

Case C-401/24**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:**

7 June 2024

Referring court:

Stockholms tingsrätt (Sweden)

Date of the decision to refer:

29 May 2024

Applicant:

Staten genom Sjöfartsverket

Defendant:

Stockholms Hamn Aktiebolag

Subject matter of the main proceedings

The question of whether compensation paid by the Sjöfartsverket (Swedish Maritime Administration) (the State) to Stockholms Hamn (a wholly owned municipal company), pursuant to an agreement from 1979, in order to compensate Stockholms Hamn for its loss of revenue resulting from the abolition of lockage fees constitutes prohibited State aid which must be repaid.

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

Interpretation of Articles 107(1) and 108 TFEU, Article 1(b) of Regulation 2015/1589, Regulation No 794/2004 and Article 144 of the Act of Accession in order to clarify whether there is State aid and, if so, whether it should be regarded as existing aid, and therefore permitted, or whether, for various reasons – which relate to the factual circumstances of the case – it should be regarded as constituting new aid.

Questions referred for a preliminary ruling

1. Should the criterion of favouring in Article 107(1) of the Treaty on the Functioning of the European Union be understood as meaning that annual compensation which is paid by a State authority to a municipal joint stock company from State resources under an agreement as compensation for the company's undertaking to provide free of charge a certain service, in this case lock operations, for which fees were charged until the conclusion of the agreement,

(a) is to be regarded in its entirety as constituting aid which distorts or threatens to distort competition by favouring the recipient?

(b) is to be regarded as constituting aid which distorts or threatens to distort competition by favouring the recipient to the extent that the compensation exceeds the recipient's previous annual revenue from fees for the service, taking into account changes in, for example, the consumer price index and traffic volume in lock operations?

(c) is to be regarded as constituting aid which distorts or threatens to distort competition by favouring the recipient to the extent that the compensation exceeds the recipient's annual costs for providing the service?

(d) is to be regarded as constituting aid which distorts or threatens to distort competition by favouring the recipient based on some other calculation model?

(e) is not to be regarded to any extent as constituting aid which distorts or threatens to distort competition by favouring the recipient?

2. Should an agreement on annual compensation paid by a State authority to a municipal joint stock company from State resources as compensation for the company's undertaking to provide free of charge a service outside the agriculture sector, in this case lock operations, where the agreement was concluded before Sweden's accession to the European Union and was not notified to the Commission, be considered to constitute existing aid which, in accordance with Article 1(b)(i) 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, is to be regarded as lawful provided the Commission has not found the aid to be incompatible with the internal market?

3. If question 2 is answered in the affirmative, should such annual compensation nevertheless be considered to constitute new aid if, on several occasions after Sweden's accession to the European Union, the agreement was extended by five years at a time, in accordance with the original terms, in the absence of notice of termination and the annual compensation for each new five-year period was changed, partly in the light of the consumer price index and partly in the light of the extent of the service which was provided free of charge during the preceding agreement period, in this case traffic volume in lock operations?

Provisions of European Union law and case-law relied on

Articles 107(1) and 108 TFEU

Articles 1(b)(i), 1(c), 21, 22 and 23 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 ('the Procedural Regulation')

Articles 4(1), 4(2)(a) and 4(2)(b) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union ('the Implementing Regulation')

Article 1(c) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union

Articles 137(1) and 144 of the Act of Accession for Austria, Finland and Sweden

Judgments of the Court of Justice of the European Union in the following cases:

C-280/00, *Altmark Trans*, EU:C:200:3:415

C-690/13, *Trapeza Eurobank Ergasias*, EU:C:2015:235

C-81/10 P, *France Télécom v Commission*, EU:C:2011:811

T-816/17 and T-318/18, *Amazon*, EU:C:2021:252

C-173/73, *Italy v Commission*, EU:C:1974:71

30/59, *Gezamenlijke Steenkolenmijnen v High Authority*, EU:C:1961:2

57/86, *Greece v Commission*, EU:C:1988:284

C-372/97, *Italy v Commission*, EU:C:2004:234

C-128/19, *Azienda Sanitaria Provinciale di Catania*, EU:C:2021:401

C-138/09, *Todaro Nunziatina*, EU:C:2010:291

C-111/10, *Commission v Council*, EU:C:2013:785

C-121/10, *Commission v Council*, EU:C:2013:784

C-44/93, *Namur-Les assurances du crédit v OND and Belgium*, EU:C:1994:311

C-590/14 P, *DEI and Commission v Alouminion tis Ellados*, EU:C:2016:797

C-6/12, *P Oy*, EU:C:2013:525

C-322/09 P, *NDSHT v Commission*, EU:C:2010:701

T-152/06 RENV, *NDSHT v Commission*, EU:T:2011:433

C-437/97, *EKW and Wein & Co*, EU:C:1999:342

Advocate General's Opinions in the following cases:

