Case C-212/19

Request for a preliminary ruling

Date lodged:

6 March 2019

Referring court:

Conseil d'État (France)

Date of the decision to refer:

15 February 2019

Applicant:

Ministre de l'Agriculture et de l'Alimentation

Defendant:

Compagnie des pêches de Saint-Malo

[…]

MINISTRE DE L'AGRICULTURE
ET DE L'ALIMENTATION
v
Compagnie des pêches de Saint-Malo

The Conseil d'État acting in its judicial capacity

[…]

Session of 1 February 2019
Reading of 15 February 2019

Having regard to the following procedure:

Compagnie des pêches de Saint-Malo (a company) applied to the tribunal administratif de Rennes (Administrative Court, Rennes) for the annulment of the

order for payment of 22 February 2013 issued by the directeur régional des finances publiques de Bretagne (Regional Director of Public Finances for Brittany) for recovery of the sum of EUR 84 550.08. By a judgment [...] of 25 June 2015, the Administrative Court annulled that order for payment.

By a judgment [...] of 14 April 2017, the cour administrative d'appel de Nantes (Administrative Court of Appeal, Nantes) dismissed the appeal brought by the Ministre de l'environnement, de l'énergie et de la mer, chargé des relations internationales sur le climat (Minister for the Environment, Energy and the Sea, in charge of international relations on climate) against the judgment of the Administrative Court.

By an appeal lodged on 14 June 2017 with the secretariat of the judicial section of the Council of State, the ministre de l'agriculture et de l'alimentation (Minister of Agriculture and Food) applied to the Conseil d'État (Council of State) for the annulment of the judgment of the Administrative Court of Appeal.

The Minister claimed that the Administrative Court of Appeal:

- failed to respond to the plea alleging an irregularity in the judgment of the Administrative Court which had omitted to rule on the admissibility of the application; **[Or. 2]**

- made an error of law in finding that the exemptions from employees' contributions had not benefited fishing undertakings and fish farmers despite the fact that they had been classified as State aid by the European Commission;

- distorted the evidence before it in finding that it was apparent from the file that the reduction in employees' contributions had automatically had the effect of increasing the amount of net salary paid to employees.

By a defence, lodged on 13 March 2018, Compagnie des pêches de Saint-Malo contended that the appeal should be dismissed and that the State be ordered to pay the sum of EUR 3 000 under Article L. 761-1 of the code de justice administrative (Code of Administrative Justice). It argued that the pleas raised by the Minister were unfounded.

[…] **[Or. 3]**

1 It is apparent from the documents in the file submitted to the trial courts that, by Decision No 2005/239/EC of 14 July 2004, the European Commission declared the aid implemented by France in the form of reductions in social security contributions for fishermen between 15 April and 15 October 2000, to remedy the damage caused by the wreck of the tanker Erika on 12 December 1999 and by the storm of 27 and 28 December 1999, incompatible with the common market. The Commission ordered the immediate and effective recovery of the aid. By a judgment of 20 October 2011, *Commission* v *France* (C-549/09), the Court of

Justice of the European Union held that France had failed to fulfil its obligations by failing to recover from the beneficiaries the aid declared unlawful and incompatible with the common market by the decision of 14 July 2004. An order for payment was issued on 22 February 2013 against Compagnie des pêches de Saint-Malo for an amount corresponding to the reductions in employees' contributions between 15 April and 15 July 2000, together with interest for late payment. By a judgment of 25 June 2015, the Administrative Court, Rennes annulled the order for payment. By a judgment of 14 April 2017, the Administrative Court of Appeal, Nantes dismissed the appeal brought by the Minister for the Environment, Energy and the Sea against the judgment of the Administrative Court. The Minister of Agriculture and Food appealed on a point of law against that judgment of the Administrative Court of Appeal.

2 The Administrative Court of Appeal omitted to rule on the Minister's claim for the judgment of the Administrative Court to be annulled on the grounds that the Administrative Court had not ruled on the plea that the complaint made by Compagnie des pêches de Saint-Malo was out of time and therefore inadmissible. This ground being sufficient to entail the annulment of the judgment under appeal, it is not necessary to examine the other grounds of appeal.

3 In the circumstances, it is appropriate to deal with the substance of the case pursuant to the provisions of Article L. 821-2 of the Code of Administrative Justice.

4 Before the Administrative Court, the Minister had raised a plea that the application made by Compagnie des pêches de Saint-Malo was inadmissible due to its complaint being made out of time. The Administrative Court, which upheld the company's claim, did not rule on that plea, although the latter was not ineffective. Consequently, the Minister is entitled to seek the annulment of the judgment of the Administrative Court.

