Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

16 April 2015 *

(Reference for a preliminary ruling — State aid — Meaning — Article 87(1) EC — Privileges granted to a bank — Company exercising public service obligations — Existing aid and new aid — Article 88(3) EC — Powers of the national court)

In Case C-690/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Monomeles Efeteio Thrakis (Greece), made by decision of 18 November 2013, received at the Court on 27 December 2013, in the proceedings

Trapeza Eurobank Ergasias AE

v

Agrotiki Trapeza tis Ellados AE (ATE),

Pavlos Sidiropoulos,

THE COURT (Ninth Chamber),

composed of K. Jürimäe, President of the Chamber, J. Malenovský (Rapporteur), and A. Prechal, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Trapeza Eurobank Ergasias AE, by A. Mitsibouna and E. Katsigianni, dikigoroi,

— Agrotiki Trapeza tis Ellados AE (ATE), by E. Bourtzalas and M. Fefes, dikigoroi,

— the Greek Government, by G. Skiani and M. Germani, acting as Agents,

— the European Commission, by L. Flynn and I. Zervas, acting as Agents,

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

* Language of the case: Greek.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 87(1) EC and the last sentence of Article 88(3) EC.

2 The request has been made in proceedings between Trapeza Eurobank Ergasias AE ('Eurobank'), on the one hand, and Agrotiki Trapeza tis Ellados AE (ATE) ('ATE') and Mr Sidiropoulos, on the other hand, concerning the validity of the registration of a mortgage by ATE on immovable property belonging to Mr Sidiropoulos.

Legal context

EU law

3 Article 1(b), (c) and (f) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) provides:

'For the purpose of this Regulation:

(b) "existing aid" shall mean:

(i) … all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

…

(iv) aid which is deemed to be existing aid pursuant to Article 15;

…

(c) "new aid" shall mean all aid … which is not existing aid, including alterations to existing aid;

…

(f) "unlawful aid" shall mean new aid put into effect in contravention of Article [88 EC].'

4 Article 3 of that directive provides:

'Aid notifiable pursuant to Article 2(1) shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorising such aid.'

5 Article 15 of that regulation is worded as follows:

'1. The powers of the Commission to recover aid shall be subject to a limitation period of 10 years.

2. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. …

3. Any aid with regard to which the limitation period has expired, shall be deemed to be existing aid.'

6 Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999 (OJ 2004 L 140, p. 1) states :

'… an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market. …'

Greek law

7 ATE was established by Law 4332/1929 (FEK A 283 of 16 August 1929). Article 1(1) of that law provides:

'An independent banking organisation of public benefit is hereby established, which shall have its seat in Athens and be named '[ATE]', and with the object of providing all forms of agricultural credit, supporting cooperative organisations and improving the conditions under which agricultural operations generally and associated transactions are carried out.'

8 In order to compensate for the high level of risk involved in the grant of an agricultural credit, Articles 12 and 13(1) of that law conferred special privileges on ATE ('the privileges at issue in the main proceedings'), namely inter alia:

— the right to register a mortgage over the property of its debtors, farmers or other persons exercising a related activity, without it being required to conclude a mortgage contract with them;

— the right to seek enforcement with an ordinary private document, such as a credit document, which constitutes, in itself, an enforcement order, and

— the exemption from all fees and duties when registering such a mortgage and seeking enforcement thereof.

9 In 1987, the objects of ATE were extended to cover the exercise of all banking activities.

10 Article 26(1) and (4) of Law 1914/1990 (FEK A 178 of 17 December 1990) provides:

'[ATE] shall be converted into a public limited company as of the date of publication — in accordance with the provisions pertaining to public limited companies in force — in the Official Gazette, Issue pertaining to Public Limited Companies, of its new statutes, which shall be drawn up by it on the basis of the provisions concerning public limited banking companies within 6 months from the date of publication of the present law and shall be approved by a joint decision of the Ministers for Finance and Agriculture.

