regions concerned, particularly the Mezzogiorno.

The Minister for Merchant Shipping is consequently authorised to grant subsidies for the provision of those services, by concluding ad hoc agreements, in consultation with the Minister for the Treasury and the Minister for State Investments, for a period of 20 years.'

8 Article 9 of Law No 684 states:

'The agreements under the preceding article must stipulate:

(1) the routes to be served;

(2) the frequency of each service;

(3) the types of vessel allocated to each route;

(4) the subsidy, which must be determined on the basis of net income, the amortisation of investments, operating costs, organisational costs and financial burdens.

Before 30 June each year, the subsidy to be paid for the year shall be adjusted whenever, during the previous year, at least one of the economic components specified in the agreement was subject to variation by more than one twentieth of the value used for the same item when determining the previous year's subsidy.'

9 Article 18 of Law No 684 provides:

'The financial burden arising from the application of the present Law is to be met in the sum of ITL 93 billion by the amounts already entered in Chapter 3061 of the Ministry for Merchant Shipping's estimate of expenditure for the financial year 1975 and by those which will be entered in the corresponding chapters for successive financial years.'

10 Article 19 of Law No 684 states as follows:

'Until the date of approval of the agreements provided for under the present Law, the Minister for Merchant Shipping shall, in agreement with the Minister for the Treasury, make in deferred monthly instalments payments on account which may not in the aggregate exceed [ninety] per cent of the total amount indicated in Article 18.'

11 Article 7 of the Decree of the President of the Republic No 501 of 1 June 1979 (GURI No 285 of 18 October 1979), adopted in order to implement Law No 684, states that the payments on account referred to in Article 19 of that law are paid to companies providing services of major national interest until the date of registration by the Corte dei conti (Court of Auditors, Italy), of the measures relating to the conclusion of new agreements.

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

12 As may be seen from the judgments of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391), and of 10 June 2010, *Fallimento Traghetti del Mediterraneo* (C-140/09, EU:C:2010:335), FTDM and Tirrenia are two maritime transport undertakings which, in the 1970s, ran regular ferry services between mainland Italy and the islands of Sardinia and Sicily.

13 In 1981, FTDM brought proceedings against Tirrenia before the Tribunale di Napoli (District Court, Naples, Italy) seeking compensation for the damage which it claimed to have suffered as a result of the low-fare policy operated by Tirrenia between 1976 and 1980. In particular, FTDM argued that Tirrenia had abused its dominant position on the market in question by operating with fares well below cost owing to its having obtained public subsidies in breach of EU law.

14 The application brought by FTDM was dismissed by judgment of the Tribunale di Napoli (District Court, Naples) of 26 May 1993, upheld on appeal by judgment of the Corte d'appello di Napoli (Court of Appeal, Naples, Italy) of 13 December 1996.

15 The appeal brought against that judgment by the insolvency administrator for FTDM was dismissed by judgment of the Corte suprema di cassazione (Supreme Court of Cassation, Italy) of 19 April 2000, which, in particular, refused to accede to the administrator's request to refer questions for preliminary ruling to the Court on whether Law No 684 was compatible with EU law, on the ground that the approach adopted by the court ruling on the substance complied with the relevant legislative provisions and was consistent with the Court's case-law.

16 By writ of summons of 15 April 2002, the insolvency administrator for FTDM instituted proceedings against the Italian State before the Tribunale di Genova (District Court, Genoa, Italy), with a view to that State being held liable on various grounds: first, in its legislative capacity, for having granted aid under Law No 684, which was incompatible with the EEC treaty; second, in its judicial capacity, for having failed, through the judgment of the Corte di Cassazione (Court of Cassation) of 19 April 2000, to fulfil its obligation to refer questions to the Court of Justice for a preliminary ruling on the compatibility with EU law of Law No 684; and, finally, in its administrative capacity, for having failed to inform the Corte suprema di Cassazione (Supreme Court of Cassation) about the initiation of infringement proceedings by the European Commission in relation to that law, thereby failing to fulfil its obligation of loyal cooperation with the European institutions.

17 In its action, FTDM claimed that the Court should order the Italian State to pay it the sum of EUR 9 240 000 by way of compensation for the damage it had suffered.

