JUDGMENT OF THE COURT (Second Chamber)

21 March 2013 (*)

(Regional aid scheme — Investment in the processing and marketing of agricultural products — Commission decision — Incompatibility with the internal market — Abolition of incompatible aid — Time at which aid is granted — Principle of the protection of legitimate expectations)

In Case C-129/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht des Landes Sachsen-Anhalt (Germany), made by decision of 27 February 2012, received at the Court on 8 March 2012, in the proceedings

Magdeburger Mühlenwerke GmbH

v

Finanzamt Magdeburg,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, G. Arestis, J.-C. Bonichot, A. Arabadjiev (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,

– the European Commission, by V. Kreuschitz and T. Maxian Rusche, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 2 of Commission Decision 1999/183/EC of 20 May 1998 concerning State aid for the processing and marketing of German agricultural products which might be granted on the basis of existing regional aid schemes (OJ 1999 L 60, p. 61).

2 The reference has been made in proceedings between Magdeburger Mühlenwerke GmbH (‘Magdeburger Mühlenwerke’) and the Finanzamt Magdeburg (‘the Finanzamt’) concerning the

Finanzamt's refusal to take account, when calculating investment aid, of certain investments in milling.

Legal context

European Union law

3 Commission Decision 94/173/EC of 22 March 1994 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products and repealing Decision 90/342/EEC (OJ 1994 L 79, p. 29) provides, in point 2.1., first indent, of the Annex thereto:

'2.1. The following investments are excluded in the cereals and rice sectors (not including seeds):

– investments relating to … milling …'.

4 In 1995, the Commission of the European Communities adopted Guidelines for State aid in connection with investments in the processing and marketing of agricultural products (OJ 1996 C 29 p. 4, 'the Agricultural Guidelines'). By letter No SG (95) D/13086 of 20 October 1995, the Commission communicated those guidelines to the Member States.

5 In paragraph 3(b) of those Agricultural Guidelines, the Commission stated, inter alia, that 'no State aid granted in connection with any of the investments … excluded unconditionally by point 2 of [the Annex to Decision 94/173] may be considered compatible with the common market'. It is apparent from paragraph 3(b) of the Agricultural Guidelines that they cover inter alia aid granted in the context of a regional aid scheme.

6 The operative part of Decision 1999/183 provides inter alia:

'Article 1

National regional aid schemes in Germany are incompatible with the common market … , in so far as they do not comply with the guidelines and appropriate measures for State aid in connection with investments in the processing and marketing of agricultural products which were communicated to [the Federal Republic of Germany] by letter SG(95) D/13086 of 20 October 1995.

Article 2

Within two months of the date of this Decision [the Federal Republic of Germany] shall amend, or where necessary abolish, existing aids and existing aid schemes in order to ensure that they are compatible with the common market. In particular, in accordance with [paragraph] 3(b) of the guidelines referred to in Article 1, [the Federal Republic of Germany] shall ensure that:

(1) no State aid for investments in the processing and marketing of agricultural products shall be granted in respect of any of the investments … which are excluded unconditionally by point 2 of [the Annex to Decision 94/173]

…

Article 3

[The Federal Republic of Germany] shall inform the Commission of the measures taken to comply with this Decision within two months of notification thereof.

…’

German law

7 The Law on investment subsidies (Investitionszulagengesetz) of 22 January 1996, the purpose of which was to accelerate and intensify the investment activity of private undertakings in the assisted region, namely the Land of Berlin and the new Länder, provided for the disbursement of an investment subsidy, in the form of a State subsidy, to taxable persons who carried out certain investments in their undertaking.

8 Pursuant to the first sentence of Paragraph 2 of that law:

‘Investment eligible for this aid is the acquisition and production of new movable perishable assets assigned to the fixed assets which, at least 3 years after their acquisition or manufacture,

(1) are part of the fixed assets of an undertaking or of an establishment in the eligible region,

(2) remain within an establishment in the eligible region, and

(3) each year, are used no more than 10% for private purposes.’

9 The second sentence of Paragraph 2 specifies investments which are ineligible for the investment subsidy. According to point 4 thereof, which was inserted by the Law on tax relief of 1999 (Steuerentlastungsgesetz 1999), of 19 December 1998, which entered into force on 24 December 1998, the following, inter alia, are ineligible:

‘(4) assets which the person acquired … after 2 September 1998 and which are named in … point 2 of the Annex to [Decision 94/173] ... ’.

10 Point 4 of Paragraph 3 of that law provides:

‘… investments shall be eligible when the beneficiary:

4. began them after 30 June 1994 and concluded them before 1 January 1999 and the investments concerned are in processing undertakings ...’.

