

Case C-313/22

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:

11 May 2022

Referring court:

Elegktiko Synedrio (Greece)

Date of the decision to refer:

28 January 2022

Appellant on a point of law:

ACHILLEION Anonymi Xenodocheiaki Etaireia

Respondent:

Elliniko Dimosio

Subject matter of the main proceedings

Appeal on a point of law against a decision of a chamber of the Elegktiko Synedrio (Court of Auditors, Greece) dismissing a company's appeal against a decision by the Deputy Minister for the Economy, Competitiveness and Shipping imposing a financial correction on it.

Subject matter and legal basis of the request for a preliminary ruling

The reference for a preliminary ruling pursuant to Article 267 TFEU concerns national legislation providing for an absolute long-term prohibition on the transfer of the fixed assets of an undertaking which has received aid.

Questions referred for a preliminary ruling

Question 1:

For the purposes of (i) Article 30(1), (3) and (4) of Regulation No 1260/1999 and Rule No 1, point 1.9, of Regulation No 1685/2000, (ii) Article 4(3) of Regulation No 70/2001 and (iii) Articles 38 and 39(1) of Regulation No 1260/1999, Article 4 of Regulation No 438/2001, Article 2(2) of Regulation No 448/2001, Article 1(2) of Regulation No 2988/1995 and Article 14 of Regulation No 659/1999, does the sale of the assisted undertaking, together with its fixed assets, constitute automatically such a substantial modification of the implementation conditions of the co-financed investment in that undertaking as to justify of itself national legislation, such as Article 18(5) of Joint Ministerial Decision 192249/EYS 4057 of 19 August 2002 (Ministerial Decision 9216/EYS 916 of 12-18 February 2004), which enacts an absolute long-term prohibition on the transfer of the fixed assets of the subsidised undertaking, on pain of total or partial revocation of the decision granting the aid and repayment of all or part of the public grant paid?

Question 2:

Are (i) Article 30(4) of Regulation No 1260/1999; (ii) Article 4(3) of Regulation No 70/2001 and point 4.12 of the Guidelines on national regional aid concerning the principle of the durability of small and medium-sized enterprises in receipt of aid and (iii) Articles 38 and 39 of Regulation No 1260/1999, Article 2(2) of Regulation No 448/2001, Articles 1(2), 2 and 4 of Regulation No 2988/1995 and Article 14 of Regulation No 659/1999 to be understood as meaning that the sale of the fixed assets and of the assisted undertaking itself, further to an internal shareholders' agreement intended to ensure its viability, does not give rise to a substantial modification to the co-financing operation or to an undue advantage for any of the contracting parties and therefore constitutes neither an irregularity nor a reason to recover the aid, provided that the conditions for the carrying out of the investment are not modified and the transfer falls under a legal regime under which the transferor and the transferee are jointly and severally liable for the debts and for the liabilities that exist at the time of the transfer?

Question 3:

Do Articles 17, 52 and 53 of the Charter of Fundamental Rights of the European Union and the principle of legal certainty, interpreted in conjunction with Article 1 of Protocol No 1 to the ECHR, require a fair balance to be struck between financial correction measures and measures for the recovery of aid in accordance with Articles 38[(1)](h) and 39(1) of Regulation No 1260/1999, Article 2(2) of Regulation No 448/2001, Article 4 of Regulation No 2988/1995 and Article 14 of Regulation No 659/1999 and the right to the protection of 'property' of the recipient of the aid, resulting in partial or even total exemption of the recipient, even where it is found that the transfer gave rise to a substantial modification to the assisted operation or an undue advantage?

Relevant provisions of EU law

Articles 108(3) and (4) and 109 TFEU.

Charter of Fundamental Rights of the European Union ('the Charter'), Articles 16, 17, 52(1) and (3) and 53.

Protocol No 1 to the ECHR, Article 1(1).

Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1), Articles 1(2), 2, 4 and 5.

Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1), recitals 4, 5, 7, 26, 27, 41, 43 and 57 and Articles 8, 30(1), (3) and (4), 38 and 39(1).

Commission Regulation (EC) No 1685/2000 of 28 July 2000 laying down detailed rules for the application of Council Regulation (EC) No 1260/1999 as regards eligibility of expenditure of operations co-financed by the Structural Funds (OJ 2000 L 193, p. 39), as amended by Commission Regulation (EC) No 448/2004 of 10 March 2004, Rule No 1 of the annex.

Commission Regulation (EC) No 438/2001 of 2 March 2001 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards the management and control systems for assistance granted under the Structural Funds (OJ 2001 L 63, p. 21), Articles 4 and 7(3).

Commission Regulation (EC) No 448/2001 of 2 March 2001 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards the procedure for making financial corrections to assistance granted under the Structural Funds (OJ 2001 L 64, p. 13), Article 2(2).

Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 (OJ 2006 L 210, p. 25), Articles 105(1) and 107.

Regulation (EC) No 1783/1999 of the European Parliament and of the Council of 12 July 1999 on the European Regional Development Fund (OJ 1999 L 213, p. 1).

Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ 2001 L 10, p. 33), Article 4(3).

Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [now Article 108 TFEU] (OJ 1999 L 83, p. 1), Articles 1 and 14.

Guidelines on national regional aid (OJ 1998 C 74, p. 9), points 4.12 and 4.14.

Relevant provisions of national law

Constitution of Greece, Articles 5(1), 17(1) and 25(1)(d).

Law 3016/2002 on corporate governance, wages and other provisions (FEK (Official Gazette) A 110), Article 35.

Decision 179846/E.Y.S.2830 of 26 June 2002 of the Minister for the Economy and Finance (FEK B 999).

Joint Ministerial Decision 192249/EYS 4057 of 19 August 2002 of the Minister for the Economy and Finance and the Minister for Development (FEK B 1079), as amended by Ministerial Decision 9216/EYS 916 of 12-18 February 2004, Articles 1 to 5, 8 to 14 and 18.

Articles 477 and 479 of the Greek Civil Code ('the Civil Code').

Presidential Decree 178/2002 on measures to safeguard employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, in compliance with Council Directive 98/50/EC (FEK A 162), Articles 1, 2(1)(a) and (b), 3(1) and 4(1) and (2).

Succinct presentation of the facts and procedure

- 1 By decision 4334 of 14 July 2004, the General Secretary of the Region of West Macedonia included the act entitled 'Aid for SMEs in the Region of West Macedonia in the Tourism Sector, Notice II' in Measure 4.2. 'Support/aid for small and medium-sized enterprises and micro-enterprises and promotion of local products' of the Region of West Macedonia Operational Programme 2000-2006, which is governed by the scheme established by Regulations Nos 1260/1999 and 70/2001.
- 2 On 10 May 2004, the undertaking Gousios V.-Ntagkoumas G. AXE lodged an application with the Region of West Macedonia on that basis, requesting that an investment to upgrade and modernise a hotel establishment in the municipality of Grevena be included in the aforesaid act.
- 3 By decision 529 of 27 January 2005, the General Secretary of the Region of West Macedonia approved the inclusion of the aforesaid company's investment to upgrade and modernise its hotel establishment (Hotel Aigli), with a budget totalling EUR 201 900 and aid totalling EUR 90 000, under the 'Tourism' section of the aid scheme for small and medium-sized enterprises. The starting date for the eligibility of expenditure was set at 10 May 2004 and the final date for the eligibility of expenditure was set at 18 months from the investment inclusion date.
- 4 The physical scope of the investment involved the construction, improvement and configuration of the buildings of an existing hotel, the procurement of hotel

equipment and the installation of an energy-saving system. The completed project would create three new jobs.

- 5 The aforesaid decision 529 of 27 January 2005 was amended as to the shareholdings in the assisted undertaking further to the latter's application of 20 September 2006. Completion decision 60654/2797 of 8 June 2006 confirmed that the approved physical scope of the investment had been completed within the eligible period and that three new jobs had been created.
- 6 The audit team which audited the project prepared an audit report dated 5 November 2009, in which it proposed that the full amount of the public grant of EUR 90 000 be recovered from the final beneficiary. It found that that amount was ineligible, having ascertained from its audit of the books and operating licences of the subsidised Hotel Aigli that it had been transferred on 9 November 2006 from the appellant on a point of law ('the appellant') to the limited company Gousios Vaios-Monoprosopi EPE, thereby infringing the obligation not to transfer fixed assets of the subsidised undertaking for a period of five years from the date of the decision confirming completion of the investment, in breach of Article 7(7) of the aforesaid decision 529 of 27 January 2005 (which contains a rule identical to Article 18(5) of Joint Ministerial Decision 192249/EYS 4057/2002).
- 7 A copy of that audit report was sent to the appellant, which lodged objections that were dismissed by decision of the General Secretary of the Region of West Macedonia.
- 8 By memorandum 222 of 19 July 2010 to the Deputy Minister for the Economy, Competitiveness and Shipping, the official responsible noted that, in its reply to the appellant's request that the final beneficiary of the investment programme be changed so that the new entity that would take over the investment programme would be the company Gousios Vaios Monoprosopi EPE that was being set up, the Region had advised the appellant of its obligation to retain the fixed assets until 8 June 2011.
- 9 It was also proposed in that memorandum that the public grant be repaid pro rata, i.e. that the sum of EUR 82 500 should be recovered as wrongly paid, as the amount corresponding to the period of five months in which the appellant had managed the hotel in compliance with the obligation to retain its fixed assets had to be deducted from the total grant of EUR 90 000 received by the appellant.
- 10 By decision 3411/A.Pl.3704 of 3 August 2010, the Deputy Minister for the Economy, Competitiveness and Shipping subsequently imposed a financial correction on the appellant in the amount of EUR 82 500 – of which 75% corresponded to European Regional Development Fund (ERDF) funds and 25% to national funds through the Public Investment Programme – on the ground of breach of Article 18 of the aforesaid Joint Ministerial Decision 192249/EYS 4057/2002.