18 On 14 April 2003, the Tribunale di Genova (District Court, Genoa) referred a request for a preliminary ruling to the Court. That request gave rise to the judgment of 13 June 2006, *Traghetti del Mediterraneo* (C-173/03, EU:C:2006:391).

19 Further to that judgment, by decision of 27 February 2009, the Tribunale di Genova (District Court, Genoa), found that the 'State judiciary [had] acted unlawfully', and by a separate order directed that the proceedings should continue so that the claim for damages resulting from that unlawful conduct could be heard. It was at that stage of the proceedings that, uncertain as to the interpretation of the EU law on State aid, the Tribunale di Genova made a further reference to the Court.

20 By judgment of 10 June 2010, *Fallimento Traghetti del Mediterraneo* (C-140/09, EU:C:2010:335), the Court held that 'Under EU law subsidies paid in circumstances such as those in the main proceedings, pursuant to national legislation providing for payments on account prior to the approval of an agreement, constitute State aid if those subsidies are liable to affect trade between Member States and distort or threaten to distort competition, which it is for the national court to determine'.

21 By decision of 30 July 2012, the Tribunale di Genova (District Court, Genoa) ordered the Presidency of the Council of Ministers to pay FTDM the sum of EUR 2 330 355.78, increased to reflect changes in monetary values, together with interest at the statutory rate, as compensation for the damage suffered by FTDM because of the unlawful conduct of the State in its judicial capacity.

22 The Presidency of the Council of Ministers appealed and FTDM cross-appealed against that decision.

23 By judgment of 24 July 2014, the Corte di appello di Genova (Court of Appeal, Genoa, Italy) set aside that decision and ruled on the merits of the case.

24 While rejecting FTDM's claims for compensation based on the liability of the Italian State in its judicial and administrative capacities, that court upheld the claim based on the liability of that State in its legislative capacity, because of the adoption by the Italian Parliament of Law No 684. It, therefore, ordered that State to pay FTDM the sum of EUR 2 330 355.78, increased to reflect changes in monetary values, together with interest at the statutory rate, as compensation for the harm suffered by that company.

25 The Corte di appello di Genova (Court of Appeal, Genoa) took the view, in particular, that the subsidies granted to Tirrenia had been liable to affect trade between Member States, on the ground that, 'for reasons of geographical proximity, the routes served by Tirrenia, could have been operated by carriers of other Member States (in particular [the Kingdom of Spain] and [the French Republic]) which, however, found themselves at a disadvantage compared to the former'.

26 Furthermore, that court held that the presence of operators from other Member States on the routes served by Tirrenia had been noted by the Commission in its Decision 2001/851/EEC of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company by Italy (OJ 2001 L 318, p. 9).

27 In addition, that court found that, having regard to the significant value of the subsidies paid during the years in question, of around 400 billion Italian lire (ITL), and the fact that Tirrenia also operated on international routes, those subsidies were also caught by the prohibition on so-called cross subsidies.

28 In those circumstances, the Corte di appello di Genova (Court of Appeal, Genoa) held that the subsidies at issue in the main proceedings, in that they were not granted before the entry into force of the EEC Treaty, had to be regarded as new aid, subject to the obligation of notification under Article 93(3) of the EEC Treaty, so that, in the absence of such notification, there was an infringement of EU law.

29 The Presidency of the Council of Ministers lodged an appeal on a point of law against that judgment before the referring court, arguing, inter alia, that the aid granted to Tirrenia was wrongly classified as new aid and not as existing aid.

30 The referring court observes, first of all, that, for the purposes of the legal classification as existing or new aid of State aid granted in the context of a non-liberalised market, such as that at issue in the main proceedings, it is necessary to examine the applicability *ratione temporis* of Article 1(b)(v) of Regulation No 659/1999 and its scope.

31 Next, that court notes the importance of one of the characteristics of the market at issue, namely the absence of liberalisation of that market. Thus, it considers that, in paragraph 143 of its judgment of 15 June 2000, *Alzetta and Others* v *Commission* (T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, EU:T:2000:151), the Court of First Instance of the European Communities identified a principle according to which an aid scheme established in a market originally closed to competition had, when that market was liberalised, to be regarded as an existing aid scheme, and it adds that that principle was confirmed by the Court in paragraphs 66 to 69 of the judgment of 29 April 2004, *Italy* v *Commission* (C-298/00 P, EU:C:2004:240). Thus, for the purposes of the legal classification of the subsidies at issue in the main proceedings as existing or new aid, it was necessary also to examine the scope of that principle.

