JUDGMENT OF THE COURT (First Chamber)

8 December 2011 *

In Case C-275/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 28 May 2010, received at the Court on 2 June 2010, in the proceedings

Residex Capital IV CV

v

Gemeente Rotterdam,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, M. Safjan, A. Borg-Barthet, E. Levits and J.-J. Kasel, Judges,

* Language of the case: Dutch.

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 April 2011,

after considering the observations submitted on behalf of:

— Residex Capital IV CV, by M. Scheltema and E. Schotanus, advocaten,

— the Gemeente Rotterdam, by J. van den Brande and M. Custers, advocaten,

— the Netherlands Government, by M. Noort, acting as Agent,

— the Danish Government, by C. Vang, acting as Agent,

— the German Government, by T. Henze and K. Petersen, acting as Agents,

— the European Commission, by H. van Vliet and S. Thomas, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 May 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 88(3) EC.

2 The reference has been made in the course of proceedings between Residex Capital IV CV ('Residex') and the Gemeente Rotterdam (Municipality of Rotterdam) concerning a guarantee granted by the Gemeentelijk Havenbedrijf Rotterdam (Municipal Port Authority of Rotterdam; the 'GHR') to Residex for the purpose of covering a loan granted by Residex to a borrower.

Legal context

European Union law

3 Recital 13 in the preamble to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) reads as follows:

'… in cases of unlawful aid which is not compatible with the common market, effective competition should be restored; … for this purpose it is necessary that the aid, including interest, be recovered without delay; … it is appropriate that recovery be effected in accordance with the procedures of national law; …'

4 Article 1 of that regulation provides:

‘For the purpose of this Regulation:

…

(f) “unlawful aid” shall mean new aid put into effect in contravention of Article [88](3) of the Treaty;

…’

5 The Commission Notice on the enforcement of State aid law by national courts (OJ 2009 C 85, p. 1) states in paragraph 28, under the heading ‘Preventing the payment of unlawful aid’:

‘… As part of their duties under Article 88(3) of the Treaty, national courts must safeguard the rights of individuals against possible disregard of those rights. …’

6 Paragraph 30 of that notice, under the heading ‘Recovery of unlawful aid’, reads as follows:

‘Where a national court is confronted with unlawfully granted aid, it must draw all legal consequences from this unlawfulness under national law. The national court must therefore in principle order the full recovery of unlawful State aid from the beneficiary …. Ordering the full recovery of unlawful aid is part of the national court’s obligation to protect the individual rights of the claimant (such as the competitor)

under Article 88(3) of the Treaty. The recovery obligation of the national court is thus not dependent on the compatibility of the aid measure with Article 87(2) or (3) of the Treaty.'

7 Section 2.1., third paragraph, of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ 2008 C 155, p. 10; 'the Guarantee Notice') states that:

'… The benefit of a State guarantee is that the risk associated with the guarantee is carried by the State. Such risk-carrying by the State should normally be remunerated by an appropriate premium. Where the State forgoes all or part of such a premium, there is both a benefit for the undertaking and a drain on the resources of the State. …'

8 Under section 2.2 of that notice:

'Usually, the aid beneficiary is the borrower. … In some cases, the borrower would not, without a State guarantee, find a financial institution prepared to lend on any terms.... Likewise, a State guarantee may help a failing firm remain active instead of being eliminated or restructured, thereby possibly creating distortions of competition.'

9 Under the heading 'Aid to the lender', section 2.3 of that notice reads as follows:

'2.3.1 Even if usually the aid beneficiary is the borrower, it cannot be ruled out that under certain circumstances the lender, too, will directly benefit from the aid. In particular, for example, if a State guarantee is given *ex post* in respect of a loan or other financial obligation already entered into without the terms of this loan or financial obligation being adjusted, or if one guaranteed loan is used

to pay back another, non-guaranteed loan to the same credit institution, then there may also be aid to the lender, in so far as the security of the loans is increased. …

2.3.2 Guarantees differ from other State aid measures, such as grants or tax exemptions, in that, in the case of a guarantee, the State also enters into a legal relationship with the lender. Therefore, consideration has to be given to the possible consequences for third parties of State aid that has been illegally granted. … The question whether the illegality of the aid affects the legal relations between the State and third parties is a matter which has to be examined under national law. …'

10 Section 3.2 of the Guarantee Notice, entitled 'Individual guarantees', states:

'Regarding an individual State guarantee, the Commission considers that the fulfilment of all the following conditions will be sufficient to rule out the presence of State aid.

…

(c) The guarantee does not cover more than 80 % of the outstanding loan or other financial obligation; …

The Commission considers that if a financial obligation is wholly covered by a State guarantee, the lender has less incentive to properly assess, secure and minimise the risk arising from the lending operation, and in particular to properly assess the borrower's creditworthiness.... This lack of incentive to minimise the

risk of non-repayment of the loan might encourage lenders to contract loans with a greater than normal commercial risk ….

