Case C-746/23

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:

5 December 2023

Referring court:

Consiglio di Stato (Italy)

Date of the decision to refer:

29 November 2023

Appellants:

Cividale SpA

FLAG Srl

Respondents:

Ministero dello Sviluppo Economico

Direzione Generale per l'incentivazione delle attività imprenditoriali del Ministero dello Sviluppo Economico

Dipartimento per lo sviluppo e la coesione economica del Ministero dello Sviluppo Economico

Direzione Generale per l'incentivazione delle attività imprenditoriali del Ministero dello Sviluppo Economico-Divisione X

Other party to the proceedings:

Fonderia di Torbole SpA

Subject matter of the main proceedings

Appeal against judgment No 00118/2019 of the Tribunale amministrativo regionale per il Veneto (Veneto Regional Administrative Court) dismissing the

action brought by Flag s.r.l. seeking annulment of Decision No 1303 of 29 May 2013, pursuant to which the Ministero dello Sviluppo Economico (Ministry of Economic Development) contrary to its provisional award in an earlier memorandum, authorised payment of only EUR 200 000.00 to Flag s.r.l. by way of a contribution for that company's participation in a rationalisation programme for the foundry sector.

Subject matter and legal basis of the request

By the reference for a preliminary ruling pursuant to Article 267 TFEU, the Consiglio di Stato (Council of State) seeks an interpretation of the concept of 'State aid' within the meaning of Articles 107 and 108 TFEU and of Council Regulation (EU) [EC] No 659/1999, in order for the contribution referred to, inter alia, in Article 2(2)(a) and (b) of decreto ministeriale n. 73/2004 (Ministerial Decree No 73/2004) to be correctly classified.

Questions referred for a preliminary ruling

[1.] Can a measure such as that governed by the national legislation referred to in paragraph 20 [of the original version of the present order for reference], and in particular the measure provided for in Article 2(2)(a) of Ministerial Decree No 73/2004, be classified as 'aid' within the meaning and for the purposes of Articles 107 and 108 TFEU and Council Regulation (EU) [EC] No 659 of 22 March 1999?

[2.] Can a measure such as that governed by the national legislation referred to in paragraph 20 [of the original version of the present order for reference], and in particular the measure provided for in Article 2(2)(b) of Ministerial Decree No 73/2004, be classified as 'aid' within the meaning and for the purposes of Articles 107 and 108 TFEU and Council Regulation (EU) [EC] No 659 of 22 March 1999?

Provisions of European Union law relied on

Treaty on the Functioning of the European Union, and in particular Articles 107 and 108.

Council Regulation (EU) [EC] No 659/1999 ('Regulation No 659/1999'), and in particular Articles 2, 3 and 8.

Commission notice on the enforcement of State aid law by national courts (OJ 2009 C 85, p. 1 et seq., 'the 2009 notice').

Commission Notice of 19 July 2016 on the notion of State aid ('Notice C 262/1'), and in particular paragraphs 66 to 69 of Chapter 4.

Provisions of national law relied on

Legge del 12 dicembre 2002, n. 273 (Law No 273 of 12 December 2002, 'Law No 273/2002'); in particular, Article 12, launching the programme for rationalisation of the industrial sector of iron and steel foundries, to be carried out in accordance with detailed rules and criteria laid down by decree of the Minister for Productive Activities, which seeks, in compliance with EU law on State aid, to pursue a number of objectives, including: '(a) *promoting higher quality in production, including reorganisation of production capacity and the development of conditions conducive to concentration in the most competitive undertakings.*'

Decreto del Ministero delle Attività Produttive del 13 gennaio 2004, n. 73 (Decree No 73 of the Ministry of Productive Activities of 13 January 2004 ('Ministerial Decree No 73/2004'); in particular

Article 2, which provides: '*1. For the purposes of restructuring the sector, because of the over-capacity in the production system programmes for the physical destruction of the plant and machinery that make up the production cycle shall be incentivised, leading to the closure of the production site* (…).

2. The extent of the contribution shall be the higher of the two values set out in Communication from the Commission C(2002) 315 of 7 March 2002: 'contribution to fixed costs' – 'residual value of plant to be scrapped', and shall be:

(a) 100% in the event of a reduction in production capacity resulting from a merger of undertakings or from agreements between foundry companies providing, inter alia, for an appropriate solution to employment problems. In particular, a foundry acquiring production facilities that have been taken out of operation must demonstrate that it has obtained positive ROS values, on average, over the last three approved balance sheets. Such certification must be carried out by an audit firm. In addition, an expert's report by a technical expert in the sector must be provided to demonstrate the capacity to deliver, using its own plant, production equivalent to that of the foundry ceasing activity;

(b) 60% of its maximum amount, for the reduction of production capacity only.

