JUDGMENT OF THE COURT (Second Chamber)

18 December 2008 *

In Case C-384/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgerichtshof (Austria), made by decision of 31 July 2007, received at the Court on 13 August 2007, in the proceedings

Wienstrom GmbH

v

Bundesminister für Wirtschaft und Arbeit,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot, J. Makarczyk, L. Bay Larsen (Rapporteur) and C. Toader, Judges,

* Language of the case: German.

Advocate General: J. Mazák,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 23 October 2008,

after considering the observations submitted on behalf of:

— Wienstrom GmbH, by H.R. Laurer, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Commission of the European Communities, by K. Gross and B. Martenczuk, acting as Agents,

— the EFTA Surveillance Authority, by B. Alterskjær, N. Fenger and L. Young, 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 the last sentence of Article 88(3) EC.

2 The reference has been made in the course of proceedings brought by Wienstrom GmbH ('Wienstrom') against the Bundesminister für Wirtschaft und Arbeit (Federal Minister for Economics and Labour, 'the defendant authority') concerning the amounts of aid to be granted to Wienstrom under the Ökostromgesetz (Austrian Green Electricity Law) ('the ÖG').

Legal context

The aid measure

3 The ÖG governs support for combined heat and power plants ('CHP plants') in Austria.

4 The first version of the ÖG (BGBl. I 149/2002, 'the ÖG (old version)') entered into force on 1 January 2003. It was replaced, on 2 October 2006, by a new version (BGBl. I 105/2006, 'the ÖG (new version)').

5 In order to encourage the production of electricity by CHP plants, costs necessary for maintaining their operation are reimbursed under certain conditions. For 2003 and 2004, the amount of that support was limited by the ÖG (old version) to 1.5 cent per kWh of combined heat and power electricity. Since 2005, that amount has been set on the basis of the relevant provisions of the ÖG (old version) by the defendant authority, which can amend the amount at the end of its examination.

6 During the years at issue in the main proceedings, the measure was financed by means of a uniform surcharge on the quantity of electricity supplied to end customers, irrespective of actual consumption by those end customers of combined heat and power electricity. That surcharge was transferred to Energie-Control GmbH, the public body responsible for paying assistance to CHP plants.

7 Paragraph 30d of the ÖG (new version) introduced changes to that measure with retroactive effect.

8 Paragraph 30d provides that, for the period from 1 January 2003 until 31 December 2006 inclusive, traders in electricity who import so-called 'green' electricity or CHP

energy and who sell that imported green electricity or that imported CHP energy to domestic (Austrian) end customers, and end customers who import that same type of electricity for their own consumption, are entitled to apply for reimbursement of the levy applicable to small-scale hydro-electricity or to other green electricity and for CHP bonuses for CHP energy.

The Commission decision

9 Following an exchange of correspondence with the Austrian authorities in the course of 2003, the Commission of the European Communities registered the measures relating to CHP plants as non-notified aid, under the reference number NN 162/B/2003. The Republic of Austria notified the Commission of the amendments introduced by the ÖG (new version). That notification was registered under reference number N 317/B/2006.

10 By decision C(2006) 2964 final of 4 July 2006 (OJ 2006 C 221, p. 9, 'the Commission decision'), the Commission decided not to raise objections. The Commission found that, as it complied with the Community guidelines on State aid for environmental protection (OJ 2001 C 37, p. 3), the aid was compatible with the common market pursuant to Article 87(3)(c) EC. The Commission found that the amendment introduced by the ÖG (new version) was an appropriate means of neutralising effects that had the potential to discriminate against imported electricity.

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

11 Wienstrom operates several CHP plants in Vienna. It receives support in accordance with the ÖG.

12 Wienstrom challenges two decisions by the defendant authority, of 11 October 2004 ('the first contested decision') and 7 December 2006 ('the second contested decision'), respectively.

13 The first contested decision fixed at EUR 37 335 602.20 the amount to be allocated to Wienstrom in support for three CHP plants for 2003. Given that Wienstrom had received advance payments of EUR 44 551 514.75, that decision meant that it had to repay the difference, namely EUR 7 215 912.55.

