

Case C-102/21

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

18 February 2021

Referring court:

Administrative Court, Autonomous Section for the Province of Bolzano (Italy)

Date of the decision to refer:

9 February 2021

Appellant:

KW

Defendant:

Autonomous Province of Bolzano

Subject matter of the main proceedings

Compatibility with the internal market of aid for the construction of micro-hydroelectric power plants granted in respect of mountain huts and hostels not connected to the electricity grid; Legality of the recovery of the aid by national authorities after the expiry of the aid scheme established under EU law

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU, in particular

Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9) ('Regulation [EU] 2015/1589')

Commission Decision of 25 July 2012 on the authorisation of State aid pursuant to Articles 107 and 108 TFEU, SA.32113 (10/N) (2013/C 1/02) (OJ 2013 C1, p. 7) ('State aid decision SA.32113')

Questions referred for a preliminary ruling

1. Did the aid authorised by Commission Decision SA.32113 (2010/N) of 25 July 2012 to cover 80% of the costs of the construction of mini-hydroelectric power plants for the generation of electrical energy for own consumption from renewable energy sources for the benefit of mountain huts and hostels in high alpine areas, for which connection to the electricity grid is not feasible without disproportionate effort in technical and financial terms, expire on 31 December 2016?
2. If that question is answered in the affirmative:
 - 2.1 Is Article 20 of Regulation (EU) 2015/1589 to be interpreted as meaning that, in the case where aid is misused, the Commission must issue a recovery decision before the public authorities intervene?
 - 2.2 Is the abovementioned aid compatible with the internal market within the meaning of Article 107(3)(c) TFEU, since it serves to facilitate the development of certain economic areas, or is it liable to distort competition and affect trade between Member States?

Provisions of EU law relied on

Article 107(1) and (3)(c) and Article 108(1), (2) and (3) TFEU

Article 1(a), (c), (f) and (g), Article 4(3), Article 9(3) and (4), Article 20 and recital 28 of Regulation (EU) 2015/1589

Article 4(1), (2)(b) and (3) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 2004 L 140, p. 1)

Article 41(7)(a), (8) and (9) of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ 2014 L 187, p. 1) (General Block Exemption Regulation [GBER]; ‘Regulation [EU] No 651/2014’)

Articles 3 and 6 of Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ 2013 L 352, p. 1) (‘Regulation [EU] No 1407/2013’)

Paragraphs 6, 97 and 98 of State aid decision SA.32113

Provisions of national law relied on

Provincial Law of 7 July 2010, No 9 ‘Provisions concerning energy savings, renewable energy and climate protection’, published in the Official Gazette of the Region of 3 August 2010, No 31, in the version currently in force (‘Provincial Law No 9’)

Resolution of the Provincial Government of 8 November 2010, No 1804, published in the Official Gazette of the Region of 13 November 2012, No 46 (‘Provincial Government Resolution No 1804’)

Facts and procedure

- 1 The appellant (‘applicant’) owns properties that are not connected to the public electricity grid due to their remote location.
- 2 Provincial Law No 9 introduced aid to cover 80% of the costs of constructing mini-hydroelectric power plants for the generation of electrical energy from renewable energy sources for the benefit of mountain huts and hostels for which connection to the electricity grid is not feasible without disproportionate effort in technical and financial terms.
- 3 That aid scheme was approved by the European Commission (‘the Commission’) on 25 July 2012 by State aid decision SA.32113.
- 4 On the basis of that aid scheme, the applicant applied to the competent authority of the defendant on 15 September 2017 for the granting of the maximum amount of aid for the construction of a hydroelectric power plant on her properties. The electricity generated was to be used exclusively for her own consumption.
- 5 By decision of the competent authority, the applicant was granted aid of EUR 144 634 – corresponding to 80% of the eligible costs of EUR 180 792.48 – for the construction of a mini-hydroelectric power plant to supply her own electricity.
- 6 Construction of the mini-hydroelectric power plant was completed on 27 September 2018. Aid of EUR 140 970 was paid on 16 November 2018.
- 7 On 27 January 2020, the competent authority partially revoked the aid granted. It stated that aid scheme SA.32113 had expired on 31 December 2016, the Provincial Government had amended the eligibility criteria and Regulation No 651/2014 had reduced the maximum amount from 80% to 65% of the eligible costs. Based on the new criteria, the eligible costs were set at EUR 174 241.68, and aid corresponding to 65% of those costs, that is to say, EUR 113 257.09, was calculated. On 14 February 2020, the applicant was requested to reimburse part of the aid, together with interest, in the total amount of EUR 27 946.12.

- 8 On 15 June 2020, the applicant brought an appeal ('action') before the present administrative court seeking the annulment of the legal acts that adversely affected her, in particular the partial revocation and the request for repayment ('contested legal acts').
- 9 In support of her action, the applicant relies on five pleas in law alleging, *inter alia*, the following, to the extent relevant to EU law:
 - The aid is not unlawful, as it does not constitute State aid within the meaning of Article 107(1) TFEU. The aid was granted to the applicant as a private person. No undertaking was favoured by the aid. A distortion of competition within the European Union is not possible, as the electricity generated is to be used solely for the applicant's own supply.
 - The defendant infringed Articles 3 and 6 of Regulation (EU) No 1407/2013, since it did not verify whether the aid had been granted in accordance with the applicable regulation.
 - The aid is permissible under Article 107(3) TFEU. A notification procedure had not been necessary as the aid had been exempted under Regulation (EU) No 651/2014.
 - The provision of Article 2 of Regulation (EU) 2015/1589, according to which new aid is to be notified to the Commission, does not apply to existing aid, that is to say, to aid schemes and individual aid that have been authorised by the Commission or the Council. Existing aid that has already been authorised, such as that at issue in the present case, does not need to be either notified or authorised. In the present case, the Commission did not initiate a procedure pursuant to Article 22 of Regulation (EU) 2015/1589 and consequently did not have any objections to the aid.
 - The revocation is unlawful because the Commission has not issued a recovery decision and the administration was not authorised to classify the aid as unlawful without a decision by the Commission pursuant to Chapter III of Regulation (EU) 2015/1589.
- 10 The defendant contends that the action should be dismissed.
- 11 It takes the view that the aid at issue constitutes unlawful State aid because aid scheme SA.32113 expired on 31 December 2016 and therefore lacked a legal basis. The aid also infringed Regulation (EU) No 651/2014. It therefore had to be adapted to that regulation and reduced accordingly.

