

Case C-338/19

Request for a preliminary ruling

Date lodged:

25 April 2019

Referring court:

Tribunale Amministrativo Regionale per la Sardegna

Date of the decision to refer:

9 January 2019

Appellant:

Telecom Italia SpA

Respondent:

Regione Sardegna

[...]

**The Tribunale Amministrativo Regionale per la Sardegna (Regional
Administrative Court, Sardinia)**

(First Chamber)

has issued the following

ORDER

in relation to the action [...] brought by

Telecom Italia S.p.A [...];

against

Regione Sardegna [...];

for the annulment:

- of the memorandum of 5 April 2013 bearing reference number 2586, signed by the Director of the Networks and Infrastructure Department, in which the Regione Sardegna (Region of Sardinia) rejected the application made by Telecom Italia seeking annulment, in accordance with the power available to the administration to withdraw, suspend or modify its own measures, of Director's Decision No 1470 of 19 December 2012 ordering the applicant to repay in full the assistance granted in connection with the project **[OR.2]** for the expansion of broadband services in the less-favoured areas of Sardinia (SICS). Telecom Italia argued that the rate of interest laid down in Articles 9 et seq. of Regulation (EC) No 794/2004, as amended by Regulation (EC) No 271/2008, applicable to cases of unlawful State aid or misuse of State aid, had been applied unlawfully;

- of the above-mentioned Director's Decision No 1470 of 19 December 2012 ordering the recovery of the above-mentioned co-financing, which, in accordance with the powers available to the administration to withdraw, suspend or modify its own measures, annulled the measure granting the co-financing on the grounds that the requirements that would have made the aid lawful had not been met, insofar as it provided for the application of the interest rates referred to in Regulation (EC) No 794/2004, instead of the statutory interest rates;

- in so far as necessary, of the memorandum of 4 January 2013, bearing reference 80, signed by the Director of the Networks and Infrastructure Department, setting out the grounds for the application of the above-mentioned interest rate;

- of all other measures prior to, related to or consequential upon, including, where appropriate and inasmuch as it has a legal interest therein, the documents relating to the tender awarded to Telecom Italia;

and, in the alternative:

the referral to the Court of Justice, pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU), of a question for preliminary ruling concerning the validity of Articles 14 and 16 of Regulation (EC) No 659/1999, and of Articles 9 et seq. of Regulation No 794/2004, as amended by Regulation No 271/2008, in relation to Article 108(2) TFEU (formerly Article 88 EC), if those regulatory provisions are to be interpreted as allowing Member States to decide autonomously whether State aid is unlawful or has been misused, and to order the beneficiaries to repay the aid, in the absence of a decision by the European Commission to recover the aid.

[...] **[OR.3]** [...] [Series of recitals]

1. Following the negotiated procedure launched by the Region of Sardinia, Telecom Italia S.p.A. was awarded financing for the expansion of broadband services in less-favoured areas of Sardinia (SICS), on the basis of the final project notified to the Commission pursuant to Articles 87 and 88 EC (now Articles 107 and 108 TFEU)[.] In Decision No 222/2006 of 22 November 2006, the Commission found the aid to be '*compatible with Article 87(3)(c) of the EC Treaty*'.

2. The Region then awarded the tender to Telecom Italia S.p.A., in respect of a total amount of co-financing of EUR 6 100 000.00. On 14 March 2007 the co-financing contract was concluded. This laid down, inter alia, (in Article 8) the procedures for monitoring the project's profitability; paragraphs 9 and 10 thereof also provided that *'if, at the end of the monitoring period, the Commission should find that the market failure was less than anticipated, it shall notify the Company accordingly to enable it to submit any counter-arguments. If no objection is made to the conclusions [...] this shall be deemed to constitute acceptance thereof. In that event, the Company shall be under an obligation to repay a proportional amount of the co-financing granted, plus statutory interest calculated as of the date the assistance was granted'*.
3. Once the monitoring had been carried out, the Region of Sardinia, having ascertained that *'not taking into account the financial assistance, an internal rate of return on the project of 12.772% [has been achieved], which is higher than the ceiling of 10% laid down in the project proposal as an indicator of market failure'*, issued Director's Decision No 1470 of 19 December 2012, ordering full repayment of the assistance that had been granted up to that date, amounting to EUR 5 490 000.00, and applied to that amount the interest rate specified for the repayment of incompatible and unlawful State aid, pursuant to Articles 9 et seq. of Commission Regulation (EC) No 794/2004 of 21 April 2004 ([**OR.4**] *'implementing Council Regulation (EC) No 659/1999 of 22 March 1999, laying down — following the amendment to the title — "detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union"*), as amended by Commission Regulation (EC) No 271/2008 of 30 January 2008.
4. By the action in question, Telecom Italia S.p.A. has requested the annulment of the provision in the regional decision referred to above, and of the other measures described in greater detail above, on the ground that the application of the interest rate pertaining to the recovery of unlawful or misused State aid is unlawful.