11 The fourth and fifth sentences of that provision state:

‘Investments shall be deemed to be concluded at the time that the assets are acquired .... Investments shall be deemed to have begun at the time that the assets are ordered ...’.

12 In accordance with the first sentence of Paragraph 4 of that law:

‘The basis for calculating the investment subsidy shall be composed of the sum of the costs of acquiring … the aided investments concluded during the accounting year.’

13 The first subparagraph of Paragraph 6 of that law provides that the ‘application for an investment subsidy must be submitted before 30 September of the calendar year following the accounting year in which the investments were concluded’.

14 Paragraph 9a of the Regulations implementing Income Tax (Einkommensteuer-Durchführungsverordnung; ‘the EStDV’) defines the year of acquisition as ‘the year of delivery’.

15 According to the Finanzgericht des Landes Sachsen-Anhalt, it is apparent from the case-law of the Bundesfinanzhof (Federal Finance Court) that the date of delivery must be regarded as the time at

which the assets are ready for operation in the acquiring undertaking.

Background to the dispute and the question referred for a preliminary ruling

16 Initially, the Law of 22 January 1996 on investment subsidies did not include any restriction in respect of investments in the agricultural sector, since the German Federal Government had considered the Agricultural Guidelines to be a recommendation by which it was not bound.

17 It is apparent from the documents before the Court that the Federal Republic of Germany notified the Law of 22 January 1996 on investment subsidies to the Commission on 31 May 1995, pursuant to Article 88(3) EC. The Commission examined that law in the context of files N494/A/95 and N710/C/95 and authorised it by decision of 29 November 1995. That decision specified that the application of that aid scheme had to comply with the applicable Community provisions, in particular, those applicable to agriculture.

18 By the Agricultural Guidelines, the Commission requested the Member States to confirm within two months that they would comply no later than 1 January 1996 with those guidelines by amending their existing aids. In the absence of such confirmation, the Commission reserved the right to initiate the formal investigation procedure under Article 88(2) EC. The Federal Republic of Germany failed to comply with that request.

19 Thus, on 12 June 1996, the Commission decided to initiate the formal investigation procedure against existing regional aid schemes in Germany in the processing and marketing of agricultural products sector. That decision was published on 5 February 1997 in the *Official Journal of the European Communities* (OJ 1997 C 36, p. 13).

20 That procedure was closed on 20 May 1998 with the adoption, on that date, of Decision 1999/183 which was notified on 2 July 1998 to the Federal Republic of Germany.

21 By letter of 18 September 1998, published on 28 September 1998 in the *Bundessteuerblatt* (Federal Tax Journal; ‘the BStBl’), the German Federal Minister of Finance informed the higher authorities of the Länder in financial matters that, from 3 September 1998, inter alia in respect of the investments referred to in point 2 of the Annex to Decision 94/173, no further investment aid could be granted, and stated that an amendment to the Law of 22 January 1996 on investment subsidies to that effect was envisaged (‘the letter of 18 September 1998’).

22 By the Law on tax relief of 1999, the German legislature amended the Law of 22 January 1996 on investment subsidies, as observed in paragraph 9 of this judgment.

23 On 10 September 1999, Magdeburger Mühlenwerke, which runs a milling undertaking in the new Länder, applied for an investment subsidy in respect of investments relating to 1998 in an amount of approximately DEM 5.9 million.

24 The Finanzamt took the view, however, that the portion of the investment which was eligible for receipt of aid amounted to only DEM 1.9 million. The Finanzamt refused to take account in the basis for calculating the aid, pursuant to point 4 of the second sentence of Paragraph 2 of the Law of 22 January 1996 on investment subsidies, of investment in respect of which the binding investment decision had been made no later than 2 September 1998, but whose delivery took place only after that date.

25 On 26 September 2001, Magdeburger Mühlenwerke brought an action against that decision before the Finanzgericht des Landes Sachsen-Anhalt, claiming that the insertion of point 4 of the second

sentence of Paragraph 4 of the Law of 22 January 1996 on investment subsidies infringed the constitutional principle of non-retroactivity.

26 In particular, Magdeburger Mühlenwerke claimed that the retroactive effect of point 4 of the second sentence of Paragraph 2 of the Law of 22 January 1996 on investment subsidies infringed its legitimate expectations, since, first, from the time that the decision to invest is made, the provision on the basis of which the aid is granted provides the basis for the legitimate expectation of the aid applicant. It claims that its decision to invest was made before 3 September 1998 and that the German legislature did not place any reservation on that provision pursuant to European Union law or create a transitional scheme applicable to investments already made.

27 Second, that company claimed that it could have been aware that it was not possible to receive an investment subsidy only on 28 September 1998 at the earliest, that is to say on the date of publication in the BStBl of the letter of 18 September 1998, and after an appropriate period of time for being notified thereof.