14 The second contested decision concerns the support granted to Wienstrom for a modernised CHP plant for the year 2005. It was preceded by a decision of 8 March 2006, which provisionally fixed the aid amount to be granted and led to an advance payment of EUR 5 408 159 on 14 March 2006. The second contested decision definitively set the amount to be granted in support at EUR 5 688 703.47 and ordered the payment of the

outstanding sum of EUR 280 544.47, taking into account the advance that had already been paid. Wienstrom claims that the amount due to it comes to EUR 8 487 228.00.

15 The referring court takes the position that the Commission's decision relates only to the ÖG (new version) and that no express negative decision has been adopted in relation to the ÖG (old version).

16 The referring court notes that the first contested decision put the aid measure into effect prior to the Commission decision.

17 The referring court states that the second contested decision, which was adopted after the Commission decision, puts the aid measure into effect, but that, in fact, the aid began to be put into effect earlier with the entry into force of the ÖG (old version), in the context of which the Republic of Austria undertook to pay the aid at issue for the year 2005.

18 In the light, in particular, of the judgment in Joined Cases C-261/01 and C-262/01 *Van Calster and Others* [2003] ECR I-12249, the referring court is uncertain as to the scope, for the purposes of the case before it, of the prohibition on putting aid into effect laid down in the last sentence of Article 88(3) EC.

19 In that context, the referring court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does the last sentence of Article 88(3) EC require that the national court should, on grounds of the prohibition contained in that provision on putting State aid into effect, refuse further grants of State aid to a recipient of aid who under national law is in principle entitled to aid, although the Commission, while regretting the non-notification of the aid, has not adopted either a decision under Article 4(2) of Council Regulation No 659/1999 of 22 March 1999 [laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1)] or a measure under Article 14 of that regulation, and the case-file does not reveal any infringement of the rights of third parties?

(2) Does the prohibition under Article 88(3) EC on putting State aid into effect preclude the application of a provision of national law, if such application is based on the new version of that law, which the Commission has held to be compatible with the common market, although the measure concerns periods of time before that new version and the amendments which were decisive for the declaration of compatibility were not yet applicable to that period, and the case-file does not reveal any infringement of the rights of third parties?'

The questions referred for a preliminary ruling

20 By way of a preliminary point, it must be noted that the Commission decision does not concern solely the ÖG (new version). That decision covers both versions of the ÖG, with the Commission's assessment relating to the ÖG as amended at the date of its investigation. In the 'subject' heading, the Commission expressly refers to the two procedures, NN 162/B/2003 and N 317/B/2006. Moreover, in paragraph 7 of the decision, the Commission states that it would describe and assess both the system in force since 1 January 2003 and the system as it was going to be applied from the entering

into force of the new law. In addition, the notice in the *Official Journal* gives 1 January 2003 as the starting point for the duration of the aid measure, in respect of which no objection was raised.

21 It must also be noted that the case in the main proceedings concerns the setting of the aid amounts actually due under the aid measure at issue, for two given periods.

22 Finally, it must be noted that, although the first of the two decisions contested in the main proceedings predates the Commission decision and the second follows it, the two questions referred by the Verwaltungsgerichtshof relate to the same legal situation, namely, in both cases, the putting into effect of a measure prior to the positive Commission decision. In fact, the second contested decision was adopted following the decision of the Austrian authorities of 8 March 2006 which, since it provisionally fixed the amount of aid due and ordered disbursement of an advance payment, began to put the aid measure into effect prior to the Commission decision.

23 In the light of those preliminary findings and observations, it is appropriate to examine together the two questions which have been referred.

24 By its questions, the referring court asks, essentially, whether the prohibition on putting State aid into effect laid down in the last sentence of Article 88(3) EC requires a national court, in a situation such as that in the main proceedings, to dismiss an action brought by a State aid recipient concerning the amount of that State aid which it claims was payable in respect of a period predating a Commission decision finding that aid to be compatible with the common market.