…'

11 Section 4.1 of that notice states:

'… As a matter of principle, the State aid element will be deemed to be the difference between the appropriate market price of the guarantee provided individually or through a scheme and the actual price paid for that measure.

…

When calculating the aid element in a guarantee, the Commission will devote special attention to the following elements:

(a) whether, in the case of individual guarantees, the borrower is in financial difficulty. …

The Commission notes that for companies in difficulty, a market guarantor, if any, would, at the time the guarantee is granted, charge a high premium given the expected rate of default. If the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee;

…'

Netherlands law

12 Article 3:40(2) of the Netherlands Civil Code reads as follows:

'Infringement of a mandatory statutory provision renders a legal transaction null and void; however, if the provision serves solely to protect one of the parties to a multilateral legal transaction, such a transaction is merely voidable; in both cases this is on condition that nothing to the contrary is to be inferred from the objective of the provision.'

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

13 In 2001 Residex acquired shares in the company MD Helicopters Holding NV ('MDH'), a subsidiary of the company RDM Aerospace NV ('Aerospace'). In the context of that acquisition, Residex had obtained an option entitling it to sell back its holding in MDH to Aerospace. In February 2003, after rejecting a request to extend its shareholding in MDH, or alternatively that it grant MDH or Aerospace a loan, Residex exercised that option.

14 However, Residex did not obtain payment of the sale price of its shares, amounting to approximately EUR 8.5 million, which it ought to have received on exercising that option. It is apparent from the order for reference that, in those circumstances, the chief executive officer of the GHR proposed to Residex that it should convert its claim into a loan and add that amount to a loan of USD 15 million (equivalent, at the time, to some EUR 13 922 405) to be granted by Residex to Aerospace. By way of consideration, the GHR undertook to provide a guarantee to cover the amount of that loan.

15 By an agreement of 3 March 2003, supplemented in May 2003, the loan was concluded for EUR 23 040 657,03, including interest and costs. By agreement of the same date, the GHR undertook to act as guarantor to Residex for a maximum amount of EUR 23 012 510, plus interest and costs relating to the loan.

16 It is common ground that Aerospace repaid a part of that loan, in an amount of EUR 16 000 000. Having noted that Aerospace had failed to repay the balance of the loan together with the interest owed, Residex, by letter of 22 December 2004 addressed to the Gemeente Rotterdam, invoked the guarantee against the latter and requested payment of EUR 10 240 252, plus interest and costs. As the Gemeente Rotterdam refused to pay that amount, Residex brought an action before the Netherlands courts.

17 By judgment of 24 January 2007, the Rechtbank Rotterdam (Rotterdam District Court) declared the defence of the Gemeente Rotterdam, to the effect that the guarantee was null and void on the ground that it infringed European Union law on State aid, to be well founded and consequently dismissed the claim made by Residex. The appeal brought by Residex against that judgment was dismissed by the Gerechtshof te 's-Gravenhage (Regional Court of Appeal, The Hague) by judgment of 10 July 2008.

18 Residex thereupon lodged an appeal in cassation against that judgment before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). The Hoge Raad held that, in the proceedings in cassation, there was no dispute as to the finding of the Gerechtshof te 's-Gravenhage that, as the guarantee constituted aid within the meaning of Article 87 EC, it should have been notified to the Commission pursuant to Article 88(3) EC.

19 Residex criticises the Gerechtshof te 's-Gravenhage, in particular, for failing to take account of the fact that Article 88(3) EC affects the validity of implementing measures that are in conflict with that provision only where the nullity of those measures leads to the withdrawal of the unlawful aid granted to the beneficiary and, consequently,

to the removal of the distortions in competition to which the implementation of the aid measure gave rise, that is to say, in the present case, to the recovery of the loan granted to Aerospace.

20 Basing itself on, inter alia, the judgments in Case C-390/98 *Banks* [2001] ECR I-6117, paragraphs 73 to 80, and in Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraphs 34 to 55, the Hoge Raad takes the view that the withdrawal of unlawful aid by way of recovery is the logical consequence of a finding that it is unlawful and that the national courts must in principle allow an application for repayment of aid granted in breach of Article 88(3) EC.

21 Accordingly, in the present case, contrary to Residex's contention, the Gerechtshof te 's-Gravenhage was, in the view of the Hoge Raad, authorised to annul, on the basis of Article 3:40(2) of the Netherlands Civil Code, a legal act entailing implementation of that aid measure if it was contrary to that provision of the EC Treaty. The Hoge Raad der Nederlanden notes, moreover, that in a similar matter, in Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, the Court found that the guarantee was invalid and held that it should therefore be cancelled by the national court within the framework of its obligation to remedy the consequences of an unlawful aid measure.

