

**Case C-653/23**

**Request for a preliminary ruling**

**Date lodged:**

6 November 2023

**Referring court:**

Administratīvā apgabaltiesa (Latvia)

**Date of the decision to refer:**

1 November 2023

**Applicant at first instance and appellant on appeal:**

SIA TOODE

**Defendant at first instance:**

Valsts ieņēmumu dienests

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[...]

**The Administratīvā apgabaltiesa (Regional Administrative Court, Latvia)**

**ORDER**

Riga, 1 November 2023

The Administratīvā apgabaltiesa (Regional Administrative Court, Latvia), [...] [composition of the court],

by means of a written procedure, initiated the examination of the appeal brought by SIA TOODE against the judgment of the Administratīvā rajona tiesa (District Administrative Court, Latvia) of 14 April 2022 in the administrative proceedings brought by SIA TOODE seeking the adoption of a beneficial administrative act granting it aid to compensate for the reduction in the flow of working capital for January and February 2021.

**Background**

*Summary of the facts*

- 1 On 25 March and 9 April 2021, the applicant, SIA TOODE, requested that the Valsts ieņēmumu dienests (National Tax Authority, Latvia) grant it aid, as an undertaking affected by the COVID-19 crisis, to ensure the flow of working capital for January and February 2021.
- 2 The National Tax Authority stated that the applicant's turnover for the months of January and February 2021 had not decreased sufficiently to meet the requirements set out in paragraphs 4.2.1 and 4.2.2 of Ministru kabineta 2020.gada 10.novembra noteikumi Nr. 676 'Noteikumi par atbalstu Covid-19 krīzes skartajiem uzņēmumiem apgrozāmo līdzekļu plūsmas nodrošināšanai' (Decree No 676 of the Council of Ministers of 10 November 2020, approving the Regulation on aid to undertakings affected by the COVID-19 crisis to ensure the flow of working capital) (the 'Aid Decree').
- 3 SIA TOODE brought an action requesting that the aid be granted to it in order to ensure flows of working capital for the months of January and February 2021. The applicant maintains that the National Tax Authority, when calculating its turnover, did not need to take into account the total value of the transactions indicated in the value added tax return for the relevant tax period.
- 4 By judgment of 14 April 2022, the court of first instance dismissed SIA TOODE's action on the ground that it did not fulfil the eligibility criteria for the aid.
- 5 SIA TOODE appealed against the judgment of the court of first instance on the ground that it disagreed with the latter's finding that, in order to calculate turnover, it was necessary to take into account the data on the total value of the transactions set out in the value added tax return.
- 6 During the proceedings, the Ministry of Finance expressed its view that the aid scheme provided for in the Aid Decree had been established in accordance with the requirements set out in Section 3.1 of the Communication from the European Commission of 19 March 2020 entitled 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (C/2020/1863) (the 'Temporary Framework') and that the Ministry of the Economy obtained the European Commission's approval regarding that aid scheme. The European Commission's approval regarding the compatibility of the aid was valid until 30 June 2022, meaning that, after that date, the granting of aid is not authorised under the Temporary Framework.
- 7 In response to the questions raised by the Augstākā tiesa (Supreme Court, Latvia) in a separate administrative case (Case SKA-356/2023), the European Commission issued an opinion on 11 September 2023 (the 'Commission's Opinion').

The Commission states that it is for the national courts to identify, based the relevant provisions of national law, the point in time when the applicant acquired a legally binding and unconditional right to receive aid under the Aid Decree. The Commission considers that, in accordance with paragraph 23 of the Aid Decree,

the granting of aid takes place at the time when the National Tax Authority takes a decision on the granting of such aid (or refusing to grant it).

At the same time, the Commission stresses that the granting of aid after the expiry of the deadline referred to in paragraph 22(d) of the Temporary Framework would infringe the suspension obligation laid down in Article 108(3) of the Treaty on the Functioning of the European Union and that it would be for the national courts to prevent the payment of such aid to the applicant. If the aid sought by the applicant had not been granted by 30 June 2022, the national courts could not, after that date, award compensation instead of that aid for the damage suffered by the applicant as a result of non-payment of the aid.

- 8 The applicant gave its view on the Commission's Opinion and stated that the date to be taken into account as the point in time when the aid was granted is the date on which the tax authority took the initial decision to grant or not to grant the aid, which in the present case is 23 April 2021. If the national court were to uphold the action seeking the adoption of a beneficial administrative act and order the National Tax Authority to take a decision granting the aid to the applicant, then that subsequent decision of the National Tax Authority would have to be regarded as the culmination of the administrative proceedings previously initiated.