3. The above values shall be identified as follows:

(a) discounted value of the contribution to fixed costs obtainable from plants over the three-year period 2000-2002; in determining the industrial undertaking's contribution, reference shall be made only to revenue and cost items upstream of operating profit, thus excluding elements of both a financial and non-operational nature;

(b) residual book value of the plants to be scrapped, less depreciation implemented on 31 December 2002.

4. The values themselves shall be determined by means of a technical appraisal carried out by a specialised credit institution(…).

5. Undertakings applying for a contribution are also required to:

(a) have an audit company issue a restatement of the financial statements in accordance with the template set out in Annex D;

(b) provide, in programmes for the destruction of plant, for an appropriate solution to the ensuing employment problems;

(c) carry out the destruction of the plant covered by the incentives within one year of the publication of this regulation in the Gazzetta Ufficiale della Repubblica italiana (Official Journal of the Italian Republic);

(d) in order to qualify for a 100% contribution, submit an agreement signed with an undertaking that is able to deliver production equivalent to that taken out of operation, indicating the conditions set out in paragraph 2(a) of this Article.

6. The destruction of the plant shall consist of the flame-cutting of the parts of the plant listed in Annex C. The costs of such operations shall be deducted from the proceeds of the disposal of the scrap.

7. Special committees set up by decree of the Director-General for coordinating incentives for undertakings shall verify the destruction of the production plant. (…).

8. The revenue obtained by the undertakings applying for a contribution from the sale of scrap, after deduction of the costs incurred for the interventions relating to the flame-cutting and demolition of the plant, shall be allocated by payment to the State budget and, in any event, after having collected the entire contribution due for the scrapping of plants. (…)*';*

Article 7: '*1. Undertakings engaged in iron and steel foundry activities seeking to benefit from the contributions provided for in Article 12 of Law No 273/2002, for the purposes set out in subparagraph (a), must:*

(a) be registered in the companies register; that requirement shall also apply to undertakings resulting from the merger, acquisition or spin-off of undertakings with legal personality before 1 January 2000; it shall also apply to production units carrying out the entire foundry production cycle, even if they belong to the same undertaking;

(b) not have altered their production type or the structure of their plant since 1 January 2002;

(c) have carried out regular production up until 31 December 2001, certified by a sworn expert appraisal by a technical expert in the sector who is included in the register of experts appointed by the court;

(d) be in possession, on the date of the application, of the plant to be taken out of operation;

(e) not be the subject of bankruptcy or insolvency proceedings(…)';

Article 9: '*1. Companies that have benefited from the incentives shall not be permitted to reinstate the production capacity that has been removed within five years of the date of payment.*

2. In the event of failure to comply with paragraph 1, the undertakings concerned shall lose their right to the incentives in respect of an amount equal to the reinstated production capacity, resulting in the obligation to repay the relevant contribution, including statutory interest and revaluation interest.

3. In the event of failure to comply with the agreement between companies referred to in Article 2(2)(a) of this decree, the undertaking concerned shall forfeit its entitlement to the increased contribution.

4. Under the legislation in force, the provisions of the preceding paragraphs shall apply to parent companies, subsidiaries or, companies that are, in any event, connected with the companies to which those contributions are made.

5. Provision shall also be made for the withdrawal of the benefits granted in the cases provided for in Article 9 of Legislative Decree No 123 of 31 March 1998.'

Decreto ministeriale del 6 febbraio 2006 (Ministerial Decree of 6 February 2006), published in Official Journal of the Italian Republic No 36 of 13 February 2006 ('the 2006 Ministerial Decree'); in particular:

Article 1, which confirms that the contribution provided for in Article 2 of Ministerial Decree No 73/2004 is compensation for the loss of the asset value of the plant caused by the undertaking's implementation of the restructuring programme launched by Law No 273/2002;

Article 2, under which that indemnity is to be paid '*following the removal of the undertaking from the companies register within the meaning of Article 2495 of the Civil Code, or in the case of undertakings with more than one branch of activity, following the transfer of the foundry branch to another newly created undertaking which, after carrying out the operations and obligations for the physical destruction of the plant, ceases activity. In any event, compensation may not be paid if the plant is not destroyed within one year of the publication of the decree in the Official Journal of the Italian Republic*';

Article 3, which confirms that the amount of the contribution is to be determined in accordance with Article 2(3) of Ministerial Decree No 73/2004.

Decreto-legge del 31 dicembre 2007, n. 248 (Decree-Law No 248 of 31 December 2007), converted by legge del 28 febbraio 2008, n. 31 (Law No 31 of 28 February 2008, 'Decree-Law No 248/2007'); in particular, Article 51 quater, which reiterates that the incentive granted pursuant to Article 12(2) of Law No 273/2002 is to be paid in accordance with the procedures established by the 2006 Ministerial Decree, subject to '*the verification through technical appraisal of compliance with the asset guarantee of the company's creditors, pursuant to Article 2740 of the Civil Code*'.

