

Case C-700/22**Request for a preliminary ruling****Date lodged:**

15 November 2022

Referring court:

Nejvyšší soud (Czech Republic)

Date of the decision to refer:

26 September 2022

Applicants:

RegioJet a. s.

STUDENT AGENCY k.s.

Defendants:

České dráhy, a.s.

Správa železnic, státní organizace

Česká republika, Ministerstvo dopravy

[...] ORDER

Nejvyšší soud (the Supreme Court, Czech Republic) has ruled [...] in the case of the applicants **a) RegioJet a.s.**, [...] **b) STUDENT AGENCY k.s.**, [...] against the defendants **1) České dráhy, a.s.**, (Czech Railways) [...] **2) Správa železnic, státní organizace**, (Railway Administration, state organisation) [...] **3) Česká republika – Ministerstvo dopravy**, (the Czech Republic – the Ministry of Transport) [...] concerning the recovery of unlawful public aid and concerning protection against unfair competition, conducted before the Městský soud v Praze (City Court, Prague) under file no 1 Cm 6/2015, concerning the appeal on a point of law of the applicants against the judgment of the Vrchní Soud v Praze (High Court in Prague) of 23 September 2020, ref. no 3 Cmo 10/2019-463, as amended by a corrective order dated 3 December 2020, ref. no 3 Cmo 107/2019-501, and concerning the appeal on a point of law of defendant 1) against that corrective order, as follows:

I. [...]

II. The Supreme Court **requests** an answer from the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union to the following question referred for a preliminary ruling:

Must the last sentence of Article 108(3) of the Treaty on the Functioning of the European Union be interpreted as meaning that a national court must, in proceedings initiated on the application of a third party (competitor), order the recipient to return aid provided in breach of that provision even though (as at the date of the court's decision) the limitation period for the Commission's powers pursuant to Article 17(1) 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 has expired, due to which the aid provided is deemed, pursuant to Article 1(b)(iv) and Article 17(3) of the Regulation, to constitute existing aid?

Grounds:

I.

Facts of the case and proceedings before courts of the Czech Republic thus far

1. The present case concerns (inter alia) a dispute pertaining to the recovery of financial consideration that, as the applicants claim, constitutes unlawful public aid provided to defendant 1) by defendant 2) with the contribution of defendant 3).

2. As competitors of defendant 1), the applicants claim that the payment of the purchase price pursuant to an agreement on the sale of a section of a corporation concluded on 26 June 2008 by and between defendant 1), as the seller, and defendant 2), as the purchaser, amounted to unlawful public aid was provided to defendant 1), as the purchase price agreed was overvalued by the amount claimed, and by the payment of the purchase price from public funds, defendant 1) sold assets which defendant 1) originally obtained as a contribution from the state for the purpose of operating a railway in the public interest.

3. In its judgment of 6 February 2019, the court of first instance (City Court, Prague), [...] dismissed the application. On the applicants' appeal, the appellate court (High Court in Prague) upheld the judgment of the court of first instance on the merits of the case, by its judgment dated 23 September 2020, [...].

4. In support of its decision, the appellate court stated that the Commission had not conducted any investigation concerning the provision of this alleged unlawful aid, and hence, the limitation period pursuant to Article 17(1) of Council Regulation (EU) 2015/1589 had expired. According to the court of appeal, it is therefore necessary to view the payment of the said purchase price, even if it were public aid, as existing public aid, and consequently the court cannot order its

recovery pursuant to Article 108(3) of the Treaty on the Functioning of the European Union.

5. The applicants challenged the judgment of the court of appeal by an appeal on a point of law, claiming an incorrect legal classification of the case as the grounds for the appeal on a point of law.

6. In the proceedings concerning the appeal on a point of law, the court of appeal found that its decision in the matter depends on the resolution of the question whether the expiry of the limitation period on the Commission's powers as concerns the recovery of aid prevents a national court from imposing, by means of direct application of Article 108(3) of the Treaty on the Functioning of the European Union, an obligation on the recipient to return any aid the provision of which was not notified to the Commission pursuant to that article.

