

Case C-588/23**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:**

25 September 2023

Referring court:

Tribunale Amministrativo Regionale della Campania (Italy)

Date of the decision to refer:

18 September 2023

Appellant:

Scai Srl

Respondent:

Regione Campania

Subject matter of the main proceedings

Action for annulment of a decision of 7 February 2023 of the Regione Campania (Campania Region) extending to the appellant company the scope *ratione personae* of Commission Decision (EU) 2015/1075 of 19 January 2015 on State aid SA.35843 (2014/C) (ex 2012/NN) (notified under document C(2015) 75), by which the European Commission ordered the Italian Republic to recover, on the ground that it was declared incompatible with competition rules, the additional compensation for public service obligations that had been paid to another company, which had in the meantime become insolvent and whose business was transferred, in several stages, to the appellant company.

Subject matter and legal basis of the request

Pursuant to the second paragraph of Article 267 of the Treaty on the Functioning of the European Union ('TFEU'), interpretation is sought of Regulation (EU) 2015/1589 and of the principles enshrined in the TFEU and in the Charter of Fundamental Rights of the European Union concerning the division of powers

between the Commission and the national authorities as regards the identification of the beneficiaries of State aid, the right of interested parties to be heard, the rights of the defence and to judicial protection. More specifically, the referring court questions whether those EU provisions preclude national legislation which confers on national authorities the power:

- first, to determine whether there is economic continuity between the beneficiary company expressly listed by the Commission in the decision on the recovery of unlawful State aid and a third-party company, which did not participate in the procedure conducted by the Commission;
- second, to extend to the latter company the scope *ratione personae* of the Commission’s decision, thus declaring it obliged to repay the amount unduly received by the first undertaking.

Questions referred for a preliminary ruling

(a) Do Articles 108 and 288 TFEU and Articles 16 and 31 of [Regulation (EU) No 2015/1589] preclude national legislation, such as Article 48 of Law No 234 of 24 December 2012, which allows the national authority, during the implementation stage of recovery, to broaden the circle of persons required to repay the unlawful aid, by means of an assessment concerning economic continuity between undertakings, without excluding that power where the Commission has already identified the direct beneficiaries, thereby excluding the Commission’s competence in relation to State aid?

(b) Do Articles 263 and 288 TFEU, Articles 41 and 47 of the [Charter of Fundamental Rights of the European Union] and Articles 16 and 31 of [Regulation (EU) No 2015/1589] preclude national legislation, such as Article 48 of Law No 234 of 24 December 2012 on State aid, in so far as – in providing that the State, when implementing a recovery decision, is to identify, where necessary, the persons required to repay the aid – it also permits the decision to be implemented with regard to a person other than the addressees of the decision who is autonomous, did not participate in the procedure before the Commission, did not have the right to be heard and, consequently, does not have legal standing to contest that decision before the General Court of the European Union?

Provisions of European Union law relied on

TFEU: the fourth paragraph of Article 263 on actions for annulment; the fourth paragraph of Article 288 on whether a decision is binding on its addressees; and Article 108(2) on the Commission’s competence in State aid matters.

Charter of Fundamental Rights of the European Union: Article 41 on the right to be heard, and Article 47 on the right to an effective remedy.

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: Article 16 on the recovery of aid, and Article 31 on the addressee of recovery decisions.

Provisions of national law relied on

Article 48 of Legge del 24 dicembre 2012, n. 234 – ‘Norme generali sulla partecipazione dell’Italia alla formazione e all’attuazione della normativa e delle politiche dell’Unione europea’ (Law No 234 on the general rules on the participation of Italy in the development and implementation of the legislation and policies of the European Union) of 24 December 2012) (‘Law No 234/2012’): following notification of a recovery decision by the Commission, the competent national authority (Ministry, Region, Province or regional or local authority, as the case may be) is to identify, if necessary, the persons required to repay the aid, determine the amounts due and establish the arrangements for and terms of payment.

