



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

6 July 2017*

(Reference for a preliminary ruling — State aid — Regulation (EC) No 800/2008 — General exemption by category — Scope — Article 1(6)(c) — Article 1(7)(c) — Concept of ‘undertaking in difficulty’ — Concept of ‘collective insolvency proceedings’ — Company granted State aid under a regional operational programme of the European Regional Development Fund (ERDF) subsequently admitted to an arrangement with creditors as a going concern — Withdrawal of the aid — Obligation to reimburse the advance paid)

In Case C-245/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per le Marche (Regional Administrative Court for Le Marche, Italy), made by decision of 4 March 2016, received at the Court on 28 April 2016, in the proceedings

Nerea SpA

v

Regione Marche,

intervening parties:

Banca del Mezzogiorno — MedioCredito Centrale SpA,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Vilaras (Rapporteur), J. Malenovský, M. Safjan and D. Šváby, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Regione Marche, by L. Di Ianni, avvocato,
- the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli and M. Capolupo, avvocati dello Stato,

* Language of the case: Italian.

— the Polish Government, by B. Majczyna, acting as Agent,
— the European Commission, by D. Recchia and A. Bouchagiar, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 5 April 2017,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 1(7)(c) of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles [107 and 108 TFEU] (General block exemption Regulation) (OJ 2008 L 214, p. 3).
- 2 The request has been made in proceedings between Nerea SpA and the Regione Marche (Le Marche, Italy) concerning the withdrawal of State aid, granted to Nerea as part of the implementation of a regional operational programme ('ROP') of the European Regional Development Fund (ERDF), on account of the admission of that company to an arrangement with creditors as a going concern.

Legal context

EU law

- 3 Recitals 15 and 36 of Regulation No 800/2008 provide:

'(15) Aid granted to undertakings in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty [(OJ 2004 C 244, p. 2)] should be assessed under those Guidelines in order to avoid their circumvention. Aid to such undertakings should therefore be excluded from the scope of this Regulation. In order to reduce the administrative burden for Member States, when granting aid covered by this Regulation to SMEs [small and medium-sized enterprises], the definition of what is to be considered an undertaking in difficulty should be simplified as compared to the definition used in those Guidelines. Moreover, SMEs which have been incorporated for less than three years should not be considered, for the purposes of this Regulation, to be in difficulty with regard to that period, unless they fulfil the criteria under the relevant national law for being the subject of collective insolvency proceedings. That simplification should be without prejudice to the qualification of those SMEs under those Guidelines with regard to aid not covered by this Regulation and without prejudice to the qualification as undertakings in difficulty of large enterprises, under this Regulation, which remain subject to the full definition provided in those Guidelines.

...

(36) Consistent with the principles governing the aid falling within Article [107(1) TFEU], aid should be considered to be granted at the moment the legal right to receive the aid is conferred on the beneficiary under the applicable national legal regime.'

- 4 Article 1(6) and (7) of Regulation No 800/2008 provides:

'6. This Regulation shall not apply to the following aid:

...

(c) aid to undertakings in difficulty.

7. For the purposes of point (c) of paragraph 6, an SME shall be considered to be an undertaking in difficulty if it fulfils the following conditions:

...

(c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

An SME which has been incorporated for less than three years shall not be considered, for the purposes of this Regulation, to be in difficulty with regard to that period unless it meets the condition set out in point (c) of the first subparagraph.’

5 Points 9 to 11 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2, ‘the Guidelines’) provide:

‘9. There is no Community definition of what constitutes “a firm in difficulty”. However, for the purposes of these Guidelines, the Commission regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.

10. In particular, a firm is, in principle and irrespective of its size, regarded as being in difficulty for the purposes of these Guidelines in the following circumstances:

(a) in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;

(b) in the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;

(c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

11. Even when none of the circumstances set out in point 10 are present, a firm may still be considered to be in difficulties, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value. In acute cases the firm may already have become insolvent or may be the subject of collective insolvency proceedings brought under domestic law. In the latter case, these Guidelines apply to any aid granted in the context of such proceedings which leads to the firm’s continuing in business. In any event, an undertaking in difficulty is eligible only where, demonstrably, it cannot recover through its own resources or with the funds it obtains from its owners/shareholders or from market sources.’