Decreto del MISE del 17 aprile 2009 (MISE Decree of 17 April 2009, 'the 2009 Ministerial Decree'), which reiterates the above-mentioned methods of calculating the incentive granted pursuant to Article 12(2) of Law No 273/2002.

Succinct presentation of the facts and procedure in the main proceedings

1 On 18 June 2004, Flag s.r.l., which is active in the iron and steel foundry sector and wholly owned by Cividale s.p.a., submitted to the Ministero dello Sviluppo Economico (Ministry of Economic Development, 'the MISE') an application for a contribution of 100%, as provided for by Article 12 of Law No 273/2002 in conjunction with Article 2(2)(a) of Ministerial Decree No 73/2004 ('the contribution at issue'). That company intended to take one of its production plants out of operation and to conclude an inter-company agreement with Cividale Spa in order to resolve the employment problems arising from that step.

2 By memorandum of 14 September 2006 the MISE, having completed an appraisal to determine the value of the plant to be scrapped, provisionally set the contribution to the company Flag s.r.l. at EUR 1 645 365.58. It also stated that payment of the contribution was subject, first, to verification by an appropriate ministerial committee that the plant had been destroyed and, second, to the transfer of the branch of undertaking being taken out of operation to another company, established solely to carry out the destruction of the plant in question.

3 By an act of 28 December 2006, Flag s.r.l. transferred the branch of the undertaking to be scrapped to Flag Fonderia Acciaio Marcon s.r.l., a company set up for the purpose of destroying the plant in question, selling the scrap metal and transferring the corresponding revenue to the public purse. That company was then put into liquidation and removed from the companies register.

4 Cividale S.p.A., the sole surviving partner, therefore asked the MISE to pay the contribution as quantified in the memorandum of 14 September 2006.

5 By order No 1303 of 29 May 2013 ('the contested order'), the MISE, however, authorised payment of only EUR 200 000.00 in application of the rules on small amounts of State aid (the de minimis rule).

6 Cividale s.p.a. and Flag s.r.l. challenged that decision before the Lazio Regional Administrative Court, claiming, inter alia, infringement of the principles of proportionality, reasonableness and the protection of legitimate expectations, as well as the irrational nature and failure to state reasons for the contested measure, given that the MISE had never mentioned the existence of a notification procedure to the European Commission with regard to the contribution at issue, under the State aid scheme, or made payment of the aid conditional upon that notification procedure. In addition, they alleged infringement of Articles 107 and 108 TFEU and of Regulation No 659/1999, in that the contribution at issue was not, in their view, State aid, but mere compensation not conferring any economic advantage.

7 The MISE entered legal proceedings, stating that, on 24 September 2003, it had 'attempted' to notify the European Commission, in accordance with Regulation No 659/1999, of the scheme for the contribution at issue, but that, following a request for additional information sent by the Commission on 21 November 2003, the Ministry had taken the view that the Commission would adopt a negative decision and, therefore, had decided to abandon the procedure.

8 By judgment No 00118/2019, the Veneto Regional Administrative Court, before which the proceedings at first instance were conducted after the Lazio Regional Administrative Court had declared that it did not have jurisdiction, dismissed the actions of those companies. While criticising the MISE's conduct in its handling of the case vis-a-vis the European Commission, that court held that, in the absence of a prior decision by the Commission, the contribution applied for by the above-mentioned companies could not be granted. The companies then brought an appeal against that judgment before the Council of State, the referring court.

The essential arguments of the parties in the main proceedings

9 The appellant companies submit that the contribution at issue cannot be classified as State aid because the conditions required pursuant to Article 107 TFEU are, for a number of reasons, not met. First of all, given that payment of the contribution at issue is subject to the definitive destruction of the production plants and the termination of the entity that owns them, the contribution cannot distort competition, since it is paid to an entity that is no longer part of the relevant market. Next, the contribution at issue is, in the view of the appellants, merely compensation for that entity's loss of production capacity. Finally, the amount of that contribution, under the calculation criteria laid down in the ministerial decrees, is significantly lower than the value of the plant destroyed, in relation to its production capacity.

10 The appellant companies also submit that Veneto Regional Administrative Court was wrong to state that the national court cannot take the place of the European Commission in interpreting the concept of State aid, as provided for in the 2009 Notice, in particular where, as in the present case, the European Commission did not take a decision due to a failure to follow the notification procedure.