32 The referring court, however, also observes that it is apparent from a series of cases concerning undertakings in the Gruppo Tirrenia di Navigazione, which gave rise to the judgment of the Court of 10 May 2005, *Italy* v *Commission* (C-400/99, EU:C:2005:275), and to the judgments of the General Court of 20 June 2007, *Tirrenia di Navigazione and Others* v *Commission* (T-246/99, not published, EU:T:2007:186), and of 4 March 2009, *Tirrenia di Navigazione and Others* v *Commission* (T-265/04, T-292/04 and T-504/04, not published, EU:T:2009:48), that the lack of liberalisation of the maritime cabotage market was found to be irrelevant for the classification of some of the measures in question as existing aid.

33 Finally, the referring court is unsure whether Article 1(b)(iv) of Regulation No 659/1999, read in conjunction with Article 15 of that regulation, applies to State aid granted before the entry into force of that regulation. According to that court, it is apparent from the judgment of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235), that those provisions could be applicable to events prior to the entry into force of that regulation.

34 In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) For the purposes of classifying the aid in question (as “existing” and, therefore, not “new” aid), is Article 1(b)(v) of Regulation [No 659/1999], according to which “aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation”, applicable and, if so, under what conditions; or is the principle (formally different in scope from that of the abovementioned substantive law provision) established by the General Court in its judgment of 15 June 2000, *Alzetta and Others* v *Commission* (T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, EU:T:2000:151, paragraph 143) and confirmed, by the ruling, of interest in the present case, of the Court of Justice in its judgment of 29 April 2004, *Italy* v *Commission* (C-298/00 P, EU:C:2004:240, paragraphs 66 to 69) — according to which “... a system of aid established in a market that was initially closed to competition must, when that market is liberalised, be regarded as an existing aid system, since at the time of its establishment it did not come within the scope of Article 92(1) of the EEC Treaty [subsequently Article 87(1) EC,

now Article 107(1) TFEU], which, having regard to the requirements set out in that provision regarding effect on trade between Member States and repercussions on competition, applies only to sectors open to competition" — applicable and, if so, under what conditions?

(2) For the purposes of classifying the aid at issue, is Article 1(b)(iv) of Regulation No 659/1999, according to which 'existing' aid is "aid which is deemed to be existing aid pursuant to Article 15" — Article 15 establishing a 10-year limitation period for recovering unlawfully granted aid — applicable and, if so, under what conditions — or are the well-established principles of the Court of Justice of the protection of legitimate expectation and legal certainty applicable and, if so, under what conditions (whether or not similar to the principle set out in the substantive law provision referred to above)?'

Consideration of the questions referred

The first question

35 By its first question, the referring court asks, in essence, whether subsidies granted to an undertaking before the date of liberalisation of the market concerned, such as those at issue in the main proceedings, may be classified as existing aid because of the merely formal absence of liberalisation of that market at the time of their grant.

36 In that regard, it must be recalled that, according to the Court's settled case-law, classification of a national measure as 'State aid' requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53).

37 Bearing that in mind, it is necessary to ascertain, in a situation such as that at issue in the main proceedings, in which the relevant market was not yet formally open to competition, whether, at the time of their grant, the subsidies concerned constituted State aid because they fulfilled the conditions that there be an effect on trade between Member States and that competition be distorted.

38 In that connection, it must be noted that whilst it is true that State aid may, in principle, be treated as existing aid because it can be established that at the time it was put into effect, inter alia because of the absence of liberalisation of the market in question, it did not constitute aid, the Court has already held that such absence of liberalisation does not necessarily exclude the possibility that an aid measure is liable to affect trade between Member States or that it distorts or threatens to distort competition (see, to that effect, judgment of 10 June 2010, *Fallimento Traghetti del Mediterraneo*, C-140/09, EU:C:2010:335, paragraph 49).

