

Case C-915/19

Request for a preliminary ruling

Date lodged:

12 December 2019

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

28 November 2019

Applicant:

Eco Fox s.r.l.

Defendants:

Fallimento Mythen s.p.a.

Ministero dell'Economia e delle Finanze and Others

[...]

[...]

ITALIAN REPUBLIC

The Consiglio di Stato (Council of State)

acting in its judicial capacity (Fourth Chamber)

makes the following

ORDER

in action [...] [No] 8746/2018, brought by:

Eco Fox s.r.l., [...];

Fallimento Mythen s.p.a., [...];

Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance), Ministero dell'Ambiente e della Tutela del Territorio e del Mare (Ministry of the Environment, the Protection of Natural Resources and the Sea), Ministero delle Politiche Agricole, Alimentari e Forestali (Ministry of Agricultural, Food and Forestry Policy), Ministero dello Sviluppo Economico (Ministry of Economic Development), Agenzia delle Dogane e dei Monopoli (Customs and Monopolies Agency), [...] **[Or.2]** [...];

intervening parties:

Oil.B s.r.l. unipersonale, Novaol s.r.l., [...];

seeking to have set aside

the judgment of the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio), Division II, No 8482/2018, published on 26 July 2018.

[...] [citations]

Background

1. By means of successive legislative measures and with a view to facilitating the start-up of a domestic biodiesel market, the Italian Government has implemented three different multiannual intervention programmes.
2. These programmes have received the prior approval of the European Commission, as required since they represent State aid.
3. In order to implement Article 21 of decreto legislativo 26 ottobre 1995, n. 504 (Legislative Decree No 504 of 26 October 1995) **[Or.3]**, as amended, and then Article 22-*bis*, the Ministry of Economic Affairs and Finance ('the MEF') has enacted specific decrees adopting regulations laying down the procedures for application of the reduced excise duty on the product.
4. By means of judgments No 812 of 16 February 2012 and No 1120 of 28 February 2012, the Fourth Chamber of the Council of State annulled Article 4(2) of decreto ministeriale n. 256/2003 (Ministerial Decree No 256/2003) and Article 3(4) of decreto ministeriale refon. 156/2008 (Ministerial Decree No 156/2008), respectively. The annulled provisions both related to the criteria used to allocate quantities of product exempt from excise duty to biodiesel producers.

[...] [proceedings]

6. By means of decreto ministeriale 17 febbraio 2015, n. 37 (Ministerial Decree No 37 of 17 February 2015) the MEF adopted a new regulation, which rewrote the annulled provisions.

The proceedings at first instance

7. The company Eco Fox s.r.l. challenged Ministerial Decree No 37/2015.

8. By judgment No 8482 of 26 July 2018, the Regional Administrative Court, Lazio, [...] dismissed that action [...].

With regard to the eleven grounds for complaint alleging breach of (national and [EU]) law and abuse of power on a number of points, the Regional [Administrative] Court held that the following were not present:

I) [...] **[Or.4]** [...] [rejection by the Regional Administrative Court of an objection of purely internal relevance];

II) the lack of authority on the part of the government body (MEF) to adopt State aid, which falls, rather, under the powers of the European Commission or, in any case, the failure to provide prior notification to the supranational bodies with authority to establish whether the aid was compatible with the provisions of [EU] law. Ministerial Decree No 37/2015 did not create a new State aid programme but, without modifying its duration, laid down new criteria to be applied retroactively to replace those annulled by the national court. [...]

III) [...]

IV) in the alternative, if the case were to be recognised as *res judicata*, the breach and erroneous application of judgments No 812/2012 and No 1120/2012 and the breach of the law on a number of points, since Ministerial Decree No 37/2015 reintroduced State aid that had expired without prior notification being provided to the competent EU bodies. As stated above, the provisions challenged did not create a State aid programme, but, rather, reformulated certain coefficients to be applied retroactively for allocation of biodiesel quotas subject to tax concessions following **[Or.5]** the annulment of the previous criteria;

[...] **[Or.6]** [...]

[...] **[Or.7]** [rejection by the Regional Administrative Court of the grounds asserted at first instance]

The appeal proceedings

9. The applicant appealed against the judgment, reiterating the basic argument whereby Ministerial Decree No 37/2015 created a new State aid programme with the effect of extending the annulled programme and, specifically, stating eight grounds for appeal.

To challenge the appeal, appearances were entered by the Finance department and other Government departments, and by Fallimento Mythen s.p.a. ('Fallimento'), which considers the appeal inadmissible in part and, in any event, entirely unfounded.

[...]

At the public hearing on 15 May 2019, Fallimento filed a copy of judgment No 5749/2019 issued by Division II of the Regional Administrative Court, Lazio, which ordered the Agenzia delle [dogane] e dei monopoli ([Customs] and Monopolies Agency), in application of Ministerial Decree No 37/2015, which is being challenged in these proceedings, to reformulate the biodiesel quotas subject to tax concessions allocated to the applicant for the years 2006-2020.

10. By decision No 3242 of 21 May 2019, the referring court issued a measure of inquiry to 'obtain from the Administration a report indicating whether, and within what time scale, the regulations adopted by means of Ministerial Decrees No 256 of 25 July 2003 and No 156 of 3 September 2008 were notified to the competent EU bodies, and, in relation to that notification, any other information that could be valuable in reaching a decision.'