The National Tax Authority states that, by the decisions contested in the main proceedings, the applicant was refused the granting of the aid for the months of January and February 2021. Those decisions did not grant the applicant a definite right to receive the aid. As at the end of the aid period, on 30 June 2022, the National Tax Authority had not taken any other decision granting the aid to the applicant. In accordance with the Commission's Opinion, the granting of aid cannot be resolved retroactively by the courts, by requiring that the National Tax Authority adopt an administrative act granting the aid after the expiry of the aid period.

### **Grounds**

#### *Applicable legislation*

##### *National law*

- 9 Komercedarbības atbalsta kontroles likums (Law on the Control of Aid for Commercial Activity)

Article 1, paragraph 2, point 2:

Date of granting of the aid: the date on which the recipient of the aid for commercial activity acquires the right to that aid in accordance with the law.

- 10 Administratīvā procesa likums (Law on Administrative Proceedings)

Article 250, paragraph 2:

When assessing the legality of an administrative act, the courts shall take into account in their decision only the grounds included by the public authority in the administrative act. This limitation shall not apply in cases where the application seeks the granting of a beneficial administrative act.

Article 254, paragraph 1:

If a court considers the application for the adoption of an administrative act to be well founded, it shall order the public authority to adopt the corresponding administrative act.

11 Aid Decree

Paragraph 23:

The moment of granting the aid is deemed to be the day on which the National Tax Authority takes a decision regarding the granting of the aid.

Paragraph 23.<sup>1</sup>:

If the aid is not used within two months of the date on which the National Tax Authority took the decision to grant the aid, the undertaking shall repay the unused part of the aid to the National Tax Authority.

Paragraph 24:

The decision is taken by 30 June 2022, in accordance with the Temporary Framework.

*EU law*

12 Treaty on the Functioning of the European Union.

Article 107, paragraph 1:

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 shall, in so far as it affects trade between Member States, be incompatible with the internal market.

Article 107(3)(b):

The following may be considered to be compatible with the internal market:

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State.

- 13 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 ('Regulation 2015/1589')

Article 1(b)(ii):

'existing aid' means: authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council.

Article 1(c):

'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 Temporary Framework

Paragraph 22(d):

The Commission will consider such State aid compatible with the internal market on the basis of Article 107(3)(b) TFEU, provided that all the following conditions are met [...]:

(d) the aid is granted no later than 30 June 2022;

*Reasons for uncertainties regarding the interpretation of the European Union legislation*

- 15 In view of the impact of COVID-19 on the Member States and of the containment measures taken by Member States, which also impact, *inter alia*, undertakings, the Commission recognised in the Temporary Framework that State aid is justified and can be declared compatible with the internal market on the basis of Article 107(3)(b) of the Treaty on the Functioning of the European Union, for a limited period, to remedy the liquidity shortage faced by undertakings and ensure that the disruptions caused by the COVID-19 outbreak do not undermine their viability (paragraph 18). In addition, paragraph 21 of the Temporary Framework states that, beyond the existing possibilities based on Article 107(3)(c) of the Treaty on the Functioning of the European Union, temporary limited amounts of aid to undertakings that find themselves facing a sudden shortage or even unavailability of liquidity can be an appropriate, necessary and targeted solution during the current circumstances.

The Aid Decree entered into force on 17 November 2020 and set out the criteria and procedures for granting aid to undertakings affected by the COVID-19 crisis, with the aim of ensuring flows of working capital. The Aid Decree was drawn up in accordance with the Temporary Framework and is intended to compensate undertakings affected by the COVID-19 crisis, through the reduction in flows of working capital, in order for them to overcome the second wave of the COVID-19 pandemic.

It is apparent from paragraph 26 of the Aid Decree that the National Tax Authority is not to take a decision on the granting of the aid, or to pay it, until after the European Commission has taken a decision on the compatibility with the European Union's internal market of the aid for commercial activity covered by that Regulation.

That decision on the compatibility of the aid was taken by the European Commission on 16 December 2020 (SA.59592 (2020/N)) and established that the aid could be granted until 30 June 2021 at the latest. By subsequent decisions of the European Commission, it was agreed that the deadline for granting the aid would run until 30 November 2021 (Decision SA.64046 (2021/N) of 3 June 2021) and, finally, until 30 June 2022 (Decision SA.100596 (2021/N) of 14 December 2021).

State aid granted and paid in accordance with the Aid Decree must therefore be considered compatible with the internal market.