Italian law

6 The arrangement with creditors scheme, of which the arrangement with creditors as a going concern is a variation, is governed by Articles 160 to 186a of Regio Decreto n. 267 — Disciplina del fallimento, del concordato preventivo, dell’amministrazione controllata e della liquidazione coatta amministrativa

(Royal Decree No 267 laying down rules for bankruptcy, pre-bankruptcy agreements, supervised administration and compulsory liquidation), of 16 March 1942 (GURI No 81 of 6 April 1942), in the version applicable at the material time ('the Law on bankruptcy').

7 Article 160 of the Law on bankruptcy, entitled 'Conditions for admission to the proceedings', provides:

'An economic operator in difficulty may propose an arrangement to its creditors based on a plan ...

For the purposes laid down in the first paragraph, difficulty also includes insolvency.'

8 Article 161 of the Law on bankruptcy, entitled, 'Application for an arrangement with creditors', provides:

'The request for admission to the arrangement with creditors shall be made by application signed by the debtor to the court for the place where the undertaking has its registered office ...'

9 Article 186a of the Law on bankruptcy, entitled 'Arrangement with creditors as a going concern', provides:

'When the insolvency plan referred to in Article 161(2)(e) provides for the activity of the undertaking to be continued by the debtor, for the transfer of the continuing business, or for the continuing business to be assigned into one or more companies, including newly formed companies, the provisions of this article shall apply. The plan may also provide for the sale of assets that are not instrumental to the operation of the undertaking.

In the cases for which the present article provides:

- (a) the plan referred to in Article 161(2)(e) must also contain an analysis of the anticipated costs and proceeds of the business activity set out in the insolvency plan, of the financial resources required and of the means of covering them;
- (b) the expert report referred to in Article 161(3) must confirm that continuance of the business activity as provided for in the insolvency plan will contribute to meeting the needs of the creditors;
- (c) subject to the provisions of Article 160(2), the plan may provide for a moratorium of up to one year from the date of its approval for the payment of preferential creditors and creditors holding pledges or mortgages, unless there is provision for the sale of assets or rights to which preferential rights attach. In that circumstance, the creditors with preferential rights referred to in the previous sentence shall not have the right to vote.

Subject to the provisions of Article 169a, contracts in the course of performance at the date when the application was submitted, including contracts entered into with public authorities, shall not be terminated as a result of the opening of the procedure. Any agreements to the contrary shall be without effect. Admission to an arrangement with creditors shall not prevent the continuation of public contracts if the expert appointed by the debtor pursuant to Article 67 has confirmed compliance with the plan and a reasonable capacity to fulfil the contract. If the legal requirements are met, the transferee company or company assigned the business or areas of the business to which the contracts are transferred may also benefit from that continuation. When transfer or assignment takes place, the court-appointed receiver shall arrange for the entries to be removed.

After the application has been submitted, participation in procedures for the award of public contracts must be authorised by the court, after hearing the opinion of the judicial auditor, if appointed; if no judicial auditor has been appointed, the court shall decide.

Admission to an arrangement with creditors shall not prevent participation in procedures for the award of public contracts provided that the undertaking submits in the tender:

- (a) a report by an expert fulfilling the conditions set out in Article 67(3)(d) confirming compliance with the plan and reasonable capacity to fulfil the contract;
- (b) a declaration by another operator fulfilling the general conditions and those relating to financial, technical and economic standing, and to certification as well, required for the award of the contract, who has undertaken, in relation to the tenderer and the contracting authority, to make available, for the duration of the contract, the resources necessary to perform the contract, and to take over from the assisted undertaking if the latter becomes insolvent during the tender or after the contract has been entered into, or is for any other reason no longer in a position properly to perform the contract. Article 49 of [decreto legislativo n. 163 — Codice dei contratti pubblici relativi a lavori, servizi e forniture in attuazione delle direttive 2004/17/CE e 2004/18/CE (Legislative Decree No 163 — Code of public works contracts, public service contracts and public supply contracts pursuant to Directives 2004/17/EC and 2004/18/EC) of 12 April 2006 (GURI No 100 of 2 May 2006)] shall apply.