Grounds for the request

- 12 The success of the appeal is dependent on a decision of the Court of Justice of the European Union ('the Court') on the interpretation of the Treaties.

- 13 The present Chamber considers it necessary to refer the questions set out above to the Court of Justice for a preliminary ruling under Article 267 TFEU for the reasons set out below, since they are decisive in this dispute as regards several of the applicant's pleas in law.

Provisions of EU law and national law

- 14 The legal provisions relevant to the dispute are listed above in the sections 'Provisions of national law relied on' and 'Provisions of EU law relied on'. The following statements serve to supplement those provisions.
- 15 Provincial Law No 9 provides that the Province of Alto Adige may grant aid covering up to 80% of the costs of the construction and expansion of installations for the generation of electrical energy from renewable energy sources. On that basis, it was decided by Provincial Government Resolution No 1804 that, for such installations, aid was to be granted for the construction and expansion of hydroelectric power plants for the benefit of mountain huts and hostels. Furthermore, the expenditure to be charged to the subsequent financial years was to be determined by the annual law on finance.
- 16 The Commission approved the aid scheme described above in its State aid decision SA.32113. It is clear from that decision that the aid scheme had a total budget of EUR 187 million and an annual budget of EUR 32 million and was scheduled to run until 31 December 2016. According to the Commission's statements, approximately half of the funds do not constitute State aid; the exact duration is explicitly not mentioned.
- 17 The Commission decided not to raise any objections with regard, in particular, to the envisaged investment aid for hydroelectric power plants for mountain huts and hostels, since it constituted State aid compatible with the internal market to facilitate the development of certain economic activities or of certain economic areas within the meaning of Article 107(3)(c).
- 18 It deemed the effects on trade between Member States of electricity generation not connected to the grid in remote areas to be *a priori* limited (paragraph 97 of State aid decision SA.32113).
- 19 It considered that the scheme at hand was intended to offset a genuine territorial specificity and was objectively justified so as to efficiently address the lack of a reliable and efficient electricity supply in the remote areas of Alto Adige. Accordingly, the Commission concluded that the aid in favour of the electrification of rural and alpine areas of Alto Adige results in a positive overall effect, as it helps to ensure the right of customers, namely households and small enterprises, to be supplied with electricity in a reliable and environmentally friendly manner (paragraph 98 of State aid decision SA.32113).

20 Pursuant to Article 41 ('Investment aid for the promotion of energy from renewable sources') of Regulation (EU) No 651/2014, investment aid for the promotion of renewable energy sources is to be compatible with the internal market and is to be exempted from the notification requirement, provided that it fulfils the further conditions laid down in that provision.

The questions referred

21 The first plea in law raises the legal question of whether the aid granted to cover 80% of costs is liable to distort competition and affect trade between Member States.

22 Should that question be answered in the negative, this would lead to the annulment of the contested acts.

23 In addition, seven other similar cases, which are based on the same legal question, are pending before this court.

24 The other pleas in law raise the legal question of whether the aid in the present case is existing aid and whether the public authority was entitled to decide on this question itself or whether it should have referred that decision to the Commission.

25 In that context, the present Chamber has doubts as to the actual expiry of aid scheme SA.32113 approved by the Commission.

26 A time limit for the scheme is not explicitly specified in aid decision SA.32113 itself. It is only apparent from its publication in extract in the Official Journal of the European Union of 4 January 2013 that the aid scheme provided for by the Provincial Law was intended to run until 31 December 2016.

27 Provincial Law No 9 provided that the necessary funds for contributions to the construction of mini-hydroelectric power plants for mountain huts and hostels for which connection to the electricity grid is not feasible without disproportionate effort in technical and financial terms is to be determined annually by the respective law on finance.

28 This was also done after 2016, and corresponding amounts were earmarked for those contributions in the provincial budget for 2017 and 2018.

29 In State aid decision SA.32113, the Commission had regarded the objective of Provincial Law No 9 as compatible with the internal market with regard to mountain huts and hostels not connected to the electricity grid.

30 Accordingly, the question arises as to whether the aid scheme concerning the electrification of mountain huts and hostels by means of renewable energy sources, which was declared by the Commission to be compatible with the internal market within the meaning of Article 107(3) TFEU, expired on 31 December 2016.

- 31 If the above question were answered in the negative, the aid granted would constitute existing aid, with the consequence that the contested reduction of the aid would be unlawful.
- 32 If the question were answered in the affirmative, on the other hand, it would constitute aid granted after the period approved by the Commission. Even if there is no infringement of conditions and obligations imposed by the Commission, the aid would have been granted improperly.
- 33 In such a case, it would be necessary to assess whether Article 20 of Regulation (EU) 2015/1589 is to be interpreted as meaning that, in the case where aid is granted improperly, the Commission must issue a recovery decision before the public authority intervenes.
- 34 Furthermore, it is necessary to assess whether that aid continues to be compatible with the internal market within the meaning of Article 107(3)(c), since it serves to facilitate the development of certain economic areas – as found by the Commission in State aid decision SA.32113.

WORKING DOCUMENT