28 The Finanzamt submitted before the referring court that Decision 94/173 was published in the *Official Journal of the European Communities* on 23 March 1994 and was accessible to anyone from that date, with the result that, from then onwards, the legitimate interest of aid applicants could no longer be the subject of protection.

29 On 20 December 2007, the Finanzgericht des Landes Sachsen-Anhalt stayed the proceedings and referred to the Bundesverfassungsgericht (Federal Constitutional Court) the question whether point 4 of the second sentence of Paragraph 2 of the Law of 22 January 1996 on investment subsidies was compatible with the constitutional principle of non-retroactivity. In that regard, it stated that, since the relevant amendment to the Law of 22 January 1996 on investment subsidies applies also to binding investment decisions that were taken by the investor before the new legislation entered into force, that amendment has retroactive effect according to German case-law and academic writing.

30 According to the Finanzgericht des Landes Sachsen-Anhalt, aid should be regarded as granted at the time that the binding investment decision is made. The national aid scheme has an incentive effect once it has led an investor to make the decision to invest. Moreover, that interpretation is supported by the wording of Decision 1999/183 which provides for a period in which to comply with that decision. In addition, Article 2 of Decision 1999/183 should be interpreted in the light of the principle of the protection of legitimate expectations.

31 In that regard, the Finanzgericht des Landes Sachsen-Anhalt took the view that, in the interest of the protection of legitimate expectations, the Commission had authorised, by Decision 1999/183, a transitional scheme for binding investment decisions concluded before that decision was published. Thus, since the Federal Republic of Germany had had the possibility of establishing a transitional scheme and chose to amend the Law of 22 January 1996 on investment subsidies retroactively, the relevant legislative amendment could not be justified on the ground of the public interest.

32 By order of 4 October 2011, the Bundesverfassungsgericht dismissed the reference as inadmissible, taking the view inter alia that, before the case was referred to it, the Finanzgericht des Landes Sachsen-Anhalt ought to have asked the Court of Justice whether or not Article 2(1) of Decision 1999/183 covered investment aid in respect of which the binding investment decision had been made no later than 2 September 1998, but in respect of which the delivery of the asset took place only after that date.

33 In those circumstances, the Finanzgericht des Landes Sachsen-Anhalt decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Did [Decision 1999/183] grant the German legislature discretion in relation to the formulation of point 4 of the second sentence of Paragraph 2 of the [Law of 22 January 1996 on investment subsidies], whereby a scheme would be covered by that discretion if it promotes investments under that scheme, in relation to which the binding investment decision was made before the expiration of the period for the implementation of Decision [1999/183] or before the publication of the intended measures in the [BStBl], but the delivery of the capital asset and the determination and disbursement of the subsidy take place afterwards?’

The question referred for a preliminary ruling

34 By its question, the referring court asks, in essence, whether Article 2 of Decision 1999/183 precludes the grant of investment aid concerning milling in relation to which the binding investment decision was made before the expiration of the period afforded to the Federal Republic of Germany to comply with that decision or before the publication in the BStBl of the measures taken to that effect, when the delivery of the capital asset and the determination and disbursement of the subsidy took place only after the expiration of that period or after that publication.

35 It is apparent from the order for reference that, in the light of circumstances of the main proceedings, the Finanzgericht des Landes Sachsen-Anhalt raises the question, inter alia, of when aid must be considered to be granted and of the requirements of the principle of the protection of legitimate expectations.

36 It must be pointed out in that regard that Article 2(1) of Decision 1999/183 requires the Federal Republic of Germany to ensure that, within two months of notification of that decision, namely, from 3 September 1998, no aid for investments relating, inter alia, to milling be granted.

37 It should be recalled that, in accordance with the first subparagraph of Article 108(2) TFEU, if the Commission finds that aid granted by a State or through State resources is not compatible with the internal market, it is to decide that the State concerned is to abolish or alter such aid within a period of time to be determined by the Commission. The period mentioned in paragraph 36 of this judgment was therefore granted to the Federal Republic of Germany only to alter or, where necessary, abolish, the aid at issue in the main proceedings.

38 Moreover, Decision 1999/183 makes no provision for any transitional scheme. Accordingly, it is clear that the prohibition on granting, after 2 September 1998, aid for investments relating to milling is unconditional.

39 It follows that Article 2(1) of Decision 1999/183 does not permit aid for investments relating to milling to be granted after 2 September 1998.

40 As regards the question when the investment subsidy at issue in the main proceedings was granted, it should be observed that aid must be considered to be granted at the time that the right to receive it is conferred on the beneficiary under the applicable national rules.