- 11 The appellant challenged that decision, initially lodging an appeal with Chamber I of the Court of Auditors, which was dismissed by the decision under appeal.

The essential arguments of the parties in the main proceedings

- 12 By the appeal under consideration, the appellant puts forward three grounds of appeal on a point of law. The first concerns misinterpretation and misapplication of Article 30(4) of Regulation No 1260/1999 and of Article 18(5) of Joint Ministerial Decision 192249/EYS 4057/2002 adopted in implementation of that regulation, read in the light of the principle of proportionality, inasmuch as the Court of Auditors held in the decision under appeal that the transfer of the assisted establishment automatically gave cause for the aid paid to be recovered, without ascertaining whether the investment had actually been substantially modified as regards the conditions for carrying it out and as regards whether or not an undue advantage had been obtained.
- 13 The second ground of appeal on a point of law alleges infringement of an essential procedural requirement, specifically inadequate reasoning and infringement of the relevant rules of evidence, in that the decision under appeal dismissed the grounds of appeal without examining the substance of the appellant's submissions in that regard, namely that the appellant did not obtain an undue advantage from the disputed transfer. In particular it argues, first, that the transfer was made to a company owned by one of its two shareholders and was necessary, moreover, for technical reasons to ensure the financial viability of the undertaking and, second, that the transfer itself ensured that the successor company would comply in all events with the appellant's long-term obligations, given also the automatic application of Article 479 of the Civil Code, which is a general national rule governing transfers of undertakings and provides that the transferor remains jointly and severally liable with the transferee for the debts of the transferred undertaking up to the value of the undertaking.
- 14 Lastly, the third ground of appeal on a point of law concerns infringement of Articles 5(1), 17(1) and 25(1), fourth sentence, of the Constitution of Greece, which guarantee respectively the freedom to conduct a business and the right to property, read in the light of the principle of proportionality. The appellant argues that the Court of Auditors wrongly found by its decision under appeal that a financial correction in the amount in question had been lawfully imposed on the appellant, even though it had complied with all the long-term obligations assumed and the purpose of the aid paid to it had been achieved.
- 15 The Elliniko Dimosio (Greek State) contends that the appeal on a point of law should be dismissed.

Succinct presentation of the reasoning of the reference for a preliminary ruling

- 16 The Court of Auditors sitting in plenary session notes the following in respect of the first ground of appeal on a point of law: first, by its judgment of 14 November 2013, *Comune di Ancona* (C-388/12, EU:C:2013:734), the Court of Justice addressed the question of the meaning of Article 30(4) of Regulation No 1260/1999 and of the principle of durability where a public service is assigned by one public body (the final beneficiary) to another public body (third party), not the question of the transfer of an undertaking by which the final recipient of the aid has been fully deprived of ownership thereof and full ownership has been transferred to a private third party, as has happened in this case.
- 17 Second, by its judgment of 8 May 2019, *Järvelaev* (C-580/17, EU:C:2019:391), the Court interpreted the relevant, albeit not identical, provisions of Article 72 of Regulation No 1698/2005 in a case concerning the leasing of financed equipment, that is to say the contractual assignment of the right to use and operate the equipment, rather than the transfer of ownership.
- 18 Third, recital 41 of Regulation No 1260/1999 and the heading and wording of Article 30 thereof link the eligibility of operations to the principle of durability; in principle, the relevant national rules apply to eligibility, pursuant to Rule No 1 of Regulation No 1685/2000.
- 19 Fourth, as the Court found in its judgment of 3 September 2014, *Baltlanta* (C-410/13, EU:C:2014:2134, paragraphs 38 and 39), Article 38(1) of Regulation No 1260/1999 contains a non-exhaustive list of measures which the Member States must take to protect the European Union's financial interests, including the organisation of management and control systems (Regulation No 438/2001) to prevent, detect and correct irregularities, while Article 39 of Regulation No 1260/1999 expressly provides that Member States bear responsibility in the first instance for investigating irregularities, acting upon evidence of any major change, including to the conditions for the implementation or supervision of assistance, and making the financial corrections required.
- 20 Fifth, 'irregularity' within the meaning of Articles 38(1) and 39(1) of Regulation No 1260/1999, Article 2 of Regulation No 448/2001 and Article 1(2) of Regulation No 2988/1995 includes any infringement of EU law and related national law which has not only caused damage to the budget of the European Union but which may cause such damage, and the imposition of recovery measures or penalties (Articles 4 and 5 of Regulation No 2988/1995) does not depend upon the existence of a specific financial impact (see judgment of 1 October 2020, *Elme Messer Metalurgs*, C-743/18, EU:C:2020:767, paragraph 67).
- 21 Sixth, Regulation No 70/2001 and the Guidelines on national regional aid also contain rules on the durability of assisted small and medium-sized enterprises as a

