

Case C-453/23**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:**

19 July 2023

Referring court:

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

19 April 2023

Appellant on a point of law:

E. sp. z o.o.

Respondent in the appeal on a point of law:

Prezydent Miasta Mielca

Subject matter of the main proceedings

Appeal on a point of law to the Naczelny Sąd Administracyjny (Supreme Administrative Court, Poland) brought by E. sp. z o.o. against a judgment of the Wojewódzki Sąd Administracyjny w Rzeszowie (Regional Administrative Court, Rzeszów) of 19 October 2021, given in an action brought by E. sp. z o.o. against an individual interpretation of provisions of tax law relating to property tax issued by the Prezydent Miasta Mielca (Mayor of the Town of Mielec) on 14 June 2021.

Subject matter and legal basis of the request

Interpretation of Article 107(1) and Article 108(3) of the Treaty on the Functioning of the European Union ('TFEU'), in conjunction with Article 2 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU. The questions for a preliminary ruling are referred pursuant to Article 267 TFEU.

Questions referred for a preliminary ruling

(1) In the light of Article 107(1) of the Treaty on the Functioning of the European Union (consolidated version: OJ 2016 C 202, p. 47), does the grant by a Member State of tax relief addressed to all operators, such as that provided for in Article 7(1)(1)(a) of the Ustawa z dnia 12 stycznia 1991 r. o podatkach i opłatach lokalnych (Law of 12 January 1991 on local taxes and fees) (Dz.U. of 2019, item 1170, as amended), consisting in an exemption from tax on immovable property for land, buildings and structures forming part of railway infrastructure within the meaning of the provisions on rail transport, which is made available to rail-transport operators, distort or threaten to distort competition?

(2) If the answer to Question 1 is in the affirmative, is an operator which has availed itself of the tax exemption pursuant to the abovementioned provision of national law, introduced without following the required procedure, as laid down in Article 108(3) of the Treaty on the Functioning of the European Union (consolidated version: OJ 2016 C 202, p. 47), in conjunction with Article 2 of 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 (codification) (Text with EEA relevance) (OJ 2015 L 248, p. 9), required to pay the outstanding tax, plus interest?

Provisions of EU law cited

Treaty on the Functioning of the European Union: Articles 107(1), 108(3), and 267;

Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU: Article 2

Provisions of national law cited

Ustawa z dnia 12 stycznia 1991 r. o podatkach i opłatach lokalnych (Law of 12 January 1991 on local taxes and charges) (Dz.U. of 2019, item 1170, as amended): Articles 2(1) and (2), 4(1), and 7(1)(1)(a);

Under Article 7(1)(1)(a) of the Law on local taxes and charges cited in the first question referred for a preliminary ruling, land, buildings and structures forming part of railway infrastructure within the meaning of the provisions on rail transport, which is made available to rail-transport operators, are to be exempt from tax on immovable property.

Ustawa z dnia 30 kwietnia 2004 r. o postępowaniu w sprawach dotyczących pomocy publicznej (Law of 30 April 2004 on the procedure in cases concerning State aid) (Dz.U. of 2023, item 702): Article 6(2).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The appellant company, which is a taxable person for the purposes of property tax on the infrastructure and land underneath it which it owns, submitted a request to the Mayor of the Town of Mielec ('the interpreting authority') for a written individual interpretation of the provisions of tax law. In the request, it stated that, as an entity carrying on an economic activity, it owns a railway siding on its land, and part of the infrastructure of the railway siding forms part of it. In its view, from the moment at which the siding is made available to another rail transport operator, which will carry out transport operations on its behalf, it will be able to avail itself of the exemption from property tax in respect of the entire cadastral parcel on which the elements of the railway infrastructure are located, and also parcels of land acquired in the future, which will also have a siding (railway infrastructure) built on part of them.
- 2 In order to obtain confirmation of its position, the company asked the interpreting authority the following questions: (1) can it apply the exemption from property tax under Article 7(1)(1)(a) of the Law on local taxes and charges to the land and infrastructure concerned starting from the moment at which the permission to enter the siding is granted and the relevant authorisation is granted to the licensed railway transport operator, which [was] to occur in 2021, and (2) following the acquisition of the new land will it be able to apply the exemption from property tax under Article 7(1)(1)(a) of the Law of local taxes and charges to the entire area of the new land?
- 3 The interpreting authority found that the company's position is incorrect. In its view, although the conditions for the exemption are formally fulfilled, that right cannot be exercised because it infringes EU provisions on State aid. The amending law, as a result of which State aid was granted to operators in the form of an exemption from property tax, was not made subject to the European Commission's preliminary examination procedure.
- 4 The appellant then brought an action against that individual interpretation before the Wojewódzki Sąd Administracyjny w Rzeszowie, which is the court of first instance.
- 5 The court of first instance dismissed the action. That court found that the tax exemption, which relieves a company of the burden of tax owed to the budget of a public entity (local authority), fulfils the conditions for being regarded as State aid, and therefore pointed to the need to determine whether the national legislature had satisfied the requirements laid down Articles 107 and 108 TFEU.
- 6 The court of first instance went on to state that the Ustawa z dnia 16 listopada 2016 r. o zmianie ustawy o transporcie kolejowym oraz niektórych innych ustaw (Law of 16 November 2016 amending the Law on railway transport and certain other laws) had not been notified to the European Commission for prior