4.1. Specifically, the company puts forward the following pleas in law:

- infringement of Articles 4 and 7 of Regulation (EC) No 659/1999, in so far as Decision No 222/2006 of the European Commission of 22 November 2006, finding the State aid notified to be compatible with the Treaty, cannot be regarded as a *'conditional decision'* within the meaning of Article 7(4) of that Regulation [which provides that *'The Commission may attach to a positive decision conditions subject to which an aid may be considered compatible with the common market and may lay down obligations to enable compliance with the decision to be monitored (hereinafter referred to as a "conditional decision")'*], as no formal investigation procedure was launched (of which a conditional decision may be one of the outcomes);

- infringement of the first subparagraph of Article 108(2) TFEU, under which the Commission has sole responsibility for deciding that State aid that has been misused must be abolished or altered; and of Article 16 of Regulation (EC)

No 659/1999, which provides (with regard to ‘*Misuse of aid*’): ‘*Without prejudice to Article 23, the Commission may in cases of misuse of aid open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7, 9 and 10, Article 11(1), Articles 12, 13, 14 and 15 shall apply mutatis mutandis*’. Thus, should the Commission not **[OR.5]** decide to refer the matter directly to the Court of Justice, pursuant to Article 23 of the above-mentioned Regulation, it must open a formal investigation procedure to determine whether one of its decisions has been implemented incorrectly, at the end of which a decision to recover the aid must be adopted pursuant to Article 14 of the Regulation, in which the Commission assesses whether there has been infringement of the conditions that were originally imposed (for conditional decisions);

- that Articles 14 and 16 of Regulation (EC) No 659/1999, and Articles 9 et seq. of Regulation (EC) No 794/2004, as amended by Regulation (EC) No 271/2008, are invalid because they infringe subparagraph 1 of Article 108(2) TFEU, when interpreted as allowing Member States to determine autonomously whether there has been any misuse of aid previously authorised by the Commission and to apply the interest consequently payable, even where the European Commission has not previously made a decision (to recover the aid).

5. The Region of Sardinia entered an appearance before the Court, and objected, as a preliminary issue, that the action was out of time [Relevant pleas in law] [...] On the substance, it claims that the action should be dismissed as unfounded.
6. [...] [The hearing]
7. [...]

[...] **[OR.6]** [...] [The objection that the action is out of time was rejected]
8. With regard to the substance of the dispute, the Tribunale Amministrativo Regionale per la Sardegna (Regional Administrative Court, Sardinia) considers that it must refer to the Court of Justice of the European Union, pursuant to Article 267 of the Treaty on the Functioning of the European Union, a question on the interpretation of the above-mentioned provisions of Regulation (EC) No 659/1999/EC of 22 March 1999, and of Regulation (EC) No 794/2004/EC of 21 April 2004, as amended by Regulation (EC) No 271/2008 of 30 January 2008, as set out in detail below.
9. It should be observed, first, that, given the close connection between them, all the pleas in law advanced by the applicant, Telecom Italia S.p.A., are relevant, in so far as, if even one of the objections raised were to be upheld, that would make it possible to settle the dispute, and to annul the measures challenged.
10. The relevant provisions of EU law.

The following provisions of EU law are relevant for the resolution of this case.

First, Article 108(2) of the Treaty on the Functioning of the European Union (formerly Article 88(2) EC), which provides: *'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.'*

Also of relevance are various provisions of Regulation (EC) No 659/1999/EC of 22 March 1999 ('Council Regulation laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union'):

- Article 1(1)(g), which defines 'misuse of aid' as *'aid used by the beneficiary in contravention of a decision taken pursuant [OR.7] to Article 4(3) or Article 7(3) or (4) of this Regulation'*;

- Article 7(4), under which *'The Commission may attach to a positive decision conditions subject to which an aid may be considered compatible with the common market and may lay down obligations to enable compliance with the decision to be monitored (hereinafter referred to as a "conditional decision")'*;

- Article 16, which provides *'Without prejudice to Article 23, the Commission may in cases of misuse of aid open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7, 9 and 10, Article 11(1), Articles 12, 13, 14 and 15 shall apply mutatis mutandis'*.

Finally, paragraphs 1 and 2 of Article 9 of Commission Regulation (EC) No 794/2004 of 21 April 2004 (implementing Council Regulation (EC) No 659/1999 of 22 March 1999), as amended by Commission Regulation (EC) No 271/2008 of 30 January 2008, which provide:

- *'1. Unless otherwise provided for in a specific decision, the interest rate to be used for recovering State aid granted in breach of Article 88(3) of the Treaty [now Article 108(3)] shall be an annual percentage rate which is fixed by the Commission in advance of each calendar year'*;

- *'2. The interest rate shall be calculated by adding 100 basis points to the one-year money market rate. Where those rates are not available, the three-month money market rate will be used, or in the absence thereof, the yield on State bonds will be used'*.