…

All special regulations concerning the [ATE] relating in particular to its substantive and procedural privileges, its tax and other exemptions, its instruments of credit, the securing of its claims, and itself in general as the subject of rights and obligations, shall remain in force and shall apply unchanged …'

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

11 In 2001, ATE and Mr Sidiropoulos concluded a loan agreement and in 2003 a contract for a credit facility in order to meet the latter's farming requirements. For the purpose of guaranteeing its loans, following the conclusion of those contracts, ATE registered a mortgage over the agricultural land belonging to the debtor.

12 Eurobank, a bank registered as a public limited company, was also a creditor of Mr Sidiropoulos. On that basis, Eurobank brought before the Eirinodikeio Dramas (District Court, Dráma) an application for an order for payment, which was granted.

13 On the basis of that order for payment, Eurobank initiated an enforcement procedure over Mr Sidiropoulos' agricultural land. In that procedure, other creditors came forward, including ATE, which obtained, on the basis of its mortgage, the status of preferred creditor. Since the sale price of the land was lower than the total sums held by ATE, Eurobank was not registered on the list of preferred creditors and, therefore, failed to obtain repayment of its loans.

14 Before the Monomeles Protodikeio Dramas (Regional Court, Dráma) Eurobank contested the status granted to ATE on the list of creditors, claiming that the mortgage registered by ATE infringed Article 87 EC and that it should, consequently, be annulled. That court dismissed the action.

15 Eurobank lodged an appeal against that decision before the Monomeles Efeteio Thrakis (Thrace Court of Appeal, sitting as a single judge), which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) (a) Do the substantive and procedural privileges conferred upon [ATE] by Articles 12 and 13(1) of Law 4332/1929, in conjunction with Article 26(1) of Law 1914/1990, fall within the scope of Article [87(1) EC]?

(b) Does the same restriction apply even if it is assumed that [ATE] continues to engage in activity of 'public benefit' under its statutes?

(2) If the answers to questions (1)(a) and (1)(b) are in the affirmative, should Greece have observed the procedure prescribed by Article [88(3) EC] in order for the privileges in question to remain in force?

(3) In the instance in question, must this court not apply Articles 12 and 13(1) of Law 4332/1929 inasmuch as they may be contrary to Articles [87(1) and 88(3) EC]?'

Consideration of the questions referred for a preliminary ruling

Question 1(a)

16 By question 1(a), the referring court asks, in essence, whether Article 87(1) EC must be interpreted as meaning that its scope of application covers privileges conferred upon a bank, such as the right unilaterally to register a mortgage over immovable property belonging to farmers or other persons engaged in similar agricultural activities, the right to seek enforcement with an ordinary private document and exemption from fees and duties during the registration of that mortgage and that enforcement.

17 It is settled case-law that, for a measure, as State aid, to come within Article 87(1) EC, first, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient; fourth, it must distort or threaten to distort competition, on the assumption that all those conditions must be cumulatively fulfilled (see, inter alia, judgment in *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraphs 38 and 39 and the case-law cited).

18 Concerning, first of all, the condition relating to an intervention by the State or through State resources, it should be noted that only advantages granted directly or indirectly through State resources or constituting an additional burden on the State are to be regarded as aid within the meaning of Article 87(1) EC. The very wording of this provision and the procedural rules laid down in Article 88 EC show that advantages granted from resources other than those of the State do not fall within the scope of the provisions in question (judgment in *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 99 and the case-law cited).

19 In accordance with settled case-law, it is necessary to determine, for the purposes of establishing whether the advantage given to the beneficiary is a burden on the State budget, whether there exists a sufficiently direct link between, on the one hand, that advantage and, on the other hand, a reduction of the State budget, or a sufficiently concrete economic risk of burdens on that budget (judgment in *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 109).

20 Concerning, next, the condition to the effect that the measure at issue must be regarded as conferring an advantage on its recipient, it should be noted that measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or which fall to be regarded as an economic advantage that the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (judgment in *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 21 and the case-law cited).

21 Thus, measures which, in various forms, mitigate the burdens normally included in the budget of an undertaking and which, accordingly, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid (judgment in *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 22).