consultation. That gives rise to certain consequences for the Member State under the FEU Treaty and Regulation 2015/1589.

- 7 The court of first instance further held that the interpreting authority's position on the company's inability to exercise the right arising from Article 7(1)(1)(a) of the Law on local taxes and charges has a legal basis. The interpreting authority, in assessing the future event set out, was therefore entitled to rely directly on EU law, both on Articles 107 and 108 TFEU and on Article 3 of Regulation 2015/1589, since the matter identified concerns selective new State aid granted by a Member State to an operator, that is to say, a matter transferred to the competence of the European Union within the context of protection of the internal market and business competitiveness.
- 8 The appellant, which disagreed with the reasoning of the court of first instance, lodged an appeal on a point of law with the referring court.

The essential arguments of the parties in the main proceedings

- 9 The appellant – in contrast to the interpreting authority – takes the view that the exemption laid down in Article 7(1)(1)(a) of the Law on local taxes and charges does not meet the criteria relating to State aid and that its introduction therefore did not have to be notified to the European Commission.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 10 In relation to the first question, the referring court notes that the provisions of the Law on local taxes and charges in force until the end of 2016, which limited the application of the exemption to a small number of entities (railway line operators and the owners of several transshipment terminals), gave rise to the risk of that exemption being regarded as unlawful State aid on account of the overt selectivity of its application. The exemption laid down in Article 7(1)(1)(a) of the Law on local taxes and charges, in the version in force from 1 January 2017, does not appear to constitute State aid.
- 11 As of 1 January 2017, the scope of the tax exemption laid down in Article 7(1)(1)(a) of the Law on local taxes and charges was extended. In particular, railway sidings omitted in the earlier wording of the legislation, including those constituting so-called private infrastructure, and thus those located in mines, production facilities or power stations, which are the driving force behind all railway freight traffic, were exempted from property tax. In addition, buildings forming part of the railway infrastructure were also covered by the exemption and the scope of the exemption for land was also extended (to include cadastral parcels forming part of the railway infrastructure, and not only parts of land occupied by tracks, as was the case in the previous version of the provisions). However, as from 1 January 2017, the mere fact of possessing a siding on one's land is not sufficient for the application of the tax exemption for railway

infrastructure; it is necessary to make it actually available to a railway transport operator.

- 12 Thus, the exemption laid down Article 7(1)(1)(a) of Law on local taxes and charges relates, as of 1 January 2017, to an unlimited circle of recipients (any operator who makes use of rail transport may avail itself of the exemption). Consequently, it is not addressed to specified operators, to a specific sector or region, and to a specific activity, as a result of which the production of certain goods is favoured. However, the criterion relating to possession of a certain type of infrastructure used in that provision may give rise to uncertainty, which in practice means that operators carrying on economic activity in the same sectors (for example, mines, thermal power stations, breweries) may be in a different situation in terms of their tax burden.
- 13 The referring court adds that, if the difference in situation of economic operators does not arise directly from the mechanism of the exemption introduced, and every economic operator has access to it, the attribute of selectivity cannot, in principle, be attached to it. Every operator (regardless of region, industry and other features) who makes use of rail transport by means of railway sidings which it owns is entitled to benefit from the statutory tax exemption under Article 7(1)(1)(a) of Law on local taxes and charges. The inability to attribute the characteristic of selectivity to a tax exemption laid down in national law precludes the condition relating to distortion of competition from being fulfilled and, consequently, such an exemption cannot be regarded as State aid within the meaning of Article 107 TFEU.
- 14 On the other hand, however, uncertainty arises as to possible covert selectivity related to the use of what are, at first sight, objective exemption criteria. There is therefore de facto selectivity, whereby the instrument in question has the effect of favouring certain undertakings or sectors, irrespective of the fact that it is not addressed exclusively to those undertakings (sectors).
- 15 The referring court makes it clear that the exemption laid down in Article 7(1)(1)(a) of the Law on local taxes and charges was introduced on the occasion of a wide-ranging amendment of the Law on railway transport, which in turn implemented Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area. The aim of both Directive 2012/34/EU and the amendment of the Law on railway transport is development of the railways, to be achieved, inter alia, through liberalisation of legislation and stimulus measures. The form of the rail exemption in force since 1 January 2017 can be considered reasonable and in line with the stimulating function of the tax, which thus encourages operators to use zero-emission and safe rail transport.
- 16 The second question concerns the situation where an operator has availed itself of a tax exemption pursuant to the abovementioned provision of national law, introduced without following the required procedure laid down in Article 108(3)

TFEU, and is now left uncertain as to whether, in circumstances such as those in the dispute before the national court, it is required to pay the outstanding tax, plus interest.