- 16 It is apparent from the foregoing that the aid scheme approved by the Temporary Framework is intended to provide short-term aid to undertakings in situations in which they face a sudden shortage of funds due to the exceptional circumstances caused by the COVID-19 outbreak.

That conclusion is confirmed by the relevant legislation. Paragraph 22(d) of the Temporary Framework initially established that aid would be granted until, at the latest, 31 December 2020 (this deadline was extended three times: by the fourth amendment, which entered into force on 13 October 2020, it was extended until 30 June 2021; by the fifth amendment, which entered into force on 28 January 2021, it was extended until 31 December 2021 and, by the sixth amendment, which entered into force on 18 November 2021, it was extended until 30 June 2022).

The Aid Decree also governs the period during which State aid may be granted. In accordance with paragraph 24 of that Regulation, the decision is to be taken by the public authority by 30 June 2022, in accordance with the Temporary Framework. Paragraph 23 of the Aid Decree states that the moment of granting the aid is deemed to be the day on which the National Tax Authority takes a decision regarding the granting of the aid. In addition, if the aid is not used within two months of the date on which the National Tax Authority took the decision regarding the granting of the aid, the company shall repay the unused part of the aid to the National Tax Authority (paragraph 23<sup>1</sup> of the Aid Decree).

The aid should therefore be considered specific to its objective and compatible with the internal market if it is granted and used without delay for its intended purpose.

- 17 The situation changes in the event of a dispute arising over the right of the person to receive State aid.

When faced with a refusal by a public authority to grant State aid, a disadvantageous administrative act, a person has the right to refer the matter to a hierarchically superior public authority, requesting that the latter adopt a beneficial administrative act granting the aid sought. In addition, even if a hierarchically superior public authority rejects the application, the person has the right to refer the matter to the courts, to request the adoption of a beneficial administrative act (the granting of the aid) and a review of whether the public authority's refusal to grant State aid is justified.

In the present case, on 25 March and 9 April 2021, the applicant applied to the competent public authority for the granting of aid for the months of January and February 2021. The initial refusals were issued by the public authority on 23 April and 7 June 2021, but the final decisions of that public authority were taken on 9 June and 23 July 2021, respectively.

The proceedings before the appeal court were initiated on 29 June 2022.

The time limit laid prescribed in paragraph 22(d) of the Temporary Framework (and in paragraph 24 of the Aid Decree) expired during the period in which the judicial proceedings were ongoing.

- 18 In the present case, the court must assess whether the applicant is entitled to receive State aid in accordance with the Aid Decree and the Temporary Framework.

When carrying out that assessment, the court must, *inter alia*, determine the date on which the aid is 'granted' within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union, that is to say, it must determine the point in time when the aid must be considered to be granted. This aspect is decisive for the purposes of determining whether the aid applied for by the applicant constitutes existing State aid or new aid.

- 19 According to the settled case-law of the Court of Justice of the European Union, in order to determine when aid must be considered to be granted, the court must take account of all the conditions laid down by national law for the grant of the aid in question (judgment of 28 October 2020, *INAIL*, C-608/19, EU:C:2020:865, paragraphs 31 and 32). The decisive factor for establishing the date on which the right to receive State aid was conferred on its beneficiaries by a particular measure is the acquisition by those beneficiaries of a definitive right to receive that aid and to the corresponding commitment, by the State, to grant that aid. It is at that date that such a measure is liable to distort competition and affect trade between Member States, within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (judgment of 25 January 2022, *Commission v European Food and Others*, C-638/19 P, EU:C:2022:50, paragraph 123).

Furthermore, it is apparent from the case-law of the Court of Justice of the European Union that, from the moment when the right to receive support, provided through State resources, is conferred on the beneficiary under the

applicable national legislation, the aid must be considered to be granted, so that the actual transfer of the resources in question is not decisive (judgments of 19 December 2019, *Arriva Italia and Others*, C-385/18, EU:C:2019:1121, paragraph 36, and of 20 May 2021, *Azienda Sanitaria Provinciale di Catania*, C-128/19, EU:C:2021:401, paragraph 45).

In addition, the Court of Justice of the European Union has also explained that, as regards in particular a beneficiary undertaking which is in financial difficulties, it is the decision of the public authorities to allocate State support to that company, rather than the actual payment of that support, that is capable of allowing the persons who manage such an undertaking to conclude that its operation is economically viable and thus to continue that operation, provided that that decision gives rise, for the beneficiary undertaking, to a right to receive that support (judgment of 19 December 2019, *Arriva Italia and Others*, C-385/18, EU:C:2019:1121, paragraph 37).