Succinct presentation of the facts and procedure in the main proceedings

- 1 By two judgments, delivered in 2009 and 2012, the Consiglio di Stato (Council of State, Italy) ruled in favour of additional compensation for public service obligations in favour of Buonotourist Srl for the provision of passenger transport services by bus on the basis of concessions issued by the Campania Region. That compensation, amounting to EUR 1 111 572.00, was paid to the company.
- 2 Subsequently, the European Commission, by Decision (EU) 2015/1075 of 19 January 2015 on State aid SA.35843 (2014/C) (ex 2012/NN) (notified under document C(2015) 75) (‘the recovery decision’), declared that additional compensation to be incompatible with the internal market and ordered the Italian Republic to recover the sum from the beneficiary.
- 3 The company Buonotourist Srl then challenged that decision, at first instance, before the General Court (Case T-185/15) and, at second instance, before the Court of Justice (Case C-586/18 P), but its action for annulment was dismissed in both sets of proceedings.
- 4 In the meantime, the assets of Buonotourist Srl were transferred several times.
- 5 First of all, following transfers breaking up the business which occurred on 21 July 2011 from Buonotourist Srl to Buonotourist TPL Srl, and on 21 October 2013 from Buonotourist TPL Srl to Autolinee Buonotourist Srl, the two transferee companies took over, one after the other, the regional concessions for the provision of certain passenger transport services in question.

- 6 Finally, on 10 May 2019, Autolinee Buonotourist Srl leased to the appellant, Scai Srl, the branch of the business comprising, inter alia, service contracts, staff and buses for the operation of certain minimum local public transport services. That lease ended on 1 July 2021.
- 7 The companies Buonotourist Srl, Buonotourist TPL Srl and Autolinee Buonotourist TPL Srl were declared insolvent by judgments of the competent courts between 2018 and 2020.
- 8 Consequently, for the purpose of continuing to provide the local public transport service, the Region entrusted the operation of the service to the Region-owned company AIR Campania which, not having the necessary means to operate the service, purchased them from Scai Srl.
- 9 At the same time, the Campania Region attempted to obtain repayment of the unduly granted additional compensation by intervening in the respective insolvency proceedings and claiming its debt from the companies Buonotourist Srl, Buonotourist TPL Srl and Autolinee Buonotourist Srl, however without successfully recovering any sums.
- 10 Lastly, by decision of 7 February 2023, the Campania Region, on the basis of the Commission’s recovery decision in respect of Buonotourist Srl (now upheld by the EU courts, as stated in paragraph 3 above), having concluded that there was economic continuity between Buonotourist Srl and Scai Srl, extended the scope *ratione personae* of the recovery decision and ordered Scai Srl to repay the State aid in question.
- 11 That decision was challenged by Scai Srl before the referring court.

The essential arguments of the parties in the main proceedings

Arguments of Scai Srl, the appellant company

- 12 In the first place, the appellant disputes the premiss underlying the contested regional decision, according to which there is economic continuity between the appellant and Buonotourist Srl.
- 13 According to the appellant, it cannot be inferred from the lease of the branch of the business which it obtained from Autolinee Buonotourist Srl that the State aid was also transferred to the appellant. In particular, that lease was entered into in 2019 and ended in 2021, it provided for adequate rent and, when it ended, Scai Srl retained none of the lessor’s assets.
- 14 In addition, in the insolvency proceedings relating to Buonotourist Srl, two judgments of the Corte di Appello di Salerno (Court of Appeal, Salerno) of 2021 and of the Tribunale di Napoli (District Court, Naples) of 2022, respectively, ruled out the existence of a ‘de facto’ group of companies acting as a single legal entity.

- 15 In the second place, the appellant alleges infringement of Articles 108, 288 and 299 TFEU in that the contested regional decision extends to it the scope *ratione personae* of the decision by which the European Commission ordered the Italian Republic to recover the State aid unlawfully granted to Buonotourist Srl and thus identified a specific addressee.
- 16 In that regard, the appellant considers that, in this area, the power of the national authorities is purely to implement the decision and does not include the power to determine an extension of the scope *ratione personae* of the Commission's decision. That can be inferred, in particular, from the Commission Notice on the recovery of unlawful and incompatible State aid (2019/C 247/01), according to which it is for the Commission both to identify the beneficiaries from whom the aid is to be recovered (Section 4.3) and possibly to extend the decision to further beneficiaries.
- 17 In the third place, the appellant alleges infringement of its right to be heard, since it was not able to participate in the procedure at the end of which the Commission adopted the recovery decision which the Campania Region seeks to implement against it.
- 18 In the fourth place, the appellant submits that it has been deprived of its right to judicial protection, given that the decision to recover the State aid may be challenged only before the General Court of the European Union and that legal standing is conferred exclusively on its addressees, within the meaning of the fourth paragraph of Article 263 TFEU. Moreover, nor can it challenge before that EU court the decision of the Campania Region which orders the extension of that recovery on the basis of an assessment (economic continuity with the company to which the EU decision was addressed) which, in its opinion, fell within the sphere of competence of the Commission.