39 State aid is liable to affect trade between Member States and to distort or threaten to distort competition, even though the market concerned is only partially open to competition.

40 In order for an intervention by the State or through State resources to be liable to affect trade between Member States and to distort or threaten to distort competition, it is sufficient that, at the time of the entry into force of an aid measure, there is a situation of effective competition on the relevant market.

41 In the present case, as the Advocate General observed in point 67 of his Opinion, the fact that the maritime cabotage market at issue in the main proceedings was not liberalised by regulatory means until after the granting of the subsidies at issue in the main proceedings does not necessarily mean that, before that liberalisation, those subsidies constituted aid fulfilling the conditions referred to in paragraph 36 of the present judgment.

42 In that regard, it should be recalled that, as is apparent from paragraph 50 of the judgment of 10 June 2010, *Fallimento Traghetti del Mediterraneo* (C-140/09, EU:C:2010:335), it cannot be excluded, first, that Tirrenia was in competition with undertakings from other Member States on the domestic routes concerned and, secondly, that it was in competition with such undertakings on international routes and that, in the absence of any separate accounting for its various activities, there was a risk of cross-subsidisation, that is to say, a risk that the revenue from its cabotage activity, which received the subsidies at issue in the main proceedings, was used for the benefit of activities carried on by it on its international routes.

43 Thus, it is apparent from the file before the Court that, even if the relevant market was not formally liberalised, it seems that, at the time of the facts in the main proceedings that market was a competitive market and that the subsidies granted to Tirrenia were likely to affect trade between Member States and to distort or threaten to distort competition.

44 In those circumstances, it must be held that, in so far as the subsidies at issue in the main proceedings came, at the time that they were granted, under the concept of 'State aid' because they fulfil all the necessary criteria for that purpose, in particular that they were liable to affect trade between Member States and distort or threaten to distort competition, which it is for the referring court to ascertain, those measures cannot, in principle, be classified as existing aid solely because of a lack of formal liberalisation of the market concerned.

45 In the light of those considerations, the answer to the first question is that subsidies granted to an undertaking before the date of liberalisation of the market concerned, such as those at issue in the main proceedings, cannot be classified as existing aid because of the merely formal absence of liberalisation of that market at the time those subsidies were granted, to the extent that those subsidies were liable to affect trade between Member States and distorted or threatened to distort competition, which it is for the referring court to ascertain.

The second question

46 By its second question, the referring court asks whether, in a situation such as that at issue in the main proceedings, it is necessary, for the purposes of classification of the subsidies in question as existing aid or new aid, to apply Article 1(b)(iv) of Regulation No 659/1999, or whether it should base its decision on the principles of protection of legitimate expectations and legal certainty.

47 As regards, first, the applicability of Article 1(b)(iv) of that regulation, in a situation such as that at issue in the main proceedings, it is necessary, in the first place, to point out that the concept of 'existing aid', referred to in that provision, is closely linked to the role, functions and specific powers conferred on the Commission under the State aid control system.

48 In that regard, it should be recalled that, under that provision, existing aid means all aid which is deemed to be existing aid pursuant to Article 15 of Regulation No 659/1999.

49 Under Article 15(3) of that regulation any aid with regard to which the limitation period has expired is to be deemed to be existing aid.

50 For its part, Article 15(2) of that regulation provides that any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid interrupts that period and each interruption is to start time running afresh.

51 It is clear from the wording of those provisions that the classification of State aid as existing aid, within the meaning of Article 1(b)(iv) of Regulation No 659/1999, depends, in principle, on whether the Commission has taken measures in respect of the aid concerned in the limitation period.

52 Furthermore, Article 15(1) of Regulation No 659/1999 provides that the powers of the Commission to recover aid are to be subject to a limitation period of 10 years.

53 In the second place, it should be noted that, in the context of the State aid control system, the national courts have a special role and enjoy a certain level of independence in relation to the Commission, particularly when hearing an action for damages in the absence of a Commission decision.

54 In that regard, according to the settled case-law of the Court, the implementation of that system of control is a matter for both the Commission and the national courts, their respective roles being complementary but separate (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 27 and the case-law cited).

55 In particular, the assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the EU judicature, 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 Article 93(3) of the EEC Treaty has been infringed (see, to that effect, judgment of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 38).