22 It should, also, be noted that Article 87 EC prohibits aid 'favouring certain undertakings or the production of certain goods', that is to say selective aid (judgment in P, C-6/12, EU:C:2013:525, paragraph 17). Thus, advantages resulting from a general measure applicable without distinction to all economic operators do not constitute State aid within the meaning of that article (see, to that effect, judgment in *Italy* v *Commission*, C-66/02, EU:C:2005:768, paragraph 99).

23 Concerning, finally, the conditions relating to the effect on trade between Member States and the risk of distortion of competition, it should be borne in mind that for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (judgment in *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 76 and the case-law cited).

24 In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-European trade, the latter must be regarded as affected by that aid (judgment in *Libert and Others*, C-197/11 and C-203/11, EU:C:2013:288, paragraph 77 and the case-law cited).

25 In addition, it not necessary that the beneficiary undertaking itself be involved in intra-European trade. Aid granted by a Member State to an undertaking may help to maintain or increase domestic activity, with the result that undertakings established in other Member States have less chance of penetrating the market of the Member State concerned. Furthermore, the strengthening of an undertaking which, until then, was not involved in intra-European trade may place that undertaking in a position which enables it to penetrate the market of another Member State (judgment in *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 143 and the case-law cited).

26 For the purposes of the answer to the question referred, it is for the referring court to determine whether, in the light of the case-law cited in the above paragraphs of the present judgment, privileges held by a company, such as those at issue in the main proceedings, satisfy all the four conditions under Article 87(1) EC which are necessary for them to be classified as State aid within the meaning of that provision, while taking account of the following interpretation criteria.

27 Concerning the privileges benefiting ATE, under Law 4332/1929, it cannot be ruled out that they might come within the scope of Article 87(1) EC.

28 First of all, those privileges, due in particular to the exemption from fees provided for by that law, are capable of depriving the treasury of the Member State of certain sources of liquidity and, therefore, to reduce the latter's budget. Next, such an exemption could reduce the burden normally imposed on the budget of a bank, thereby conferring on it an economic advantage over its competitors. The file submitted to the Court does not disclose whether other banks benefit from such an exemption, which would indicate that that measure is selective. Finally, it cannot be ruled out that that exemption, in connection with the other privileges granted by Law 4332/1929, has the effect of strengthening ATE's position in relation to competing banks active in intra-European trade and that it makes it more difficult to penetrate the market of the Member State for banks established in other Member States.

29 In the light of all the foregoing considerations, the answer to question 1(a) is that Article 87(1) EC must be interpreted as meaning that its scope of application may cover privileges, such as those at issue in the main proceedings, in accordance with which a bank has the right unilaterally to register a mortgage over immovable property belonging to farmers or other persons engaged in similar agricultural activities, the right to seek enforcement with an ordinary private document and the right to be exempted from the payment of fees and duties connected with that registration. It is, however, for the referring court to determine whether that is the case in the main proceedings.

Question 1(b)

30 By question 1(b), the referring court asks, in the light of the answer to question 1(a), what the effect is of the fact that privileges, such as those at issue in the main proceedings, conferred by national legislation upon an independent bank acting for the public benefit, at the time of its establishment, in consideration for entering into agricultural credit activities and for specific tasks entrusted to that bank, are still in force, and that even after the functions of that bank were extended to cover all banking activities and that bank has become a public limited company.

31 In that regard, it should be noted that, according to settled case-law, measures regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them do not constitute State aid for the purposes of Article 87(1) EC (judgment in *Fallimento Traghetti del Mediterraneo*, C-140/09, EU:C:2010:335, paragraph 35 and the case-law cited).

32 The Court has also stated that, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied (judgment in *Fallimento Traghetti del Mediterraneo*, C-140/09, EU:C:2010:335, paragraph 36).

33 First, the undertaking receiving such compensation must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Fourth, the compensation must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with the requisite means so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (judgment in *Fallimento Traghetti del Mediterraneo*, C-140/09, EU:C:2010:335, paragraphs 37 to 40 and the case-law cited).