Arguments of the Campania Region, the respondent

- 19 The Campania Region submits, in the first place, that it has the power to extend to the appellant company the recovery procedure under Article 48(2) of Law No 234/2012, according to which, following notification of a recovery decision by the Commission, the competent national authority (Ministry, Region, Province or regional or local authority, as the case may be) is to identify, if necessary, the persons required to repay the aid, determine the amounts due and the arrangements for payment.
- 20 That power of the national authorities is confirmed by the European Commission, in particular in paragraph 32 of Communication 2007/C 272/05, entitled 'Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid', according to which 'if, at the stage of the implementation, it appears that the aid was transferred to other entities, the Member State may have to extend recovery to encompass all effective beneficiaries to ensure that the recovery obligation is not circumvented'.

- 21 In the second place, the Campania Region submits there exists all the objective and subjective evidence from which it may be concluded that, during the various transfers (see paragraphs 4 to 6), there was economic continuity between Buonotourist Srl and the appellant, with the de facto acquisition of the State aid by the latter.
- 22 It submits that that assessment is also confirmed by the contacts between the national authorities and the European Commission, which found, first in note COMP/H4/MC//PSD*2020/078587, and then in note COMP/H4/FM/ng/comp (2023)1978386 of 22/2/2023, that there was an anti-competitive advantage in the fact that, under the lease agreement, Scai Srl had obtained the right to use all the tangible and intangible assets necessary for carrying on the activity of the company which had initially benefited from the aid in question, thus continuing to derive an economic advantage from the unduly subsidised activity. Furthermore, Scai Srl had obtained a right of pre-emption which would have guaranteed it preference in the event of the sale of Autolinee Buonotourist Srl.

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

- 23 The national framework set out in Article 48 of Law No 234/2012 expressly allows the national authorities to extend the scope *ratione personae* of the recovery decision by broadening the circle of beneficiaries of the aid which is the subject of the Commission's decision, even if the Commission's decision expressly identified the addressee undertaking.
- 24 The referring court questions whether EU law permits such legislation, in particular from two distinct points of view, which are reflected in the two questions referred to the Court for a preliminary ruling.
- 25 **In the first place**, it is necessary to clarify whether the assessment of the existence of the requirement for economic continuity between the company receiving the unlawful aid and any third-party companies is a matter for the Commission alone or whether the assessment may also be carried out by the national authority implementing a recovery decision, as expressly provided for in the aforementioned national legislation.
- 26 In that regard, first, the referring court points out that Article 108 TFEU – under which the Commission, where it finds that aid granted by a State is not compatible with the internal market, is to decide that the State concerned shall abolish such aid and take all necessary measures to recover the aid from the beneficiary (a 'recovery decision' within the meaning of Article 16 of Regulation (EU) 2015/1589) – lays down a 'composite' procedure in which the EU authorities and the national authorities both intervene.
- 27 As regards the division of powers between those authorities in such procedures, the case-law of the Court of Justice has held that, if the beneficiaries of the aid are not identified by the Commission in the recovery decision, the Member State must

verify the individual situation of each undertaking concerned (judgment of the Court of Justice of 13 February 2014, *Mediaset*, C-69/13, ECLI:EU:C:2014:71, paragraph 22).