II.

Applicable national law

7. A decision in the case is based on the application of directly applicable provisions of EU law. National legislation shall not apply.

III.

Applicable European Union law

8. Pursuant to Article 107(1) of the Treaty on the Functioning of the European Union, 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 is, in so far as it affects trade between Member States, incompatible with the internal market.

9. Pursuant to Article 108(1) of the Treaty on the Functioning of the European Union, the Commission, in cooperation with Member States, is to keep under constant review all systems of aid existing in those States. It is to propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

10. Pursuant to Article 108(2), first sentence of the Treaty on the Functioning of the European Union, if after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it is to decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

11. Pursuant to Article 108(3) of the Treaty on the Functioning of the European Union, the Commission is to be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it is without delay to initiate the procedure provided for in paragraph 2. The Member State concerned is not to put its proposed measures into effect until this procedure has resulted in a final decision.

12. Pursuant to Article 1(b)(iv) of Council Regulation (EU) 2015/1589, for the purposes of this Regulation, ‘existing aid’ means aid which is deemed to be existing aid pursuant to Article 17 of that Regulation.

13. Pursuant to Article 1(c) of Council Regulation (EU) 2015/1589, for the purposes of this Regulation, ‘new aid’ means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid.

14. Pursuant to Article 1(f) of Council Regulation (EU) 2015/1589, for the purposes of this Regulation, ‘unlawful aid’ means new aid put into effect in contravention of Article 108(3) TFEU.

15. Pursuant to Article 17(1) and (3) of Council Regulation (EU) 2015/1589, powers of the Commission to recover aid shall be subject to a limitation period of 10 years (paragraph 1). Any aid with regard to which the limitation period has expired shall be deemed to be existing aid (paragraph 3).

IV.

Grounds for the question referred

16. To begin, it seems appropriate to state that the question referred pertains exclusively to the recipient’s obligation to return aid as such (i.e., not any other potential claims arising from unlawful provision of aid pursuant to Article 108(3) of the Treaty on the Functioning of the European Union, including, for example, claims from prematurely provided aid or damages).

17. Furthermore, it seems appropriate to state that the present case does not deal with the question of the period in which the right to recover unlawfully granted aid is time-barred in proceedings before a national court on the basis of the direct effect of Article 108(3) of the Treaty on the Functioning of the European Union, but rather, whether a recipient is obliged to provide aid that is deemed existing aid pursuant to Article 1(b)(iv) in conjunction with Article 17(3) of Council Regulation (EU) 2015/1589 due to the expiry of the period stipulated therein, i.e., support to which Article 108(3) of the Treaty on the Functioning of the European Union does not (at least according to the actual wording of the provisions) apply (at least with respect to the future).

18. The above provisions of EU law do not provide an answer that would exclude any room for reasonable doubt as to the question of the effect had by the

limitation of the Commission's powers regarding the recovery of aid pursuant to Article 17(1) of Council Regulation (EU) 2015/1589 on the recipient's obligation to return aid provided in violation of Article 108(3) of the Treaty on the Functioning of the European Union, which would (otherwise) be imposed on the recipient on the basis of the direct application of the provision or whether a national court is obliged to order compliance with that obligation [cf. Recital 25 of Council Regulation (EU) 2015/1589; cf. also, for example, judgments of the Court of Justice of 11 July 1996 in Case C-39/94, *Syndicat français de l'Express international (SFEI) and Others v La Poste and Others*, and of 8 December 2011 in Case C-275/10, *Residex Capital IV CV v Gemeente Rotterdam*].

19. Recital 26 of Council Regulation (EU) 2015/1589 does state that, for reasons of legal certainty, it is appropriate to provide for a period of limitation of 10 years with regard to unlawful aid, after the expiry of which no recovery can be ordered. It is not, however, clear whether that restriction and its effect apply solely to the Commission's decisions (pursuant to Article 16 of the Regulation) or whether certain effects of the provision can be manifest (also) in the decisions of a national court on the basis of the direct application of Article 108(3) of the Treaty on the Functioning of the European Union.