5 It is appropriate to consider and to rule forthwith on the claim brought by Compagnie des pêches de Saint-Malo before the Administrative Court.

<u>The plea of inadmissibility raised by the Minister:</u>

6 Under Article 118 of the décret du 7 novembre 2012 relatif à la gestion budgétaire et comptable publique (Decree of 7 November 2012 on budgetary management and public accounting), in the version applicable to these proceedings: '*Prior to bringing proceedings before a court, the party liable for payment must submit a complaint supported by all relevant evidence to the accountant responsible for collection of the recovery order. / The complaint shall be void unless it is lodged:/ (1) in the case of a challenge to the enforcement of an order for payment, within two months following notification of that order or two months following the first act of proceedings prior to the order for payment in question …*'. It is for the administration, when raising a plea of inadmissibility based on the lateness of a

claim before an administrative court **[Or. 4]**, to establish the date on which the contested decision was duly notified to the person concerned.

7 It appears from the file that, although the company stated in the complaint it submitted on 5 June 2013 to the directeur départemental des finances publiques d'Ille-et-Vilaine (Director of Public Finances for Ille-et-Vilaine) that it had received the relevant order for payment on 18 March 2013, it then submitted in its pleadings before the Administrative Court and the Administrative Court of Appeal that the reference to 18 March was the result of a clerical error. As the administration has not provided any evidence of the date of notification of the order for payment, the lateness of the complaint cannot be regarded as established. The plea of inadmissibility based on the expiry of the time-limit laid down in Article 118 of the Decree of 7 November 2012 must, therefore, be rejected.

Lawfulness of the order for payment:

8 In the first place, the plea alleging that the order for payment did not comply with the requirement to state reasons under national law was explicitly abandoned by the company in its reply before the Administrative Court. The plea contained in its defence before the Council of State alleging that the order for payment infringed the requirement to state reasons under EU law did not include specific details enabling the scope of the EU provisions allegedly infringed to be assessed.

9 In the second place, it is settled case law of the Court of Justice of the European Union that the recipient of State aid paid in breach of Article 107 of the Treaty on the Functioning of the European Union cannot effectively rely on the principles of protection of legitimate expectations and legal certainty in order to oppose repayment of the aid. The plea that the order for payment infringed those principles must, therefore, be rejected. Similarly, delay on the part of the State to recover the aid at issue cannot invalidate the order for payment.

10 In the third place, according to Article 263 of the Treaty on the Functioning of the European Union: '*The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. / ... Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. / ... The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter ...*'. According to the judgment of the Court of Justice of

the European Communities of 9 March 1994 in *TWD Textilwerke Deggendorf GmbH* v *Federal Republic of Germany* (C-188/92), as a result of the requirement for legal certainty, it is not possible for a recipient of aid, forming the subject-matter of a Commission decision adopted on the basis of Article 93 of the Treaty establishing the European Economic Community (subsequently Article 88 of the Treaty establishing the European Community and then Article 108 of the Treaty on the Functioning of the European Union), who could have challenged that decision and who allowed the mandatory time-limit laid down in this regard by the third paragraph of Article 173 of the Treaty establishing the European Economic Community (subsequently Article 130 of the Treaty establishing the European Community and then Article 263 of the Treaty on the Functioning of the European Union), to expire, to call in question the lawfulness of that decision before the national courts in an action brought against the measures taken by the national authorities for implementing that decision. Moreover, according to the judgment in *Italy and Sardegna Lines* v *Commission* of 19 October 2000 (C-15/98 and C-105/99) and the judgment of 25 July 2018 in *Georgsmarienhütte and Others* (C-135/16), the actual beneficiaries of individual aid, granted under an aid scheme, of which the Commission has ordered the recovery are, accordingly, individually concerned within the meaning of the fourth paragraph of Article 263 of the Treaty on the Functioning of the European Union.

11 It is common ground that Compagnie des pêches de Saint-Malo, which contests the validity of the Commission decision of 14 July 2004, published in the Official Journal of the European Union on 19 March 2005, failed to bring an action for annulment of that act under Article 130 of the Treaty establishing the European Community, then applicable, before expiry of the mandatory time-limit for bringing proceedings provided for in that article, even though that decision declared the reduction in social security contributions granted to fishermen incompatible with the common market and the company had beyond a doubt the standing to contest that decision since it was entitled to infer that it was directly and individually concerned by it, within the meaning of Article 130 cited above, as regards both the employer's and the employees' contributions. Accordingly, it cannot challenge its validity in contentious proceedings directed against the measures implementing that decision taken by national authorities. The request for a question concerning the validity of the Commission decision of 14 July 2004 to be referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty must, therefore, be rejected.