56 In fulfilling their tasks, national courts may be required to uphold claims for compensation for damage caused by the unlawful State aid to competitors of the beneficiary.

57 As the Advocate General stated, in essence, in points 82 and 84 of his Opinion, in the context of such actions for damages, those courts, in exercising their functions of safeguarding the rights of individuals, enjoy a degree of independence as regards intervention from the Commission so that the possibility to claim damages is, in principle, independent of any parallel investigation by the Commission concerning the aid in question.

58 In that regard, it is settled case-law of the Court that the initiation by the Commission of the formal examination procedure for State aid cannot release national courts from their duty to safeguard the rights of individuals faced with a possible breach of Article 93(3) of the EEC Treaty (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 32).

59 Similarly, it should be recalled that, concerning the level of independence of the national courts, a Commission decision finding aid that was not notified to be compatible with the internal market does not have the effect of regularising *ex post facto* implementing measures which were invalid because they were taken in disregard of the prohibition laid down by the last sentence of Article 93(3) of the EEC Treaty, since otherwise the direct effect of that provision would be impaired and the interests of individuals, which are to be protected by national courts, would be disregarded. Any other interpretation would have the effect of according a favourable outcome to the non-observance of that provision by the Member State concerned and would deprive it of its effectiveness (judgment of 5 October 2006, T*ransalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 41 and the case-law cited).

60 Therefore, when an applicant is able to demonstrate before the national court that he has suffered loss caused by the premature implementation of State aid and, more specifically, as a result of the illegal time advantage which the beneficiary gained from such an implementation, the action for damages can, in principle, be upheld even though the Commission has already approved the aid in question by the time the national court decides on the application.

61 It follows from the considerations set out in paragraphs 47 to 60 of this judgment that, having regard to the role played by the national courts in the State aid control system and their level of independence in relation to the Commission, particularly when hearing an action for damages where there is no Commission decision, it must be held, as the Advocate General noted in point 91 of his Opinion, that the expiry of the 10-year limitation period laid down in Article 15(1) of Regulation No 659/1999 merely sets a time limit on the Commission's powers regarding the recovery of State aid.

62 Therefore, the expiry of the limitation period provided for in Article 15(1) of Regulation No 659/1999 cannot have the effect of retroactively legalising State aid vitiated by illegality merely because it becomes existing aid within the meaning of Article 1(b)(v) and, consequently, of depriving of any legal basis an action for damages brought against the Member State concerned by individuals and competitors affected by the grant of the unlawful aid.

63 Any other interpretation would amount to reducing the scope of the obligation on the Member States to notify the aid measures and thus to depriving Article 93(3) of the EEC Treaty of its practical effect, particularly when that provision makes no reference to the role, functions and specific powers of the Commission.

64 As regards the doubts of the referring court, resulting from the judgment of 16 April 2015, *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235), concerning the applicability of Article 1(b)(iv) of Regulation No 659/1999 for the purposes of the classification of the subsidies at issue in the main proceedings as existing aid or new aid, it should be noted, as the Advocate General observed in point 102 of his Opinion, that the case giving rise to that judgment did not concern an action for damages but whether national provisions establishing privileges which are potentially incompatible with the rules of EU law on State aid had to be notified, within the meaning of Article 88(3) EC, and, if so, whether those provisions had to be disapplied.

65 It cannot, therefore, be argued on the basis of that case-law that the definition of the concept of 'existing aid' in Article 1(b)(iv) of Regulation No 659/1999 is applicable in the context of an action for damages such as that at issue in the main proceedings.

66 Furthermore, it must be recalled that, in so far as Regulation No 659/1999 contains rules of a procedural nature which apply to all administrative procedures in the matter of State aid pending before the Commission, it codifies and reinforces the Commission's practice in reviewing State aid and does not contain any provision relating to the powers and obligations of the national courts, which continue to be governed by the provisions of the Treaty as interpreted by the Court (see, to that effect, judgment of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraphs 34 and 35).

67 It follows from the foregoing that the definition of the concept of 'existing aid' in Article 1(b)(iv) of Regulation No 659/1999 is not applicable to a situation such as that at issue in the main proceedings.