11 The MISE entered legal proceedings and asked that the appeal be dismissed and the judgment under appeal upheld. It confirmed that in respect of the appellant companies, as well as 13 other undertakings, it had provisionally awarded the contribution at issue, but that it had then chosen to withdraw it, replacing it with a contribution up to the limit of EUR 200 000.00, because it was 'not convinced' of the compatibility of the contribution at issue with EU State aid rules. It also confirmed that it was no longer in possession of any document, drawn up by the MISE or by the European Commission, concerning its 'attempt' to notify the latter of the contribution scheme at issue.

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

12 The Council of State has doubts as to whether the contribution at issue may be classified as State aid within the meaning of Articles 107 and 108 TFEU and, consequently, whether it is subject to the obligation to notify the European Commission. The answer to that question is decisive for the main proceedings, in which measures adopted on the basis of the assumption that the contribution at issue constitutes State aid are challenged, even though the European Commission has not issued any decision in that regard.

13 The referring court, while acknowledging that verification of the compatibility of the contribution at issue is a matter for the European Commission, states that the concept of 'State aid', which is an independent concept, is relevant for the purposes of applying Articles 107 and 108 TFEU and Regulation No 659/1999; it argues that it is only with regard to a measure that may objectively be classified as State aid that the obligation of prior notification to the Commission exists.

14 Relying on paragraphs 66 to 69 of Commission Notice 262/1 and on the case-law of the Court of Justice of the European Union, the referring court points out that any type of advantage that benefits an undertaking, even indirectly, whether it is granted in the form of an economic subsidy or of tax advantages or other advantages that release the undertaking from the charges which are normally borne by it, constitutes State aid (see judgments of the Court of Justice of 2 July 1974, Case C-173/73, and of 5 October 1999, Case C-251/97). In particular, under the case-law of the Court of Justice, for aid of that kind it is of no relevance whether the measure has a social or fiscal purpose: in that sense, the provision of bank guarantees that the company would not otherwise have obtained and the transfer of land at preferential prices have also been classified as State aid (see judgments of the Court of Justice of 2 February 1998 in Cases 67, 68 and 70/85; of 21 March 1991 in Case C-303/88; of 19 May 1999 in Case C-6/97; of 21 March 1990 in Case C-142/87 and of 10 April 2003 in Case T-366/00). On the other hand, contributions granted to certain undertakings to offset additional costs associated with the discharge of public service obligations and measures of a general nature that do not specifically favour certain undertakings or producers do not fall under that heading (see the judgments of the Court of Justice of 22 November 2001 in Case C-53/00 and of 24 July 2003 in Case C-280/00).

15 The Council of State then notes that there are EU regulations identifying State aid that is a priori permissible, without any obligation to notify the Commission in advance: such measures include those intended to increase investment or, in any event, to contribute to the operation and continued existence of the beneficiary undertaking. The contribution at issue is, however, different, since it is paid only in return for the physical destruction of the production plant and the simultaneous cessation of the business activity of the owner of the plant that has been destroyed, which is the recipient of the contribution.

16 According to the Council of State, the latter consideration also applies to the situation provided for in Article 2(2)(a) of Ministerial Decree No 73/2004, in which an undertaking that takes the production cycle out of operation enters into agreements with other undertakings to support the jobs that have been removed and the production that has ceased. In such a case, the national legislation prevents the contribution from being paid to an undertaking that, in agreement with the undertaking that takes the plant out of operation, undertakes to acquire its production capacity and the workers affected. In addition, the entity that receives the contribution at issue is prohibited from reinstating the production capacity for five years following payment.

17 The referring court acknowledges that the EU rules on State aid include certain aid measures that, like the contribution at issue, are paid in return for a reduction in production by the beneficiary undertaking, including, in particular, the contribution to agricultural holdings in the context of the ‘compulsory set aside’, and the aid introduced by Council Regulation (EEC) No 2078/92. That court notes, however, that those measures are of a predetermined duration and do not include the scrapping of goods intended for production or the elimination of the beneficiary undertaking.

18 At the same time, the Council of State points out that if the contribution at issue is paid in the amount of 100% within the meaning of Article 2(2)(a) of Ministerial Decree No 73/2004, certain problems arise. The agreement that the applicant undertaking enters into with other undertakings in order to acquire production facilities and resolve employment problems is such as to transfer all the customers of the undertaking to another undertaking, which therefore receives an advantage in terms of customers and turnover. Such agreements, particularly if they are linked to genuine mergers, could constitute concentrations between undertakings, which are in principle capable of affecting competition. In addition, the Council of State points out that the rules governing the contribution at issue do not contain any protective clause relating to national and European merger rules. On the other hand, those problems do not exist, in the referring court’s view, in the situation provided for in Article 2(2)(b) of Ministerial Decree No 73/2004, in which, since no provision is made for the conclusion of agreements with other undertakings, all the customers left by the undertaking that has taken the production facilities out of operation are freely redistributed among the undertakings in the sector.