- 17 The issue under consideration here is all the more significant because, in the four years since the introduction of the exemption, neither the tax authorities nor the administrative courts have questioned the application of the tax exemption by operators. This has led to the belief that the use of the tax exemption is correct. From 2021, four years after the introduction of the exemption, the tax authorities began to refuse to apply it, citing Poland's failure to notify the exemption to the European Commission and the associated risk of granting State aid. The case therefore concerns fundamental issues. Such a situation infringes the fundamental rights of taxable persons and is at odds with legal certainty and a favourable business environment. It would be all the more reprehensible if it were to transpire that operators had ultimately to bear the financial cost of the entire situation.
- 18 The crucial question is therefore whether taxable persons can bear negative consequences in the form of an obligation to pay tax, plus interest, in a situation where they have acted in reliance on the law. If it were to transpire that the exemption under consideration was not, contrary to such an obligation, notified, should they be economically obliged to repay the unlawfully granted aid and thus to pay the tax, plus interest, or is such an obligation excluded on the basis of the principle of legitimate expectations?
- 19 The relevance of a potential judgment of the Court of Justice may therefore be very broad and relate to the quality of tax law, the acceptable practices of State authorities, and liability for their acts or omissions. Although the Court of Justice has repeatedly ruled on State aid, its case-law has not so far covered property tax to the extent set out in the question.
- 20 The referring court's uncertainty concerns whether the introduction of the exemption in question into the Polish legal order may lead to an imbalance in the internal market within the meaning of Article 107(1) TFEU, including as a result of the potentially selective nature of that exemption. The case pending before the referring court concerns the exemption from property tax, and thus it is possible to consider whether it constitutes a type of State aid granted by a Member State, which must be accepted by the European Commission, or whether it constitutes a simple exemption of an objective nature, which does not fall within the concept of State aid. In its view, the exemption is lawful and consistent with EU law, but the question arises as to whether it can be applied if the notification obligation has not been complied with.
- 21 The referring court notes that the interpretation of the term 'State aid' may give rise to uncertainties as to interpretation on account of the lack of a definition of that term in EU law. The Court of Justice's definition of State aid – based on an interpretation of Article 107(1) TFEU – is broad and covers an extensive spectrum of measures of State support for undertakings. The case-law of the Court of

Justice distinguishes between four criteria for declaring aid (an aid measure) incompatible with the internal market. The aid must meet the following cumulative conditions: (1) it must take place as part of intervention by the State or through State resources; (2) it must constitute an economic advantage for the operator concerned; (3) it must be selective in nature; and (4) it must affect trade between the Member States and distort or threaten to distort competition. In the view of the referring court, it is uncertain whether the latter two conditions are satisfied in the present case.

- 22 The referring court points out that in the case of the subsequent amendment of Article 7 of the Law on the local taxes and charges on 17 November 2021, which included railway freight terminals in the tax relief, the Polish legislature considered that there is a risk of State aid and, therefore, that notification to the European Commission is required. However, the referring court notes in this respect that that amendment is targeted at specific operators. It adds that, in Poland's commercial reality, there are so many operators (both private and public) which own land on which railway infrastructure is located that the inclusion of that infrastructure in the tax relief may undermine the argument as to the selective nature of the tax exemption introduced in 2017. It is therefore uncertain whether the inclusion of rail infrastructure in the tax exemption entails sectoral aid granted to operators which own the property on which such infrastructure is located.
- 23 The referring court concludes by stating that there is considerable uncertainty as to the potential impact of the exemption in question on competition, notably in view of the possibility that that exemption may display selective characteristics (covert selectivity). In that situation, it is crucial to determine whether, even if it is likely that there is aid as referred to in Article 107(1) TFEU, the draft legislative amendments should have been notified and whether the lack of such notification makes it impossible to grant the aid under Article 108(3) TFEU. Consequently, it is necessary to determine whether, despite the fact that Article 7(1)(1)(a) of the Law on local taxes and charges, in the version in force between 2017 and 2021, has entered the national legal order, it could, in the absence of notification, provide a basis for operators to acquire a right to the exemption.