34 It is, therefore, for the referring court to determine, in the light of the case-law cited in the above paragraphs of the present judgment, whether, in particular, as a result of the extension of the activities and modifications to the statute of ATE, the privileges at issue in the main proceedings constitute compensation for the services provided by that bank in order to discharge public service obligations.

35 In the light of all the foregoing considerations, the answer to question 1(b) is that the answer to question 1(a) is capable of being affected by the fact that privileges, such as those at issue in the main proceedings, conferred by national legislation upon an independent bank acting for the public benefit, at the time of its establishment, in consideration for entering into agricultural credit operations and for specific tasks entrusted to that bank, are still in force, and that even after the functions of that bank were extended to cover all banking activities and that bank has become a public limited company. It is for the referring court to determine whether, in the light of all the relevant legal and factual circumstances, the four cumulative conditions justifying, in accordance with the Court's case-law, the finding that those privileges constitute compensation for services provided by that bank in order to discharge public service obligations, and that they thus escape being classified as State aid, are satisfied.

Question 2

36 By question 2, the referring court asks, in essence, whether Article 87(1) EC must be interpreted as meaning that where privileges, such as those at issue in the main proceedings, fall within the scope of application of that provision, the Member State which established them is required to follow the preliminary examination procedure provided for in Article 88(3) EC.

37 In that regard, it should be noted, at the outset, that Article 88 EC provides for different procedures according to whether aid is existing or new. Whilst under Article 88(3) EC new aid must be notified to the Commission and may not be implemented until that procedure has led to a final decision, under Article 88(1) EC existing aid may be lawfully implemented so long as the Commission has made no finding of incompatibility (judgment in *Kremikovtzi*, C-262/11, EU:C:2012:760, paragraph 49 and the case-law cited). Thus, Article 88(3) EC does not give national courts the power to prohibit existing aid from being put into effect (judgment in P, C-6/12, EU:C:2013:525, paragraph 41).

38 It is necessary, therefore, to determine whether privileges, such as those at issue in the main proceedings, are capable of constituting existing aid.

39 According to Article 1(b) of Regulation No 659/1999, aid may be classified as existing either where it was granted before the entry into force of the Treaty in the Member State concerned, where it remains applicable after that date and has not been subsequently amended, or where it was granted after the entry into force of the Treaty in the Member State concerned, but the 10-year limitation period, provided for in Article 15(3) of that regulation, has expired.

40 It is therefore for the referring court to determine, first, whether, in the light, in particular, of the points noted above in the examination of question 1, the privileges at issue, as conferred on ATE at the time of its establishment in 1929, fell to be classified as State aid, within the meaning of Article 87(1) EC, so that they should be regarded as existing aid since they were established before the entry into force of the Treaty in the Member State concerned.

41 If that is the case, that court should determine, second, whether, taking account of the changes made to ATE in 1987 and in 1990 and in particular the extension of the latter's activities, it can be considered that the privileges initially granted were altered by the fact that they were extended to credit activities other than those initially covered. If that is the case, the Member State was thus required in principle to follow the preliminary examination procedure provided for in Article 88(3) EC. Conversely, if that is not the case, that procedure did not require to be followed.

42 Furthermore, were the referring court to come to the conclusion that the privileges at issue did not, at the time when they were granted to ATE, constitute State aid but that they became such following the extension of the activities and modifications to the statute of ATE, after the entry into force of the Treaty in the Member State concerned, the privileges at issue in the main proceedings could not, in principle, be regarded as existing aid.

43 That being said, they could nevertheless be regarded as existing aid where, as was noted in paragraph 39 of the present judgment, the limitation period provided for in Article 15(3) of Regulation No 659/1999 has expired. In such a case, the Member State would not be required to follow the preliminary examination procedure provided for in Article 88(3) EC.

44 Conversely, if the limitation period was still running, the privileges at issue would constitute new aid and the Member State concerned would be required, as is clear from paragraph 37 of the present judgment, to follow the preliminary examination procedure provided for in Article 88(3) EC.

45 Consequently, in the situations referred to in paragraphs 41 and 42 of the present judgment, it is for the referring court to determine whether, in the circumstances of the case in the main proceedings, that limitation period has expired.