22 However, the Hoge Raad is uncertain whether cancellation of the guarantee is an effective measure by which to restore the situation which existed before the loan was granted, in particular with a view to protecting the interests of the parties affected by a distortion of competition resulting from the granting of that loan. It states in that regard that cancellation of the guarantee did not, however, remove its distorting effect on competition, that is to say, the fact that Aerospace obtained a loan which, under normal market conditions, would not have been available to that company. In order to remove that effect, it would be necessary to recover the gains obtained by Aerospace from that competitive advantage.

23 In those circumstances, the Hoge Raad der Nederlanden decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does the provision in the last sentence of Article 88(3) EC, now Article 108(3) TFEU, mean that, in a case such as the present, where the unlawful aid measure was implemented by granting the lender a guarantee which enabled the borrower to obtain a loan from the lender which would not have been available to it under normal market conditions, the national courts, within the framework of their obligation to remedy the consequences of the unlawful aid measure, are obliged, or at any rate authorised, to cancel the guarantee, even if that does not result in the cancellation of the loan granted under the guarantee?'

The question referred for a preliminary ruling

24 By its question, the referring court seeks to ascertain, essentially, first, whether the national courts of the Member States have jurisdiction to cancel a guarantee in a situation such as that in the main proceedings, in which that guarantee was provided by a public authority in order to cover a loan granted by a finance company to an undertaking which would not have been able to obtain such financing under normal market conditions and, second, if so, whether European Union law requires those national courts to cancel a guarantee obtained in such conditions.

25 In order to answer the first part of that question, it should be noted that implementation of the system for supervision of State aid, resulting from Article 88 EC and the case-law of the Court on the subject, is a matter, on the one hand, for the Commission and, on the other, for the national courts (Case C-368/04 *Transalpine Ölleitung in Österreich and Others* [2006] ECR I-9957, paragraph 36).

26 In that regard, the national courts and the Commission fulfil distinct but complementary roles (see Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 41; Joined Cases C-261/01 and C-262/01 *van Calster and Others* [2003] ECR I-12249, paragraph 74; and *Transalpine Ölleitung in Österreich and Others*, paragraph 37).

27 Whilst assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the European Union Courts, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 88(3) EC has been infringed (*van Calster and Others*, paragraph 75, and *Transalpine Ölleitung in Österreich and Others*, paragraph 38).

28 In that context, it should be noted that an aid measure which is put into effect in infringement of the obligations arising from Article 88(3) EC is unlawful (see Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* [1991] ECR I-5505, paragraph 17, and Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Distribution Casino France and Others* [2005] ECR I-9481, paragraph 30). That interpretation is confirmed, moreover, by Article 1(f) of Regulation No 659/1999.

29 In that regard, the Court has repeatedly stated that it is for the national courts to draw all the necessary conclusions of the infringement of Article 88(3) EC in accordance with their national law, with regard to both the validity of the acts giving effect to the aid and the recovery of financial support granted in breach of that provision (*van Calster and Others*, paragraph 64; Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, paragraph 49; and *CELF and Ministre de la Culture et de la Communication*, paragraph 41).

30 In the dispute in the main proceedings, the referring court takes the view that the guarantee granted to Residex constitutes non-notified aid and is, therefore, unlawful.

31 If so, it follows that the national courts of the Kingdom of the Netherlands have jurisdiction to draw all of the conclusions of that unlawfulness, in accordance with their national law, including with regard to the validity of the acts which gave effect to that guarantee.

32 By the second part of its question, the national court is asking whether European Union law requires national courts to cancel a guarantee provided in conditions such as those in the main proceedings.

33 In order to answer that second part of the question, it should be noted that, according to settled case-law of the Court, the logical consequence of a finding that aid is unlawful is to remove it by means of recovery in order to restore the situation previously obtaining (see, inter alia, Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 66; judgment of 28 July 2011 in Case C-403/10 P *Mediaset* v *Commission*, paragraph 122).

34 Accordingly, the main objective pursued in recovering unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage which such aid affords (Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 76, and Case C-520/07 P *Commission* v *MTU Friedrichshafen* [2009] ECR I-8555, paragraph 57). By repaying the aid, the beneficiary forfeits the advantage which it had over its competitors on the market, and the situation prior to payment of the aid is restored (Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 22).

35 It is only in exceptional circumstances that it would be inappropriate to order repayment of the aid (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 16; *SFEI and Others*, paragraph 70; and *CELF and Ministre de la Culture et de la Communication*, paragraph 42).

36 In the case in the main proceedings, it is not apparent from the documents before the Court that such exceptional circumstances have been invoked before the courts of the Kingdom of the Netherlands, with the result that the latter are required to order repayment of the aid in question in the main proceedings in accordance with their national law.