Subject to the provisions of the previous paragraph, the undertaking that has entered into an arrangement with creditors may also tender as part of an ad hoc tendering consortium, provided it is not acting as principal and that the other undertakings forming the consortium are not subject to collective proceedings. In that circumstance, the declaration referred to in the fourth subparagraph under (b) may also be made by an operator belonging to the consortium.

If, in the course of a procedure opened in accordance with the present article, the business activity of the undertaking ceases or proves to be manifestly prejudicial to the creditors, the court shall take a decision within the meaning of Article 173. It shall remain open to the debtor to amend the application for an arrangement.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 10 By decision of 9 November 2010, the Regione Marche approved a contract notice and the forms for implementation of measure 1.2.1.05.01 of the ROP of the ERDF for the Regione Marche from 2007 to 2013, approved by the European Commission by Decision No 3986 of 17 August 2007.
- 11 On 13 April 2011, Nerea submitted an application for assistance under the ROP. By decision of 20 March 2012, the Regione Marche granted it financial assistance of EUR 144052.58 in connection with eligible expenditure amounting to EUR 665262.91. At Nerea's request, an advance equivalent to 50% of that assistance, amounting to EUR 72026.29, was paid to it by the intermediate body MedioCredito Centrale (MCC) SpA ('MCC').
- 12 On 18 November 2013, after finalising the assisted investment, Nerea submitted a declaration of expenditure and requested the settlement of the balance of that assistance.
- 13 On 24 December 2013, Nerea applied to the Tribunale di Macerata (District Court, Macerata, Italy) for an arrangement with creditors as a going concern. The court opened the procedure for an arrangement with creditors by decision of 15 October 2014, published on 23 October 2014.
- 14 By letter of 11 February 2015, MCC notified Nerea that the procedure for withdrawing the assistance granted had been set under way by Regione Marche. The opening of that procedure was justified by the fact that because it had entered into proceedings for an arrangement with creditors as a going concern, it no longer fulfilled the conditions governing eligibility for financing, pursuant to Article 1 in conjunction with Article 20(h) of the contract notice.

- 15 On 5 March 2015, Nerea submitted observations and sought to have annulled the procedure for withdrawing the assistance.
- 16 By letter of 20 March 2015, MCC confirmed to Nerea that the opening of an arrangement with creditors as a going concern constituted one of the factors excluding it from being eligible for the grant of assistance in accordance with Article 1(7)(c) of Regulation No 800/2008.
- 17 On 11 May 2015, Regione Marche withdrew the financial assistance granted to Nerea and requested the reimbursement of the advance of EUR 72026.29 which had been paid to it, plus interest of EUR 4997.93.
- 18 Nerea then brought an action before the referring court against those decisions, relying, in particular, on failure to comply with the ROP, Article 1(7) of Regulation No 800/2008 and the principle of sound administration.
- 19 In those circumstances the Tribunale amministrativo regionale per le Marche (Regional Administrative Court for Le Marche, Italy) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) First of all, does Article 1(7)(c) of Regulation No 800/2008 concern only those procedures that may be opened by administrative or judicial authorities of the Member States of their own motion (in Italy, for example, insolvency procedures) or does it also concern procedures that may be opened only at the request of the economic operator concerned (as is the case in the national law for an arrangement with creditors)? The question arises because the provision refers to “being the subject of” collective insolvency proceedings.
- (2) If it were to be concluded that Regulation No 800/2008 concerns all collective proceedings, then, with specific reference to the instrument of an arrangement with creditors as a going concern under Article 186a of [the Law on bankruptcy], must Article 1(7)(c) of Regulation No 800/2008 be interpreted as meaning that the mere fact that the requirements for opening collective proceedings exist in relation to an operator who applies for assistance from the Structural Funds prevents such financing being granted, or requires the administering national authority to withdraw the financing already granted or, on the contrary, that the situation of difficulty must be appraised in the specific case, bearing in mind, for instance, the timing of the procedure, the economic operator’s honouring of the undertakings given and any other relevant factor?’