25 In this respect, it must be noted that a positive Commission decision puts an end to the prohibition on putting advance aid into effect.

26 Where planned aid was properly notified to the Commission and was not put into effect prior to that decision, it can be put into effect as from the moment at which the decision is adopted, including, where relevant, in respect of a period predating the decision which is covered by the measure that has been declared compatible.

27 Where aid has been granted to a recipient in disregard of the last sentence of Article 88(3) EC, the national court may be required, upon application by another operator and even after the Commission has adopted a positive decision, to rule on the validity of the implementing measures and the recovery of the financial support granted.

28 It is apparent from paragraph 46 of the judgment in Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469 ('*CELF*') that, in such a case, Community law requires the national court to order the measures appropriate effectively to remedy the consequences of the unlawfulness, but that, even in the absence of exceptional circumstances, Community law does not impose an obligation of full recovery of the unlawful aid.

29 In such a situation, pursuant to Community law, the national court must order the aid recipient to pay interest in respect of the period of unlawfulness. Within the framework

of its domestic law, it may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the Member State's right to re-implement it, subsequently. It may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid (*CELF*, paragraphs 52 and 53).

30 Therefore, in a situation where the unlawful putting into effect of aid is followed by a positive Commission decision, Community law does not appear to preclude the recipient from, on the one hand, demanding the disbursement of aid payable for the future and, on the other hand, keeping aid received that was granted prior to the positive decision, subject always to the consequences arising from unlawfulness of aid disbursed prematurely, under the conditions set out in *CELF*.

31 The criterion that determines whether aid can be disbursed to a recipient in relation to a period predating a positive decision, or whether that recipient can keep aid already disbursed is therefore the finding, by the Commission, that the aid is compatible with the common market.

32 Consequently, Community law does not preclude a national court from ruling in a case such as that in the main proceedings, in which an aid recipient brings an action against the national authorities regarding the amount of aid payable, rather than the aid as such.

33 The decision handed down by the national court ends the dispute by bringing the situation in the present case closer to the one in which aid was put into effect prematurely but where the amount was not contested, as examined in *CELF*.

34 Moreover, it allows for the application of the principles identified in *CELF* in the context of the interpretation of the last sentence of Article 88(3) EC.

35 That analysis is not inconsistent with *Van Calster and Others*, as to the scope of which the referring court expresses uncertainty.

36 *Van Calster and Others* does not concern the situation of aid recipients, but that of operators subject, with retroactive effect, to charges intended specifically to finance an aid scheme and, consequently, regarded as forming an integral part of that aid scheme. In the cases in the main proceedings that gave rise to the judgment in *Van Calster and Others*, charges had been levied under an earlier aid scheme that was declared incompatible, prior to the adoption of a positive Commission decision regarding a new aid scheme replacing the first which envisaged the retroactive imposition of charges and the offsetting of those charges against the charges levied under the previous aid scheme.

37 In *Van Calster and Others*, the Court held that Article 93(3) of the EC Treaty (now Article 88(3) EC) precluded, in circumstances such as those of the cases in the main

proceedings, the levying of charges imposed retroactively in respect of a period prior to the date of a positive Commission decision.

38 In so doing, the Court considered only that, from the point of view of a third person on whom a financial charge is imposed prior to the adoption of a positive Commission decision, the only way to remedy, in respect of that person, the unlawfulness of putting an aid measure into effect is to repay that charge.

39 Therefore, the answer to the questions referred must be that the prohibition on putting State aid into effect laid down in the last sentence of Article 88(3) EC does not require a national court, in a situation such as that in the main proceedings, to dismiss an action brought by a State aid recipient concerning the amount of that State aid allegedly due in respect of a period predating a Commission decision finding that aid to be compatible with the common market.

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 (Second Chamber) hereby rules:

The prohibition on putting State aid into effect laid down in the last sentence of Article 88(3) EC does not require a national court, in a situation such as that in the main proceedings, to dismiss an action brought by a State aid recipient concerning the amount of that State aid allegedly due in respect of a period predating a decision of the Commission of the European Communities finding that aid to be compatible with the common market.

[Signatures]