- 28 Furthermore, at the implementation stage of the recovery decision, where the aid cannot be recovered from the beneficiary and has been transferred to another undertaking, the Member State must extend the recovery to the undertaking which actually benefits from the advantage as a result of the transfer of the activity, thereby ensuring that the recovery obligation is not circumvented (judgment of the General Court of 13 September 2010, *Greece v Commission*, Joined Cases T-415/05 and T-416/05, ECLI: EU: 2010:386, paragraphs 143 to 146).
- 29 Moreover, the Court of Justice has held that, if the beneficiary of the aid belongs to a group of undertakings, it is for the Commission, in the recovery decision, to assess whether the undertakings belonging to a group, even if they are regarded by national law as separate legal entities, constitute a single economic unit for the purposes of competition law and must therefore be regarded as a single undertaking (judgment of the Court of Justice of 12 July 1984, *Hydrotherm*, C-170/83, ECLI:EU:C:1984:271, paragraph 11).
- 30 Second, in the case of the transfer of the aid by the sale or leasing of the undertaking, several Commission decisions show that, in the event that economic continuity is inferred, the Commission assesses the actual case and determines whether that economic continuity exists (the referring court cites, for example, Commission Decision (EU) 2016/51 of 1 October 2014 on the State aid SA.31550 (2012/C) (ex 2012/NN) implemented by Germany for Nürburgring).
- 31 However, the Court's case-law has never examined which authority – national or of the European Union – has competence to decide on economic continuity, merely stating that the unlawful aid must be recovered from the company which carries on the economic activity of the undertaking which benefited from that aid, where it is established that that company retains the actual benefit of the competitive advantage linked to the receipt of the aid in question (judgment of the Court of Justice of 7 March 2018, *SNCF Mobilités*, C-127/16 P, ECLI:EU:C:2018:165).
- 32 In the view of the referring court, it follows from the case-law of the Court of Justice that, where the Commission itself has issued the recovery decision with respect to a specific person, the competence to extend the scope of the decision remains reserved to the Commission and the role of the Member State must be purely to implement it. Therefore, the national legislation at issue, while it pursues the commendable aim of preventing the circumvention of the implementation of the Commission's decisions, violates the Commission's competences. The only case in which it may be accepted that the national authorities proceed with implementation against a person other than that already identified by the Commission would be where the person concerned has a sufficient degree of connection with the undertaking in receipt of the aid, such that there is no

discretion on the part of the national authorities, and the matter remains within the scope of the implementation of the Commission's decision.

- 33 **In the second place**, the question arises as to whether, as a result of the extension by the implementing national authority of the scope *ratione personae* of a recovery decision adopted by the Commission, the new addressee of that decision is deprived of both the right to be heard in the initial procedure before the Commission, enshrined in Articles 41 and 47 of the Charter of Fundamental Rights of the European Union, and the right to bring legal proceedings against the recovery decision under Article 263 TFEU.
- 34 As regards the right to be heard, the national court refers to several judgments of the Court according to which observance of the rights of the defence is a general principle of Community law which applies where the authorities are minded to adopt a measure which will adversely affect an individual. Under that principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision (judgment of the Court of Justice of 18 December 2008, *Sopropè*, Case C-349/07, ECLI:EU:C:2008:746).
- 35 For its part, the case-law of the Italian administrative courts has held that, if the national authorities recover undue State aid from a person other than the addressee of the Commission's decision, the right to be heard is sufficiently guaranteed by the defence of the company to which the Commission's decision is directly addressed.
- 36 In the view of the referring court, however, those decisions of the national courts were made in respect of undertakings which had been held to form part of a 'de facto' group of companies, whereas that was ruled out in the appellant's case (see paragraph 14).
- 37 So far as concerns the right to bring legal proceedings, the referring court points out that the decision of the national authority to extend the scope *ratione personae* of the decision to recover incompatible aid cannot be challenged before the General Court of the European Union, and that only the recovery decision is open to challenge before that court, but legal standing is conferred solely on its addressees, within the meaning of the fourth paragraph of Article 263 TFEU.
- 38 In that regard, that infringement of the right to judicial protection cannot be overcome by the possibility of challenging the extension decision before the national courts, since that would entail the need for those courts to assess the merits of the existence of economic continuity between undertakings, an assessment which, in the view of the referring court, is a matter exclusively for the Commission.
- 39 Lastly, the referring court requests that the Court allow the present case to be determined under the expedited procedure provided for in Article 105 of the Rules

of Procedure of the Court of Justice, on the ground that they are new questions of interpretation that are of particular relevance to all Member States.

WORKING DOCUMENT