At the same time, account must be taken of the fact that the establishment of State aid cannot result from a judicial decision, given that the establishment of State aid entails a decision as to the appropriate course of action which falls outside the scope of a court's powers and obligations. Consequently, if the national legislation concerned is deemed to establish an advantage, the State aid, the sums allocated by a judicial decision cannot in any event be regarded as constituting State aid distinct from that advantage (judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraphs 76 and 78).

- 20 It can be inferred from that case-law that the time at which the aid is granted, which confers on the recipient a definite and unconditional right to the aid in question, must be understood as when the corresponding decision of the public authority by which that aid is granted is taken, irrespective of the time when the aid is paid.

The circumstances of this specific case, as mentioned previously, have developed in such a way that the competent public authority (the National Tax Authority) has never recognised the applicant's right to receive State aid and this issue is now being examined in court proceedings. It cannot therefore be presumed that, in respect of the applicant, at no point has a legal relationship that can be regarded as a definite and unconditional right to State aid been established.

In principle, such a right can arise for the applicant only following a judicial decision, if the court finds that the applicant had satisfied all the conditions laid down by national law for receiving the aid in question and that the refusal of the public authority to grant the aid was unlawful and unfounded. At the same time, it must be taken into account that, in view of the fact that the legal relationship did not exist beforehand, the enforcement of a judicial judgment cannot give rise to the adoption of a beneficial administrative act with retroactive (*ex tunc*) effect. The court may order the public authority to adopt the administrative act granting support on an *ex nunc* basis.



- 21 In the present case, the dispute concerns the right to receive State aid and the payment of State aid that was introduced by the Aid Decree and duly approved by the European Commission. Such aid could be considered ‘existing aid’ in accordance with Article 1(b)(ii) of Regulation 2015/1589.

The Court of Justice of the European Union addressed the question of the assessment of aid granted to a person by a competent public authority after the expiry of the period of the approved aid scheme and held that it should be regarded as new aid (judgment of 7 April 2022, *Autonome Provinz Bozen*, C-102/21 and C-103/21, EU:C:2022:272, paragraphs 31 to 35 and 42).

However, the circumstances of the present case are different, since the public authority did not take the decision to grant the aid after the expiry of the approved aid scheme, but it is possible that, in the proceedings before the court, when that court examines the refusal of the public authority to grant the aid under the Aid Decree, that refusal might be declared unlawful, that person might be recognised as having the right to receive the aid and the competent public authority might be ordered to comply with the judgment by granting and paying that person the amount of aid to which he or she is entitled.

That court has doubts as to whether, in circumstances such as those in the main proceedings, where the judgment establishes the right to receive the aid after the expiry of the time limit for granting the aid laid down by the legislation and approved by the European Commission and requires the competent public authority to grant and pay the amount of the aid applied for, the date on which the competent public authority unduly refused to grant State aid to the beneficiary can be considered the date on which the aid is granted and whether that aid should be considered existing aid or new aid.

- 22 In State aid matters, the Court of Justice of the European Union can in particular give the referring court guidance on interpretation in order to enable it to determine whether a national measure may be classified as State aid under EU law or whether that measure constitutes existing aid or new aid (judgment of 13 December 2018, *Rittinger and Others*, C-492/17, EU:C:2018:1019, paragraph 43).

Since this court is required to ensure compliance with the obligations arising from EU law and to refrain from adopting measures which could jeopardise the attainment of the objectives of the Treaty on the Functioning of the European Union, it considers it necessary to make a request to the Court of Justice of the European Union for a preliminary ruling.

[...] [procedural considerations]

Under Article 267 of the Treaty on the Functioning of the European Union, [...] [reference to national procedural rules] the Regional Administrative Court

**decides**

to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

- (1) Is Article 107(1) of the Treaty on the Functioning of the European Union to be interpreted as meaning that State aid is to be considered to have been ‘granted’ at the point in time when the competent public authority unduly refused to rule that an individual had a right to receive State aid, if such is established by a judicial decision made after the expiry of the time limit prescribed for granting the aid?
- (2) Is Article 1(b)(ii) 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 to be interpreted as meaning that aid which, in the absence of a decision by the competent public authority within the time limit prescribed for granting the aid, is granted to an individual after the expiry of the period laid down by the aid scheme for granting the aid, pursuant to a judicial decision finding that, within the period laid down by the aid scheme for the granting of the aid, the individual fulfilled all the conditions laid down by national law to receive the aid in question and that the refusal of the competent public authority to grant the aid was unlawful, constitutes existing aid?

The proceedings are stayed pending the ruling of the Court of Justice of the European Union.

This order is not open to appeal.

[...]

[...] [signatures and certification]