The MEF filed a report accompanied by several annexes.

11. The parties discussed the outcome of the measures of inquiry, reaching opposite conclusions.

[Or.8]

Fallimento notes that [the] report demonstrates an awareness, on the part of the European Commission, of the existence and content of Ministerial Decree No 37/2015, because it opened an inquiry into the alleged illegal aid at the request of a private party, which put forward the same argument now asserted in the course of these proceedings. If it had determined that the regulation being challenged constituted unauthorised State aid, the Commission would have adopted the measures necessary to restore the legality [of the EU law] breached.

The appellant notes that, contrary to the assertions made by the opposing parties, the previous regulations had been notified to the competent EU bodies, so that the challenged Ministerial Decree No 37/2015 should also have been notified, in direct application of the relevant [EU] legislation. The appellant is therefore requesting that the Ministerial Decree be annulled or not applied.

[...] With regard to the argument developed by the respondent in relation to the Commission's awareness of the existence and content of the instrument being challenged, the appellant is asserting that the Administration did not provide information about the relevant proceedings and the final decision, thus failing to comply with the order issued by the Council of State.

Fallimento has responded that, according to the relevant [EU] legislation, in the case of a complaint filed by a private individual, the Commission is not required to adopt a final decision, and may confine itself to sending its preliminary opinion to the complainant, as happened in this case.

[...] [proceedings]

The request for a preliminary ruling

13. By the second ground of appeal, the company is reiterating its allegation of breach of various [EU] provisions and decisions, and of Article 117 of the Constitution and national legal provisions: the regulation being challenged constitutes new State aid, as the [Or.9] previous one was annulled with retroactive effect, or, in any case, a modification of the existing aid, which — under Article 108(3) TFEU, as interpreted by the Court of Justice of the EU — would in any case have required prior notification to the European Commission.

The investigations ordered by the Council of State show that — contrary to the assertions made by the respondents — the regulations adopted by means of Ministerial Decrees No 256/2003 and No 156/2008 were brought to the attention of the European Commission.

As a result of the legislative technique applied, namely the recasting (*‘novellazione’*) of the previous texts, the first two articles of Ministerial Decree No 37/2015 were not intended to extend the duration of the aid already in place, but amended the criteria for allocating the benefit thereof, by laying down new regulations with retroactive effect. The following Article 3 of the regulation is unequivocal in this regard, whereby ‘Notwithstanding the historical data on the basis of which each company permitted to take part in the programmes received the biodiesel quotas subject to tax concessions, for the years 2006, 2007, 2008 and 2009 the product allocations shall be reformulated for those companies taking into account the criteria identified in Articles 1 and 2, respectively.’

The appellant asserts that, according to the case-law of the Court of Justice, any modification to State aid must be notified in advance to the European Commission.

However, the references made to the case-law on this matter do not appear to be decisive because, beyond statements of principle, they seem to refer to instruments creating aid (Court of Justice, Grand Chamber, 27 June 2017, Case C-74/16) or those extending aid to cover a new category of beneficiaries (General Court, Eighth Chamber, 11 June 2009, Case T-301/02).

It also appears that, through a complaint from another party to the proceedings, the Commission was aware of the regulation adopted by means of Ministerial Decree No 37/2015, but did not take any steps against Italy in that regard. This

circumstance could mean that the Commission did not consider that the regulation created new aid for the purposes of [EU] law.

[Or.10]

The Council of State acknowledges the provisions of section 13 of the Commission notice on the enforcement of State aid law by national courts (2009/C 85/01), whereby ‘where doubts exist as to the qualification of State aid, national courts may ask for a Commission opinion under section 3 of this notice.’ However, section 13 adds that ‘this is without prejudice to the possibility or the obligation for a national court to refer the matter to the [European Court of Justice] for a preliminary ruling under Article 234 of the [EC] Treaty’ (now Article 267 TFEU).

14. Therefore, given the monopoly on interpretation of [EU] law that the Treaties assign to the Court of the Justice and the role of court of final instance falling to the Council of State, the referring court — under Article 267 TFEU — hereby suspends these proceedings in order to make a reference for a preliminary ruling to the Court of Justice of the European Union in the following terms.

‘In the view of the Court of Justice of the European Union — in the light of Articles 107 and 108 TFEU, Council Regulation (EC) No 659/1999 of 22 March 1999, as amended, Commission Regulation (EC) No 794/2004 of 21 April 2004, and any further relevant provisions of [EU] law — does the definition of State aid, as such subject to an obligation of prior notification to the European Commission, cover a secondary regulatory instrument such as the regulation adopted by means of Ministerial Decree No 37/2015 — which is being challenged in these proceedings — which, in direct enforcement of judgments of the Council of State requiring the annulment in part of the previous regulations already notified to the Commission, has retroactively affected the procedures for application of the reduced excise duty on biodiesel by retroactively amending the criteria for distribution of the benefit thereof among the applicant companies without extending the duration of the programme of tax concessions?’

[...]

ON THE ABOVE GROUNDS

[Or.11]

The Council of State in its judicial capacity (Fourth Chamber) [...]

[...] makes the reference for a preliminary ruling set out in paragraph 14 above to the Court;

[...] [standard phrases and suspension of proceedings]

Decided in Rome [...] 28 November 2019 [...]

[...] [signatures]

Rome, 5 December 2019

[...] [attestation of conformity]

WORKING DOCUMENT