



EUROPEAN COMMISSION

Legal Service

Brussels, 11 September 2023
sj.c(2023)9452862

Senāts – Augstākā tiesa
Administratīvo lietu departaments
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Object: Opinion of the European Commission in Case SKA-356/2023 pending before the Senāts (our ref.: SA.106948.NC)

Dear Sir/Madam,

The European Commission (the ‘Commission’) has the honour to submit an opinion in response to the request submitted on 29 March 2023 by the Senāts, on the basis of Article 29(1) of Council Regulation (EU) 2015/1589 (the ‘Procedural Regulation’) ⁽¹⁾.

The Commission recalls that, in accordance with Article 29(1) of the Procedural Regulation and point 117 of the Commission’s notice on the enforcement of State aid rules by national courts ⁽²⁾, opinions of the Commission are not binding on the national court. Only the Union Courts can give a binding interpretation of the Union’s State aid rules. Therefore, the Commission’s opinion is without prejudice to the possibility or obligation for the national court to ask the Court of Justice of the European Union for a preliminary ruling regarding the interpretation or the validity of Union law in accordance with Article 267 of the Treaty on the Functioning of the European Union (‘TFEU’).

1. RELEVANT FACTS AND PROCEDURE

- (1) This opinion is based on the factual findings made by the Senāts in its request, which the Commission assumes to be accurate.
- (2) The dispute pending before the Senāts concerns State aid referred to in Cabinet Regulation No 676 of 10 November 2020 on aid to undertakings affected by the

⁽¹⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

⁽²⁾ Commission notice on the enforcement of State aid rules by national courts (OJ C 305, 30.7.2021, p. 1) (the ‘Enforcement Notice’).

COVID-19 crisis to ensure the flow of working capital ⁽³⁾, which entered into force on 17 November 2020 (the ‘Aid Regulation’). The Aid Regulation introduced an aid scheme to counter the liquidity shortage faced by undertakings during the COVID-19 pandemic ⁽⁴⁾.

- (3) Although the Senāts’ request does not detail those elements, the Commission adds that the aid scheme introduced by the Aid Regulation was notified to and approved by the Commission ⁽⁵⁾, and so were the five subsequent amendments to that scheme ⁽⁶⁾. The Commission assessed and approved that aid scheme, as well as its amendments, under Article 107(3), point (b), TFEU, in light of Section 3.1 of the Communication from the European ‘Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak’ (2020/C 91 I/01) ⁽⁷⁾ (the ‘Temporary Framework’).
- (4) In accordance with the Aid Regulation:
- (a) *‘[t]he moment of granting the aid is deemed to be the day on which the State Revenue Service takes a decision regarding the granting of the aid’* (paragraph 23 of that Regulation);
- (b) *‘[t]he decision is taken by 30 June 2022, in accordance with the Temporary Framework’* (a deadline that had been amended various times, from 30 June 2021 initially) (paragraph 24 of that Regulation).
- (5) On 14 April 2021, the applicant in the proceedings currently before the Senāts submitted an application for aid to the State Revenue Service under the Aid Regulation. On 17 June 2021 the State Revenue Service took an initial decision refusing to grant the aid. On 14 July 2021, following the applicant’s challenge to that decision, the Director-General of the State Revenue Service adopted a final decision upholding that initial decision. On 16 August 2021 the applicant lodged an action before the District Administrative Court, which was dismissed on 1 February 2022. On appeal, the Regional Administrative Court gave a judgment on

⁽³⁾ Available at: <https://likumi.lv/ta/id/318758-noteikumi-par-atbalstu-covid-19-krizes-skartajiem-uznemumiem-apgrozamo-lidzeklu-plusmas-nodrosinasanai>

⁽⁴⁾ Request for opinion, paragraphs 1 and 2.

⁽⁵⁾ Commission Decision C(2020)9355 final of 16 December 2020 in case SA.59592 (2020/N) – Latvia COVID-19: Grants to companies affected by the COVID-19 crisis to ensure the flow of working capital (OJ C 122, 9.4.2021, p. 1).

⁽⁶⁾ See Commission Decisions C(2021)837 final of 3 February 2021 in case SA.61338 (2021/N) (OJ C 260, 2.7.2021, p. 1), C(2021)1504 final of 1 March 2021 in case SA.61873 (2021/N) (OJ C 260, 2.7.2021, p. 1), C(2021)4136 final of 3 June 2021 in case SA.63046 (2021/N) (OJ C 260, 2.7.2021, p. 1), C(2021)9537 final of 14 December 2021 in case SA.100596 (2021/N) (OJ C 135, 25.3.2022, p. 1) and C(2022)579 final of 27 January 2022 in case SA.101506 (2022/N) (OJ C 71, 11.2.2022, p. 1).