Consideration of the questions referred

- 20 It must be observed, as a preliminary point, that the referring court asks the Court of Justice about the interpretation of Article 1(7)(c) of Regulation No 800/2008 since it is dealing with a dispute in which Nerea, an undertaking which is the recipient of State aid granted under an ROP for the Regione Marche challenges the obligation to reimburse that amount and interest, in accordance with that provision on the ground that, subsequent to the grant of the financial assistance, it applied for admission to an arrangement with creditors as a going concern.

The first question

- 21 By its first question the referring court asks essentially whether Article 1(7)(c) of Regulation No 800/2008 must be interpreted as meaning that the concept of ‘collective insolvency proceedings’ that it refers to covers only procedures which must be opened by the administrative or judicial authorities of the Member States of their own motion or whether it also covers those which may be opened at the request of the undertaking.

- 22 It is clear from the order for reference that that question arises on account of the specific nature of the collective insolvency proceedings at issue in the main proceedings, that is an arrangement with creditors as a going concern as provided for by the Law on bankruptcy, which is opened by the competent court at the request of the undertaking concerned.
- 23 If the concept of ‘collective insolvency proceedings’ was to be interpreted as covering only the proceedings opened by the competent court of its own motion, it would not cover the arrangement with creditors as a going concern and Article 1(6) and (7) of Regulation No 800/2008 would therefore not apply to Nerea’s situation.
- 24 In that connection, it must be recalled that, in accordance with Article 1(6)(c), Regulation No 800/2008 does not apply to aid to undertakings in difficulty. Recital 15 of that regulation states that aid granted to undertakings in difficulty should be assessed under the Guidelines in order to avoid their circumvention.
- 25 Article 1(7)(c) of Regulation No 800/2008 provides that an SME must be regarded as being an undertaking in difficulty where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.
- 26 Thus, that provision refers to national law for the determination of the conditions in which an SME is subject to collective insolvency proceedings.
- 27 However, it must be observed that neither that provision nor any other provision of Regulation No 800/2008 makes any distinction between the various existing collective insolvency proceedings in the different national legal systems according to whether they are opened by the administrative and judicial authorities of the Member States or whether they are opened at the request of the undertaking.
- 28 Thus, although it is true that Article 1(7)(c) of Regulation No 800/2008 refers to the ‘criteria ... for being the subject’ of collective insolvency proceedings, that provision cannot be interpreted as referring only to proceedings opened on the initiative of the authorities against undertakings, to the exclusion of proceedings opened at the request of the undertakings.
- 29 Therefore, Article 1(7)(c) of Regulation No 800/2008 must be interpreted as meaning that the concept of ‘collective insolvency proceedings’ that it refers to covers all collective insolvency proceedings for undertakings provided for by national law, whether they are opened by the national administrative or judicial authorities of their own motion or on the initiative of the undertaking concerned.

The second question

- 30 By its second question, the national court asks essentially whether Article 1(7)(c) of Regulation No 800/2008 must be interpreted as meaning that the fact that an undertaking satisfies the criteria for being subject to collective insolvency proceedings is sufficient to prevent it from receiving State aid under that regulation or to require that aid to be withdrawn if it has already been granted, or whether it must be actually established for that purpose that the undertaking is in difficulty.
- 31 In that connection, it must be recalled that, under Article 1(6)(c), Regulation No 800/2008 excludes from its scope aid to undertakings in difficulty, that is to say in particular, undertakings which, in accordance with Article 1(7)(c) of that regulation, satisfy the criteria for being subject to collective insolvency proceedings in accordance with the national law applicable to those undertakings.