46 In the light of all the foregoing considerations, the answer to question 2 is that Article 87(1) EC must be interpreted as meaning that where privileges, such as those at issue in the main proceedings, fall within the scope of application of that provision, the Member State which established them is required to follow the preliminary examination procedure provided for in Article 88(3) EC provided that those privileges became new aid after the entry into force of the Treaty in the Member State concerned and that the limitation period laid down by Article 15(3) of Regulation No 659/1999 has not expired, which is a matter for the referring court to verify.

Question 3

47 By question 3, the referring court asks, in essence, whether Articles 87(1) EC and 88(3) EC must be interpreted as meaning that where privileges, such as those at issue in the main proceedings, are incompatible with those provisions, that court is required to prohibit the application of national provisions establishing them.

48 In that regard, it should be noted that an answer to that question may be helpful to the referring court only in the event that new State aid, within the meaning of Article 1(c) of Regulation No 659/1999, is at issue.

49 As is apparent from paragraph 37 of the present judgment, only new aid is subject to the preliminary examination procedure provided for in Article 88(3) EC.

50 It follows from Article 88(3) EC and from Article 3 of Regulation No 659/1999 that new aid may not be put into effect before the Commission has taken a decision authorising it.

51 It follows that new aid which is put into effect in breach of the obligations arising from Article 88(3) EC is unlawful. That interpretation is confirmed, moreover, by Article 1(f) of Regulation No 659/1999 (judgment in *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 28).

52 Moreover, according to settled case-law, it is for the national courts to draw the necessary consequences, in accordance with their domestic law, with regard both to the validity of the acts giving effect to the aid and the recovery of financial support granted in disregard of that provision (judgment in *Xunta de Galicia*, C-71/04, EU:C:2005:493, paragraph 49).

53 It follows that, if the Member State concerned has infringed Article 88(3) EC, the referring court is required to exclude the application of national provisions establishing the unlawful privileges.

54 In the light of those considerations, the answer to question 3 is that Articles 87(1) EC and 88(3) EC must be interpreted as meaning that where the referring court considers that the privileges at issue constitute, in view of the answer to question 2, new State aid, it is required to exclude the application of national provisions establishing such privileges on account of their incompatibility with those provisions of the Treaty.

Costs

55 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 (Ninth Chamber) hereby rules:

1. **Article 87(1) EC must be interpreted as meaning that its scope of application may cover privileges, such as those at issue in the main proceedings, in accordance with which a bank has the right unilaterally to register a mortgage over immovable property belonging to farmers or other persons engaged in similar agricultural activities, the right to seek enforcement with an ordinary private document and the right to be exempted from the payment of fees and duties connected with that registration. It is, however, for the referring court to determine whether that is the case in the main proceedings.**

2. **The answer to question 1(a) is capable of being affected by the fact that privileges, such as those at issue in the main proceedings, conferred by national legislation upon an independent bank acting for the public benefit, at the time of its establishment, in consideration for entering into agricultural credit operations and specific tasks entrusted to that bank, are still in force, and that even after the functions of that bank were extended to cover all banking activities and that bank has become a public limited company. It is for the referring court to determine whether, in the light of all the relevant legal and factual circumstances, the four cumulative conditions justifying, in accordance with the Court's**

case-law, the finding that those privileges constitute compensation for services provided by that bank in order to discharge public service obligations, and that they thus escape being classified as State aid, are satisfied.

3. **Article 87(1) EC must be interpreted as meaning that where privileges, such as those at issue in the main proceedings, fall within the scope of application of that provision, the Member State which established them is required to follow the preliminary examination procedure provided for in Article 88(3) EC provided that those privileges became new aid after the entry into force of the Treaty in the Member State concerned and that the limitation period laid down by Article 15(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] has not expired, which is a matter for the referring court to verify.**

4. **Articles 87(1) EC and 88(3) EC must be interpreted as meaning that where the referring court considers that the privileges at issue constitute, in view of the answer to question 2, new State aid, it is required to exclude the application of national provisions establishing such privileges on account of their incompatibility with those provisions of the Treaty.**

[Signatures]