condition for exempting State aid schemes from the obligation to notify the European Commission, and any failure to comply with those rules obliges the States to recover the aid pursuant to Article 108(3) TFEU and Article 14 of Regulation No 659/1999.

- 22 Lastly, the more specific provisions of national law on the basis of which the funds were charged to the appellant, namely the terms of Joint Ministerial Decision 192249/EYS 4057/2002, lay down an absolute prohibition in principle on the transfer of the fixed assets of the assisted establishment for a period of five years from the investment completion date, a prohibition which the economic operator applying for aid must accept in order for its infrastructure to be included in the relevant aid scheme.
- 23 The Court of Auditors sitting in plenary session considers that the aforesaid legislative regime has to be interpreted in the light of Articles 16, 17, 52 and 53 of the Charter, read in conjunction with Article 1 of Protocol No 1 to the ECHR, which allow the freedom to conduct a business and the right to property to be restricted for legitimate public purposes, subject always to compliance with the principle of proportionality. It is for those reasons that the referring court has submitted the first question.
- 24 As regards the second ground of appeal on a point of law, the Court of Auditors sitting in plenary session notes that the appellant cites as relevant the circumstances under which the disputed transfer of its undertaking took place. It submits (a) that it took place by agreement between its members and that the transfer was made by the appellant, as the final recipient of the aid, to a company owned by one of its shareholders, in order to preserve its financial viability and perform its long-term obligations; (b) that it was made under Articles 477 and 479 of the Civil Code and Presidential Decree 178/2002, a regime which in principle safeguards and preserves jobs in the successor company by establishing unlimited liability of the successor employer; and (c) that the operational and financial conditions for the carrying out of the operation have not changed, including in relation to the objectives of the aid under Regulation No 70/2001 and the European Commission's Guidelines on national regional aid, given that both the object of the undertaking as a hotel establishment and the jobs corresponding to the latter have been preserved.
- 25 The Court of Auditors sitting in plenary session considers that the appellant's line of argument set out in the preceding paragraph has to be examined in the light of Articles 16, 17, 52 and 53 of the Charter, read in conjunction with Article 1 of Protocol No 1 to the ECHR, as set out above. It is for those reasons that the referring court has submitted the second question.
- 26 Lastly, the Court of Auditors sitting in plenary session notes with regard to the third ground of appeal on a point of law that the following circumstances apply in the present case: (i) the provisions of Regulation No 1260/1999 of relevance to the case contain vague and unclear legal concepts such as 'substantial modification'

and ‘undue advantage’, which were interpreted for the first time only in 2013 in the judgment in *Comune di Ancona*, and subsequently, but in the context of a different regulation, in 2019 in the judgment in *Järvelaev*; (ii) according to its wording, the disputed national legislation enacts an absolute prohibition on the transfer of the assisted undertaking; (iii) the transfer at issue was based on an agreement between the original shareholders of the undertaking intended to preserve its viability which, in principle, justifies a departure from the ordinary conditions of transfer on the relevant market; (iv) the transfer falls under the terms of Articles 477 and 479 of the Civil Code and Presidential Decree 178/2002 and there has been no change to the object or to the number of jobs corresponding to the infrastructure; (v) the recipient of the aid notified the transfer in good faith in advance to the competent national authority, which was able to examine and prevent any irregularity in good time; and (vi) the recovery of the aid does not appear to compensate for specific and quantifiable damage to the Union budget. The Court of Auditors sitting in plenary session also notes that, by its judgment of 26 May 2016, *Ezernieki* (C-273/15, EU:C:2016:364), on an agricultural aid scheme that was similar, but which concerned a legislative framework that did not involve compliance by the recipient of the aid with long-term obligations, the Court held that, inasmuch as the recipient of the aid fails to satisfy the conditions for payment of the aid (eligibility conditions), it does not in principle qualify for protection under Article 17 of the Charter.

- 27 The Court of Auditors sitting in plenary session considers that the specific circumstances of this case and the relevant provisions of secondary EU and national law must be examined in the light of Articles 17, 52 and 53 of the Charter, read in conjunction with Article 1 of Protocol No 1 to the ECHR, and in the light of the principle of legal certainty. It is for those reasons that the referring court has submitted the third question.