- 32 As is clear from recital 36 of Regulation No 800/2008, the aid covered by Article 107(1) TFEU should be considered to be granted at the moment the legal right to receive the aid is conferred on the beneficiary under the applicable national legal regime.
- 33 Therefore, as the Advocate General noted essentially in point 71 of his Opinion, it is at that time that the undertaking's eligibility to receive aid must be assessed, with regard to the conditions laid down by Regulation No 800/2008 (see, to that effect, judgment of 21 March 2013, *Magdeburger Mühlenwerke*, C-129/12, EU:C:2013:200, paragraph 40).
- 34 It must then be noted, as is clear from recital 15 of Regulation No 800/2008, that the definition of what is to be considered an 'undertaking in difficulty' should be simplified as compared to the definition used in the Guidelines in order to reduce the administrative burden for Member States when granting aid covered by this regulation to SMEs. Consequently, Article 1(7) of Regulation No 800/2008 simply reproduces the information about the concept of 'undertaking in difficulty' set out in point 10 of the Guidelines, but does not reproduce those set out in point 11 thereof.
- 35 It would be contrary to the objective of simplification to require the competent authorities of the Member States, in order to decide whether to grant State aid to an undertaking in accordance with Regulation No 800/2008, to determine themselves specifically, when they assess its eligibility, whether that undertaking is in difficulty.
- 36 Moreover, Article 1(7)(c) of that regulation does not impose on the authorities the obligation to carry out an independent examination of the undertaking's actual situation, but merely to ensure not to grant aid to an undertaking which satisfies the criteria for being subject to collective insolvency proceedings in accordance with that regulation.
- 37 It follows that an undertaking, such as Nerea, which, on the date on which it was granted aid, did not satisfy the conditions for being subject to collective insolvency proceedings laid down by the national law applicable to it, which is for the referring court to ascertain, cannot be regarded as an undertaking in difficulty under Article 1(6) of Regulation No 800/2008.
- 38 It also follows that aid granted to an undertaking in accordance with Regulation No 800/2008, and in particular the negative condition laid down in Article 1(6) thereof cannot be withdrawn solely on the ground that that undertaking was subject to collective insolvency proceedings subsequent to the date on which it was granted the aid.
- 39 Accordingly, Article 1(7)(c) of Regulation No 800/2008 must be interpreted as meaning that the fact that an undertaking satisfied the conditions for being subject to collective insolvency proceedings according to national law, which is for the referring court to establish, is sufficient to prevent State aid being granted to it under that regulation or, if such aid has already been granted to it, to hold that it could not be granted in accordance with that regulation provided that those conditions were satisfied on the date on which that aid was granted. However, aid granted to an undertaking in compliance with Regulation No 800/2008 and, in particular, Article 1(6) thereof, cannot be withdrawn solely on the ground that that undertaking has been subject to collective insolvency proceedings subsequent to the date on which that aid was granted to it.

Costs

- 40 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 (Third Chamber) hereby rules:

1. **Article 1(7)(c) of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in accordance with Articles [107 and 108 TFEU] (General block exemption Regulation) must be interpreted as meaning that the concept of ‘collective insolvency proceedings’ that it refers to covers all collective insolvency proceedings for undertakings provided for by national law, whether they are opened by the national administrative or judicial authorities of their own motion or on the initiative of the undertaking concerned.**
2. **Article 1(7)(c) of Regulation No 800/2008 must be interpreted as meaning that the fact that an undertaking satisfied the conditions for being subject to collective insolvency proceedings according to national law, which is for the referring court to establish, is sufficient to prevent State aid being granted to it under that regulation or, if such aid has already been granted to it, to hold that it could not be granted in accordance with that regulation provided that those conditions were satisfied on the date on which that aid was granted. However, aid granted to an undertaking in compliance with Regulation No 800/2008 and, in particular, Article 1(6) thereof, cannot be withdrawn solely on the ground that that undertaking has been subject to collective insolvency proceedings subsequent to the date on which that aid was granted to it.**

[Signatures]