41 Accordingly, it is for the referring court to determine, on the basis of applicable national law, when that aid must be considered to be granted. To that end, that court must take account of all the conditions laid down by national law for obtaining the aid in question.

42 Thus, if all those conditions were satisfied no later than 2 September 1998, the prohibition laid down in Article 2(1) of Decision 1999/183 does not affect the disbursement of the corresponding instalment of aid, since that decision does not require the recovery of aid already granted. However, if all the conditions were satisfied only after that date, that prohibition would apply without

reservation.

43 That being so, it should be noted that it is for the referring court to ensure that the prohibition laid down in Article 2(1) of Decision 1999/183 is not circumvented. As the account set out in paragraphs 8 to 15 of this judgment suggests, one of the conditions required by German law in order that the right to an investment subsidy be acquired is, in any event, the condition that the investment must be concluded. Accordingly, the national court cannot find, subsequent to Decision 1999/183, that the right to that aid is acquired at the time that the binding investment decision is made by the aid applicant.

44 In the light, in particular, of the unconditional nature of the prohibition laid down in Article 2(1) of that decision and the fact that the period provided for was granted to the Federal Republic of Germany only to alter or, where necessary, abolish existing aids and existing aid schemes in order to ensure that they were compatible with the internal market, any interpretation by the national authorities of the conditions for granting the aid in question in the main proceedings which would bring forward in time the point at which that aid is considered to be granted would amount to circumventing that prohibition.

45 Moreover, the incentive effect of a State aid measure falls within the examination of its compatibility with the internal market (see, to that effect, judgment of 15 September 2011 in Case C-544/09 P *Germany* v *Commission*, paragraph 68). Accordingly, it must be added that the circumstance that the Law of 22 January 1996 on investment subsidies might have had an incentive effect for the investment at issue is not relevant for determining when aid must be considered to be granted.

46 In so far as the referring court raises the question whether the principle of the protection of legitimate expectations requires that, in a case such as that at issue in the main proceedings, a binding investment decision made before 3 September 1998 may none the less be eligible for aid, it should be recalled that it was on 12 June 1996 that the Commission initiated the formal investigation procedure against, inter alia, investment aid relating to milling granted pursuant to the Law of 22 January 1996 on investment subsidies and that the decision to initiate that procedure was published on 5 February 1997 in the *Official Journal of the European Communities*.

47 Even if it is accepted that, prior to that publication, a diligent economic operator might have been able to lay claim to a legitimate expectation that such aid would be granted, it was no longer entitled to entertain such an expectation after that publication. The initiation of the formal investigation procedure means that the Commission has serious doubts as to the compatibility of the aid in question with European Union law. From that time onwards, a diligent economic operator may not therefore rely on the continuity of that aid.

48 Moreover, for the reasons set out in paragraphs 46 and 47 of this judgment, the publication in the BStBl of the letter of 18 September 1998 is irrelevant for the purposes of assessing whether the applicant in the main proceedings has a legitimate expectation.

49 In the light of all the foregoing, the answer to the question referred is that Article 2 of Decision 1999/183 must be interpreted as precluding the grant of investment aid concerning milling in relation to which the binding investment decision was made before the expiration of the period afforded to the Federal Republic of Germany to comply with that decision or before the publication in the BStBl of the measures taken to that effect, when the delivery of the capital asset and the determination and disbursement of the subsidy took place only after the expiration of that period or that publication, if the time at which an investment subsidy is considered to be granted is only after the expiration of that period. It is for the referring court to determine when an investment subsidy,

such as that at issue in the main proceedings, must be considered to be granted, by taking account of all the conditions laid down by national law for obtaining the aid in question and ensuring that the prohibition laid down in Article 2(1) of Decision 1999/183 is not circumvented.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 2 of Commission Decision 1999/183/EC of 20 May 1998 concerning State aid for the processing and marketing of German agricultural products which might be granted on the basis of existing regional aid schemes must be interpreted as precluding the grant of investment aid concerning milling in relation to which the binding investment decision was made before the expiration of the period afforded to the Federal Republic of Germany to comply with that decision or before the publication in the *Bundessteuerblatt* of the measures taken to that effect, when the delivery of the capital asset and the determination and disbursement of the subsidy took place only after the expiration of that period or that publication, if the time at which an investment subsidy is considered to be granted is only after the expiration of that period. It is for the referring court to determine when an investment subsidy, such as that at issue in the main proceedings, must be considered to be granted, by taking account of all the conditions laid down by national law for obtaining the aid in question and ensuring that the prohibition laid down in Article 2(1) of Decision 1999/183 is not circumvented.

[Signatures]

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* Language of the case: German.