37 In order to carry out this repayment, it is essential that the national courts identify the beneficiary or, as the case may be, the beneficiaries of the aid. In the case where aid is granted in the form of a guarantee, the beneficiaries of that aid may be either the borrower or the lender or, in certain cases, both of them together.

38 In that regard, it should, admittedly, be noted that the national court takes the view that, in the case before it, the beneficiary of that aid is Aerospace.

39 In the case where the loan granted by a credit institution to a borrower is guaranteed by the public authorities of a Member State, that borrower normally obtains a financial advantage and thus benefits from aid within the meaning of Article 87(1) EC, inasmuch as the financial cost that it bears is less than that which it would have borne if it had had to obtain that same financing and that same guarantee at market prices.

40 However, as is clear from the submissions made during the hearing before the Court, and as the Advocate General has noted in point 71 of her Opinion, it emerges from certain factual findings in the order for reference that, in the main proceedings, Residex would also have been liable to procure an economic advantage from the guarantee in question.

41 According to the Hoge Raad, the financial situation of Aerospace was such that it would not have been able to obtain a loan on the capital markets. As a result, it was only by means of the guarantee provided by the Gemeente Rotterdam that Residex granted Aerospace a loan at a rate that was preferential in comparison with that in force on the market. Furthermore, it is not apparent from the documents before the Court that Residex paid the Gemeente Rotterdam under normal market conditions in consideration for the benefit that it was deemed to draw from the guarantee.

42 In those circumstances, and in the light of the facts set out in paragraph 14 of the present judgment, it cannot be excluded at the outset that the guarantee in question was granted for the needs of an existing claim of Residex, in the context of a restructuring of Aerospace's debt. If that were so, Residex would have obtained its own economic advantage by means of that guarantee since, as is also stated at subsection 2.3.1 of the Guarantee Notice, the security of its claim increased as a result of being guaranteed by the public authority, with no amendment, moreover, to the conditions of the guaranteed loan.

43 It follows that it is for the national court, taking account of all the particular features of the present case, to identify the beneficiary or, as the case may be, the beneficiaries of that guarantee and to effect, pursuant to the principles set out in paragraphs 33, 34 and 36 of this judgment, recovery of the total amount of the aid in question.

44 That stated, it should be noted that, with regard to cancellation of the guarantee, and irrespective of who the beneficiary of the aid may be, European Union law does not impose any specific conclusion that the national courts must necessarily draw with regard to the validity of the acts relating to implementation of the aid.

45 However, as follows from paragraph 34 of this judgment, given that the objective of the measures that the national courts are bound to take in the event of infringement of Article 88(3) EC is, essentially, to restore the competitive situation existing prior to the payment of the aid in question, those courts must ensure that the measures which they take with regard to the validity of the abovementioned acts make it possible for such an objective to be achieved.

46 Accordingly, it is for the national court to determine whether cancellation of the guarantee may, given the circumstances specific to the dispute before it, be a more effective means of achieving that restoration than other measures.

47 There may be situations in which the cancellation of a contract, in so far as this is liable to lead to the mutual restitution of the services performed by the parties or the disappearance of an advantage for the future, may be better able to achieve the objective of restoring the competitive situation which existed before the aid was granted.

48 It follows that, in the main proceedings, the Hoge Raad may, in the absence of less onerous procedural measures, declare the cancellation of the guarantee granted by the Gemeente Rotterdam to Residex if it takes the view that, regard being had to the circumstances specific to the present case, that cancellation may lead to or facilitate the restoration of the competitive situation which existed before that guarantee was provided.

49 In the light of all of the foregoing, the answer to the question referred is that the last sentence of Article 88(3) EC must be interpreted as meaning that the national courts have jurisdiction to cancel a guarantee in a situation such as that in the main proceedings, in which unlawful aid was implemented by means of a guarantee provided by a public authority in order to cover a loan granted by a finance company to an undertaking which would not have been able to secure such financing under normal market conditions. When exercising that jurisdiction, those courts are required to ensure that the aid is recovered and, to that end, they can cancel the guarantee, in particular where, in the absence of less onerous procedural measures, that cancellation is such as to lead to or facilitate the restoration of the competitive situation which existed before that guarantee was provided.

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 (First Chamber) hereby rules:

The last sentence of Article 88(3) EC must be interpreted as meaning that the national courts have jurisdiction to cancel a guarantee in a situation such as that in the main proceedings, in which unlawful aid was implemented by means of a guarantee provided by a public authority in order to cover a loan granted by a finance company to an undertaking which would not have been able to secure

such financing under normal market conditions. When exercising that jurisdiction, those courts are required to ensure that the aid is recovered and, to that end, they can cancel the guarantee, in particular where, in the absence of less onerous procedural measures, that cancellation is such as to lead to or facilitate the restoration of the competitive situation which existed before that guarantee was provided.

[Signatures]