12 In the fourth place, the company maintains that the Commission's decision relates only to the recovery of reductions in employers' contributions and that the reductions in employees' contributions must be recovered from the employees, who were the sole beneficiaries thereof.

13 According to Article 107 of the Treaty on the Functioning of the European Union:

'*1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to*

distort competition by favouring certain undertakings or the production of certain goods shall ... be incompatible with the internal market /...'. It follows from the settled case-law of the Court of Justice of the European Union that, although every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed, must be regarded as an undertaking within the meaning of those provisions, the provisions do not apply to public interventions directly benefiting natural persons taken as individuals, since those interventions do not indirectly favour certain undertakings or the production of certain goods.

14 The Commission decision of 14 July 2004 states, in paragraph 18 concerning the description of the national measures, that the reduction applied to employers' and employees' contributions. However, in the remainder of the decision, the Commission refers only to 'social security contributions', without specifying whether the reduction in contributions of which it ordered the recovery included employees' contributions. In its judgment of 20 October 2011, *Commission* v *France* (C-549/09) **[Or. 6]**, the Court of Justice of the European Union indicated that, in the infringement action before it, it was not for the Court to rule in which situations and from which operators the aid had to be recovered and that the Court was unable, having regard to the subject-matter of the dispute and the information available to it, to determine who from the undertaking or among the employees had retained the actual benefit of the aid.

15 Under Article L. 741-9 of the code rural et de la pêche maritime (Rural and Maritime Fishing Code) and Article 4 of the décret du 17 juin 1938 relatif à la réorganisation et à l'unification du régime d'assurance des marins (Decree of 17 June 1938 relating to the reorganisation and consolidation of the insurance scheme for mariners), employers' contributions to the agricultural workers' scheme and the mariners' scheme are payable by employers, while employee contributions are payable by employees. Employees' contributions are not borne by the employer but are only deducted by him from the earnings of the insured persons every pay-day and reductions in employees' contributions are passed on to employees who receive a higher net wage and are the direct beneficiaries thereof.

16 However, this reduction in employees' contributions could be regarded as having constituted an indirect advantage to the undertaking since, during the relevant period, it gained a certain attractiveness through the higher salaries received by its employees for six months.

17 The response to the plea alleging that the Commission decision does not require the recovery of reductions in employees' contributions from undertakings depends, first, on whether the Commission decision should be interpreted as declaring that only the reductions in employers' contributions are incompatible with the common market, while the reductions in employees' contributions do not directly benefit undertakings and therefore cannot fall within the scope of Article 107 of the Treaty, or as also declaring the reductions in employees' contributions to be incompatible. In the event that the Commission decision

should be interpreted as also declaring the reductions in employees' contributions to be incompatible, the response to the plea depends on whether the undertaking should be regarded as having received the full amount of those reductions or only a part of them and, in the latter case, how that part should be evaluated and whether the Member State is required to order recovery from the employees concerned of the part of the aid from which they benefited.

18 These issues, which arise in other files submitted to the Council of State, raise a serious difficulty of interpretation which must be referred to the Court of Justice of the European Union.

RULES:

Article 1: The judgment of 14 April 2017 of the Administrative Court of Appeal, Nantes is annulled.

Article 2: The judgment of 25 June 2015 of the Administrative Court, Rennes is annulled. **[Or. 7]**

Article 3: The proceedings relating to the application brought by Compagnie des pêches de Saint-Malo are stayed pending a preliminary ruling of the Court of Justice of the European Union on the following questions:

1. Must the Commission's decision of 14 July 2004 be interpreted as declaring that only the reductions in employers' contributions are incompatible with the common market, on the ground that the reduction in employees' contributions do not benefit the undertakings and therefore cannot fall within the scope of Article 107 of the Treaty on the Functioning of the European Union, or as also declaring the reductions in employees' contributions to be incompatible?

2. In the event that the Court finds that the Commission's decision is to be interpreted as also declaring the reductions in employees' contributions to be incompatible, must the undertaking be regarded as having received the full amount of those reductions or only a part thereof? In the latter case, how is that part to be assessed? Is the Member State required to order recovery from the employees concerned of the part of the aid from which they benefited?

[…] **[Or. 8]**

[…]