177/78, *Pigs and Bacon Commission v McCarren*, EU:C:1979:127

222/82, *Apple and Pear Development Council*, EU:C:1983:370

C-6/12, *P Oy*, EU:C:2013:69

C-437/97, *EKW and Wein & Co*, EU:C:2000:110

Provisions of national law relied on

First subparagraph of Paragraph 2 and Paragraph 3 of lagen (2013:388) om tillämpning av Europeiska unionens statsstödsregler (Law (2013:388) on the application of European Union rules on State aid, 'the Implementing Law')

Kungl. Maj:ts kungörelse om fastställelse av hamn- och farledsavgifter (SFS 1950:152) (Royal Decree fixing port and fairway fees, SFS 1950:152)

Succinct presentation of the facts and procedure in the main proceedings

- 1 The parties in this case are Staten genom Sjöfartsverket (the State through the Sjöfartsverket, 'the Sjöfartsverket') and Stockholms Hamn Aktiebolag ('Stockholms Hamn'). The Sjöfartsverket is a State authority which is responsible for passage through the Södertälje Canal. Stockholms Hamn is a municipal company, wholly owned by Stockholm Municipality, which operates Hammarby lock.
- 2 Until 1979, the Sjöfartsverket charged lockage fees on the Södertälje Canal and Stockholm Municipality charged lockage fees for Hammarby lock. Fees were coordinated between the Södertälje Canal and Hammarby lock so that fees would not affect the distribution of traffic in the two connections between Lake Malar and the Baltic Sea.
- 3 In 1978, the government proposed in the Bill on the abolition of special passage fees for traffic in Lake Vänern and Lake Malar (Prop. 1978/79:24, p. 6 and 8) that canal fees on the Södertälje Canal should be abolished and that the special fees for passage through Hammarby lock should therefore be discontinued by means of a similar procedure. It was considered necessary for Stockholm Municipality to be compensated for the loss of revenue entailed by the abolition of passage fees.

- 4 The government instructed the Sjöfartsverket to negotiate with Stockholm Municipality in accordance with the guidelines set out in the Bill. According to the instructions, Stockholm Municipality should thus be compensated for the loss of revenue entailed by the abolition of passage fees. The compensation was not to be based directly on costs but be paid in the form of annual compensation based on traffic volume and the level of charges at the time.
- 5 In 1979, the Sjöfartsverket and Stockholm Municipality concluded an agreement under which the Municipality undertook not to charge fees for vessels other than recreational vessels for passage through Hammarby lock in exchange for annual compensation from the Sjöfartsverket. Under the terms of the agreement, the compensation would be calculated each year based on the consumer price index. The agreement would be extended for five years at a time unless notice of termination was given at least six months before the end of the term of the agreement. A new annual compensation sum would be fixed for each new five-year period based on changes in traffic volume in Hammarby lock during the preceding agreement period. Compensation under the agreement was paid initially to Stockholm Municipality and then, from the beginning of the 1990s, to Stockholms Hamn.
- 6 The Sjöfartsverket gave notice of early termination of the agreement at the end of 2021. A dispute concerning the termination/cancellation has been brought before Norrköpings tingsrätt (District Court, Norrköping, Sweden).
- 7 The Sjöfartsverket paid annual compensation to Stockholms Hamn retroactively under the agreement from State resources, covered by additional appropriations in the State budget. The amounts claimed were paid as follows. According to Stockholms Hamn, the reason the compensation paid in 2013 was much higher than in subsequent years is that the compensation also included a late payment for 2011 and a retroactive additional payment for 2010.

25.03.2013: SEK 7 116 097

06.11.2014: SEK 3 250 194

24.04.2015: SEK 3 142 872

11.04.2016: SEK 3 145 574

16.03.2017: SEK 3 182 706

15.02.2018: SEK 3 236 551

21.02.2019: SEK 3 310 013

05.03.2020: SEK 3 847 568

01.04.2021: SEK 3 858 216

17.02.2022: SEK 3 996 645

- 8 On 4 May 2023, the Sjöfartsverket brought an action against Stockholms Hamn at Stockholms tingsrätt (District Court, Stockholm, Sweden), claiming that Stockholms Hamn should repay a sum of SEK 38 086 436 plus interest. That sum corresponds to the payments made under the agreement on compensation within the 10-year national limitation period from the time the action was brought.