68 Next, concerning the possibility of relying on the principle of the protection of legitimate expectations, it should be noted that that principle cannot be relied on by a person who has infringed the legislation in force (see, to that effect, judgment of 14 July 2005, *ThyssenKrupp* v *Commission*, C-65/02 P and C-73/02 P, EU:C:2005:454, paragraph 41).

69 That finding is, as the Advocate General noted in point 109 of his Opinion, even more valid for State entities which have granted State aid in disregard of the procedure laid down in Article 93(3) of the EEC Treaty.

70 It follows that, where subsidies were granted in breach of the obligation of prior notification laid down in Article 93(3) of the EEC Treaty, State entities cannot rely on the principle of the protection of legitimate expectations (see, to that effect, judgment of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 104).

71 Finally, as regards the application of the principle of legal certainty in a situation such as that at issue in the main proceedings, it should be recalled that, in general, limitation periods fulfil the function of ensuring legal certainty (judgment of 13 June 2013, *Unanimes and Others*, C-671/11 to C-676/11, EU:C:2013:388, paragraph 31). In order to fulfil their function of ensuring legal certainty, those periods must be fixed in advance and any application 'by analogy' of a limitation period must be sufficiently foreseeable for a person (see, to that effect, judgment of 5 May 2011, *Ze Fu Fleischhandel and Vion Trading*, C-201/10 and C-202/10, EU:C:2011:282, paragraph 32 and the case-law cited).

72 In that regard, and since there is no Community legislation on the subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the detailed procedural rules governing actions at law intended to safeguard the rights which individuals derive from Community law, provided, firstly, that those rules are not less favourable than those governing rights which originate in domestic law (principle of equivalence) and, secondly, that they do not render impossible or excessively difficult in practice the exercise of rights conferred by the Community legal order (principle of effectiveness) (judgment of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 45).

73 Thus, the only limitation rules applicable in the present case are those of national law, interpreted in the light of the principles of effectiveness and equivalence.

74 In that context, it would be contrary to the principle of legal certainty to apply by analogy the limitation period of 10 years laid down in Article 15(1) of Regulation No 659/1999 to an action for damages brought against the Member State concerned by a competitor of the company benefiting from State aid.

75 A limitation period laid down by a provision which merely seeks to limit in time the powers of the Commission concerning recovery of State aid cannot be imposed on an individual. The expiry of such a period cannot preclude liability being incurred by the State before the national court for infringement of the obligation of prior notification laid down in Article 93(3) of the EEC Treaty.

76 In the light of the foregoing considerations, the answer to the second question is that Article 1(b)(iv) of Regulation No 659/1999 must be interpreted as meaning that it is not applicable to a situation such as that at issue in the main proceedings. In so far as the subsidies at issue in the main proceedings were granted in breach of the obligation of prior notification laid down in Article 93 of the EEC Treaty, State entities cannot rely on the principle of the protection of legitimate expectations. In a situation such as that at issue in the main proceedings, where an action for damages against the Member State is brought by a competitor of the beneficiary company, the principle of legal certainty does not permit, by analogy, a limitation period, such as that laid down in Article 15(1) of that regulation, to be imposed on the applicant.

Costs

77 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 (First Chamber) hereby rules:

1. **Subsidies granted to an undertaking before the date of liberalisation of the market concerned, such as those at issue in the main proceedings, cannot be classified as existing aid because of the merely formal absence of liberalisation of that market at the time those subsidies were granted, to the extent that those subsidies were liable to affect trade between Member States and distorted or threatened to distort competition, which it is for the referring court to ascertain.**

2. **Article 1(b)(iv) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] must be interpreted as meaning that it is not applicable to a situation such as that at issue in the main proceedings. In so far as the subsidies at issue in the main proceedings were granted in breach of the obligation of prior notification laid down in Article 93 of the EEC Treaty, State entities cannot rely on the principle of the protection of legitimate expectations. In a situation such as that at issue in the main proceedings, where an action for damages against the Member State is brought by a competitor of the beneficiary company, the principle of legal certainty does not permit, by analogy, a limitation period, such as that laid down in Article 15(1) of that regulation, to be imposed on the applicant.**

[Signatures]