20. Furthermore, Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01) states, on the one hand, that Council Regulation (EU) 2015/1589 does not contain any provision relating to the powers and obligations of national courts (paragraph 70), while on the other hand, the Notice emphasises that, when implementing State aid rules, the role of the national courts is limited to assessing whether an aid measure constitutes existing aid, and, in that case, there is no question of breach of Article 108(3) TFEU to be remedied by the national court (paragraph 69).

21. According to the referring court, the provisions of EU law do not provide an unambiguous answer to the question at hand (or, more precisely, they do not constitute *acte clair*).

22. The Court of Justice has expressed its views on the issue and consequences of the expiration of the limitation period for the Commission's powers to recover aid pursuant to Article 17(1) of Council Regulation (EU) 2015/1589 [formerly pursuant to Article 15(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty] several times. This, however, has taken place in connection with different factual circumstances or in an assessment of claims differing from those in the present case.

23. In its judgment of 5 October 2006 in Case C-368/04, *Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others*, the Court of Justice formulated a general premiss according to which the regulation codifies and reinforces the Commission's practice in reviewing State aid and does not contain any provision relating to the powers and obligations of the national

courts, which continue to be governed by the provisions of the Treaty as interpreted by the Court.

24. Subsequently, in its judgment of 16 April 2015 in Case C-690/13, *Trapeza Eurobank Ergasias AE v Agrotiki Trapeza tis Ellados AE (ATE)*, the Court of Justice specified that pursuant to Article 1(b) of Regulation 659/1999 aid may be classified as existing where it was granted after the entry into force of the Treaty in the Member State concerned, but after the expiry of the 10-year limitation period provided for in Article 15(3) of that regulation, and hence, in the case of the provision of such aid, the Member State would not be required to follow the preliminary examination procedure provided for in Article 88(3) EC. The Court of Justice inferred this in connection with an evaluation of aid in the form of a prerogative granted to a bank acting for the public benefit consisting of the possibility of a unilateral establishment of a pledge on the basis of a national law from 1929, or in evaluating the question of the applicability or non-applicability of that provision of national law. That is to say, this was not in relation to the obligation of a national court to impose on the recipient an obligation to return aid provided in financial form (or the payment of financial performance back to its provider) on the basis of an action filed by its competitor.

25. In its judgment of 30 April 2002, in Joined Cases T 195/01 and T-207/01, *Government of Gibraltar v Commission of the European Communities*, the Court of First Instance of the European Community stated that the limitation period provided for in Article 15 of Regulation No 659/1999 does not in any way express a general principle whereby new aid is transformed into existing aid but merely precludes recovery of aid established more than 10 years before the Commission first intervened.

26. However, the conclusion in that case was not reached in the context of an evaluation of the obligation of a national court to order the recipient to return financial support provided, on the basis of the direct application of Article 108(3) of the Treaty on the Functioning of the European Union (or Article 88(3) of the Treaty Establishing the European Community), but rather, in the context of a review of the Commission's decision to launch formal investigation proceedings pursuant to Article 88(2) of the Treaty Establishing the European Community and pursuant to Regulation No 659/1999.

27. The Court of Justice also expressed its opinion concerning the nature of the period specified in Article 17(1) of Council Regulation (EU) 2015/1589 [or in Article 15(1) of Council Regulation (EC) No 659/1999] in its judgments of 5 March 2019 in Case C-349/17, *Eesti Pagar AS v Ettevõtlike Arendamise Sihtasutus a Majandus- ja Kommunikatsiooniministeerium*, and of 30 April 2020 in Case C-627/18, *Nelson Antunes da Cunha, Lda proti Instituto de Financiamento da Agricultura e Pescas IP (IFAP)*. It inferred that the limitation period provided for in that provision applies solely to powers of the Commission concerning the recovery of aid and cannot therefore be applied to proceedings concerning recovery of aid by competent national authorities.