The essential arguments of the parties in the main proceedings

- 9 The Sjöfartsverket has submitted, in essence, that by the agreement on compensation Stockholms Hamn was granted an advantage through State resources which favoured Stockholms Hamn and distorted or threatened to distort competition and was such as to affect trade between Member States. This holds regardless of whether the compensation under the agreement was less than either Stockholms Hamn's previous revenue from lock operations or the company's costs for running lock operations, since it was an advantage for Stockholms Hamn to receive steady, guaranteed revenue which was not dependent on temporary fluctuations in traffic flows or other operational risks. Furthermore, the market economy investor principle (which entails an assessment of whether, in similar circumstances, a private investor of a comparable size operating in normal conditions of a market economy could have been prompted to make the investment in question) (see paragraph 74 of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union) shows that the payments constituted State aid because no private investor can be identified which would have found reason to pay compensation to Stockholms Hamn in order that Stockholms Hamn would in turn refrain from charging lockage fees. The so-called *Altmark* criteria (see paragraphs 87-95 of the judgment in Case C-280/00, *Altmark Trans*, EU:C:2003:415) are not satisfied. The compensation therefore constituted unlawful aid which must be repaid.
- 10 The exception for existing aid in Article 1(b)(i) of Council Regulation 2015/1589 ('the Procedural Regulation') is not applicable. The aid at issue was not communicated to the Commission and the conditions laid down in Article 144 of the Act of Accession are therefore not met. Article 144 of the Act of Accession appears under the heading 'Title VI Agriculture', but it is clear from its wording in particular that the provision, unlike Articles 138-143, is also generally applicable to State aid outside the agriculture sector.
- 11 In any event, there can be no question of existing aid because each new agreement period was preceded by informed deliberations by the Sjöfartsverket. Furthermore, before each new five-year agreement period, the parties negotiated the compensation to be paid.
- 12 There are no exceptional circumstances which mean that repayment would be inappropriate.

- 13 Stockholms Hamn has asserted that the compensation does not satisfy the cumulative criteria for being State aid. Stockholms Hamn's activity of operating Hammarby lock is not economic activity falling within the scope of the EU rules on State aid. In any case it constitutes a service of general economic interest which Stockholms Hamn has been required to provide. Stockholms Hamn was not favoured economically in comparison with competing undertakings because the criteria on the basis of which the compensation from the Sjöfartsverket was calculated were determined in advance in an objective and transparent manner. The compensation covered only the loss of revenue and was less than the costs of operation and maintenance. The so-called *Altmark* criteria are therefore satisfied.
- 14 The market economy investor principle is not relevant in this case because a private operator would not wish to make basic infrastructure free of charge for all users at its own expense.
- 15 The compensation did not give rise to any favouring or any economic advantage for Stockholms Hamn and, in any case, was not such as to affect trade between Member States.
- 16 Even if State aid is considered to exist, the payments would have been permitted as existing aid under Article 1(b)(i) of the Procedural Regulation. Article 144 of the Act of Accession is not relevant in this case because the provision appears in 'Title VI Agriculture' and concerns only State aid for agricultural products. For similar reasons, it is irrelevant that the purported aid was not communicated to the Commission.
- 17 The agreement on compensation was automatically extended by five years at a time unless notice of termination was given at least six months before the end of the term of the agreement. The increase in compensation was regulated in the agreement and consists merely in an indexation and an adjustment based on traffic volume in Hammarby lock under the provisions of the agreement. Therefore, there was no question of new aid or altered aid for each new five-year period. There has been no renegotiation between the parties of the terms of the agreement or of the compensation.

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

- 18 According to the District Court, it needs further guidance from the Court of Justice in order to be able to determine how the criterion of favouring in Article 107(1) TFEU is to be applied in the situation at issue. In addition, the District Court has been unable to identify any decision in which the Court of Justice has stated expressly and unequivocally whether Article 144 of the Act of Accession is to be interpreted as applying only to State aid in the agriculture sector. The Court of Justice has addressed the question of new or altered aid in a large number of decisions but the District Court has not found any clear guidance in existing case-law as regards the circumstances of the present case, where it is

undisputed that the agreement on compensation was extended and amended after Sweden's accession to the European Union.

- 19 The District Court has taken into consideration the abovementioned case-law of the Court of Justice and has also referred to the 'Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union', the 'Invitation to submit comments pursuant to Article 88(2) of the EC Treaty, concerning aid C 42/03', together with legal literature: Quigley, Conor, *European State Aid Law and Policy (and UK Subsidy Control)*, 4th edition, Hart, United Kingdom, 2022, p. 615.

WORKING DOCUMENT