11. The provisions of national law.

As regards national law, the relevant provisions are the first paragraph of Article 1282 of the codice civile (Italian Civil Code), (pursuant to which *'Liquidated and payable claims shall accrue interest automatically, unless otherwise established by law or an enforceable instrument'*); and Article 1284 of

the code (pursuant to which ‘*The rate of [OR.8] statutory interest is set at 0.8 per cent per year. By decree published in the Official Gazette of the Italian Republic, the Minister for the Treasury may, no later than 15 December of the year prior to that to which the rate applies, change the rate annually, on the basis of the average annual gross yield of government bonds going back over a period of no more than 12 months, taking into account the inflation rate for the year. If no new rate has been set by 15 December, the rate shall remain unchanged for the subsequent year*’).

12. Conclusions.

The doubts underlying the referral of the questions for a preliminary ruling concern, first of all, the interpretation of Article 16 of Regulation No 659/1999.

Commission Decision No 222/2006 of 22 November 2006 found the aid in question to be compatible with the Treaty provided that, following implementation, the subsidised project did not produce a profit greater than that initially forecast. If it did, ‘*Telecom Italia will have to repay a proportional part of the assistance granted*’ (point 5.2.3(g) of the decision).

Moreover, in providing that in cases of misuse of aid, where there is a conditional decision, the Commission may (as alternatives) either refer the matter to the Court of Justice or open the formal investigation procedure (which may be concluded with a decision to recover aid), Article 16 of the above-mentioned Regulation seems to preclude the possibility of an individual Member State establishing autonomously that State aid has been misused. That interpretation seems to be confirmed by Article 108(2) TFEU, under which the Commission has sole responsibility for deciding that incompatible or unlawful State aid is to be abolished or altered.

In any event, Article 9(1) and (2) of Regulation (EC) No 794/2004 specifies ‘the interest rate to be used for recovering *State aid granted in breach of Article 108(3)*’ TFEU, but does not seem to cover cases in which recovery is ordered as a result of [OR.9] that condition being fulfilled when State aid that was approved in a conditional decision is implemented. In that case, in view of the objective difference between the two situations in which recovery may be ordered, the statutory interest rate calculated in accordance with the Member State’s own rules could be applied to the amount to be repaid, as argued by the applicant.

13. The questions for a preliminary ruling.

In view of all the above, the Tribunale Amministrativo Regionale per la Sardegna (Regional Administrative Court, Sardinia) submits the following questions:

‘Must Article 16 of Regulation (EC) No 659/1999/EC of 22 March 1999 (“Council Regulation laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union”), applicable *ratione temporis*, which provides that “*Without prejudice to Article 23, the Commission*

may in cases of misuse of aid open the formal investigation procedure pursuant to Article 4(4). Articles 6, 7, 9 and 10, Article 11(1), Articles 12, 13, 14 and 15 shall apply mutatis mutandis”, be interpreted as meaning that a preliminary decision to recover aid must be adopted by the European Commission also in cases involving misuse of aid (without prejudice to the Commission’s power to refer the matter directly to the Court of Justice of the European Union, pursuant to Article 23 of Regulation No 659/1999/EC)?

If the previous question is answered in the negative, must Article 16 of Regulation No 659/1999/EC of 22 March 1999 be declared invalid on the basis that it is in breach of Article 108(2) of the Treaty on the Functioning of the European Union (formerly Article 88(2) EC)?

Must Article 9(1) and (2) of Commission Regulation (EC) No 794/2004 of 21 April 2004 (implementing Council Regulation (EC) No 659/1999 of 22 March 1999), as amended by Commission Regulation (EC) No 271/2008 of 30 January 2008, be interpreted as meaning that the interest rate stipulated in that provision for the recovery of incompatible and unlawful State aid also applies in the case **[OR.10]** where State aid authorised by a conditional decision and misused is to be recovered because the condition laid down therein was satisfied?’

ON THOSE GROUNDS

The First Chamber of the Tribunale Amministrativo Regionale per la Sardegna (Regional Administrative Court, Sardinia) makes the following order:

(1) refers to the Court of Justice of the European Union the questions for preliminary ruling set out in the grounds of this order, pursuant to Article 267 of the Treaty on the Functioning of the European Union;

(2) stays the proceedings pending a ruling on the questions referred for preliminary ruling;

[...] [Customary formalities]

[...] Cagliari [...] 9 January 2019 [...]

[OR.11]

[...]