28. Nevertheless, in these judgments the Court of Justice assessed the question of the importance of the limitation period provided for in that provision in terms of the possibility of the limitation of claims (otherwise possibly well-founded) brought in proceedings before a national court pursuant to Article 108(3) of the Treaty on the Functioning of the European Union [or in connection with a Commission decision pursuant to Article 16 of Council Regulation (EU) 2015/1589]. In the present case, nevertheless, the decision of the referring court does not depend on an assessment of the legitimacy of an objection raised by defendant 1), as the recipient of aid against (otherwise possibly well-founded) claims arising from Article 108(3) of the Treaty on the Functioning of the European Union, but on an answer to the question of whether defendant 1), as the recipient of aid, is obliged to return even such unnotified aid which is, as a result of the objective expiry of the period provided for in Article 17(1) of Council Regulation (EU) 2015/1589, (still) deemed to constitute existing aid (albeit not lawful *ex post facto*).

29. Outside of the scope of an assessment of the consequences of the limitation of the Commission's powers pursuant to Article 17(1) of Council Regulation (EU) 2015/1589, the conclusion formulated by the Court of Justice in its judgments of 5 October 2006 in Case C-368/04 *Transalpine Ölleitung in Österreich GmbH and Others v Finanzlandesdirektion für Tirol and Others*, and of 12 February 2008 in Case C-199/06, *Centre d'exportation du livre français (CELF), Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)*, also seems relevant. According to that conclusion, a Commission decision finding aid that was not notified compatible with the common market does not have the effect of regularising *ex post facto* the unlawful status of acts which are invalid because they were taken in disregard of the prohibition laid down by Article 108(3) of the Treaty on the Functioning of the European Union. At the same time, however, the Court of Justice inferred that the article does not give rise to the obligation of a national law to order the recipient of (prematurely) granted aid to return that aid where the Commission had already ruled on the compatibility of the aid. This does not prejudice the recipient's obligation to pay interest in respect of the period of unlawfulness or the compensation for the damages caused by the unlawful nature of the aid provided.

30. Similarly, in its judgment of 23 January 2019 in Case C-387/17, *Presidenza del Consiglio dei Ministri proti Fallimento Traghetti del Mediterraneo SpA*, the Court of Justice formulated a conclusion according to which the expiry of the limitation period provided for in Article 15(1) of Regulation No 659/1999 cannot have the effect of retroactively legalising State aid vitiated by illegality merely because it becomes existing aid within the meaning of Article 1(b)(iv) and, consequently, of depriving of any legal basis an action for damages brought against the Member State concerned by individuals and competitors affected by the grant of the unlawful aid.

31. Nevertheless, the Court of Justice did not address the question of the effect of the expiry of that limitation period on the recipient's obligation to return aid

provided (originally) in violation of Article 108(3) of the Treaty on the Functioning of the European Union on the basis of the direct application of the article.

32. The referring court maintains that the provisions of EU legislation concerned in regard of the question referred do not constitute *acte éclairé*.

33. It can thus be summarised that the nature of the question referred is whether the expiry (itself) of the limitation period to which the Commission's powers are subject pursuant to Article 17(1) of Council Regulation (EU) 2015/1589 (including during proceedings before a national court), due to which the aid provided is deemed existing aid pursuant to Article 1(b)(iv) and Article 17(3) of the Regulation, rules out the obligation of the national court to order the recipient to return (unnotified) aid as the result of the direct application of Article 108(3) of the Treaty on the Functioning of the European Union.

34. In the opinion of the referring court, in answering this question, a conclusion that seems plausible (albeit not without any reasonable doubt) would be that, if the direct application of Article 108(3) of the Treaty on the Functioning of the European Union does not give rise to an obligation on a national court to order the recipient to return aid granted prematurely in a situation when the Commission has already decided about the compatibility of that aid, *a fortiori* the court cannot impose such an obligation on the basis of that article if the Commission does not issue (or cannot issue) such a decision due to the objective expiry of the limitation period itself.

v.

[...]