⁽⁷⁾ Communication from the Commission - Temporary framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91I, 20.3.2020, p. 1), as amended by Commission Communications C(2020) 2215 (OJ C 112I, 4.4.2020, p. 1), C(2020) 3156 (OJ C 164, 13.5.2020, p. 3), C(2020) 4509 (OJ C 218, 2.7.2020, p. 3), C(2020) 7127 (OJ C 340I, 13.10.2020, p. 1), C(2021) 564 (OJ C 34, 1.2.2021, p. 6), C(2021) 8442 (OJ C 473, 24.11.2021, p. 1) and C(2022) 7902 (OJ C 423, 7.11.2022, p. 9).

30 June 2022, granting the application and ordering the Latvian administration to issue an act taking into account the legal considerations referred to by that court. That judgment was challenged by the Latvian administration before the Senāts, where the case is currently pending ⁽⁸⁾.

- (6) The Senāts emphasises that the case at hand is only one of a number of cases pending before various Latvian jurisdictions and concerning the judicial review of refusals to grant State aid, and hence requests a comprehensive opinion of the Commission on the questions raised.

2. QUESTIONS FROM THE NATIONAL COURT

- (7) In its request, the Senāts asks the Commission to provide its opinion on the following questions ⁽⁹⁾:
1. Would State aid be compatible with the internal market if it were granted as a result of dispute and/or appeal proceedings, but with a delay between the period for which the aid is sought and/or after expiry of the deadline laid down in paragraph 22(d) of the Temporary Framework, if the decision initially refusing to grant the aid but found to be unlawful had been taken before the deadline laid down in paragraph 22(d) of the Temporary Framework and/or without significant delay in respect of the period for which the aid is sought?
 2. The answer to the first question may depend on the interpretation of the term ‘granting’ used in paragraph 22(d) of the Temporary Framework. In particular, is ‘granting’ to be understood as meaning the decision by an authority which initially did not grant the aid requested, but as a result of legal proceedings it was found that the initial decision was unlawful and that aid should have been granted? Or is ‘granting’ to be understood as meaning the court ruling recognising the authority’s decision as unlawful and instructing the authority to issue the undertaking with a favourable decision, i.e. to grant aid? Or perhaps ‘granting’ is to be understood as the decision by the authority taken on completion of legal proceedings which, in implementation of a court ruling, ultimately granted aid?
 3. The answer to the first question might depend on the interpretation of the objective of State aid, which may differ from the description given in this position. It is, of course, possible that the objective of State aid is broader and also designed to mitigate effects of the COVID-19 outbreak (accumulated debts, for instance) which have persisted even after the aid period has come to an end and the restrictions brought about by COVID-19 no longer apply, and which could be remedied even if the undertaking were to receive aid at a later date. The question is therefore how broadly the objective of State aid is to be understood and what circumstances should be taken into account when assessing whether aid might still achieve the objective in question?

⁽⁸⁾ Request for opinion, paragraph 11.

⁽⁹⁾ Request for opinion, pages 5 and 6.

4. However, if State aid is not compatible with the internal market, would the principle of equality not be infringed? Might this breach be remedied by the fact that an undertaking is entitled to claim damages, given that compensation for damages does not involve the granting of State aid and that proof of damage might be legally more onerous than the claim for State aid *per se*, which would necessarily involve further administrative and judicial proceedings?

3. THE COMMISSION'S OPINION

3.1. On questions 1 and 2 – moment of granting of State aid

- (8) By its first and second questions, the Senāts seeks to understand if point 22(d) of the Temporary Framework allows the grant of State aid in a situation where a decision refusing to award such aid was taken before the expiry of the deadline laid down in that provision, but that decision is later found unlawful, significantly after the period for which the aid is sought, and/or after the expiry of the deadline laid down in point 22(d) of the Temporary Framework, and the administration is instructed to award the aid requested. In this connection, the Senāts also asks what the 'granting' of aid means for the purposes of point 22(d), and in particular whether it relates to any of the following:
- (a) the moment when the initial administrative decision concerning the granting of the aid (and refusing that grant) was issued, if that decision is later found unlawful;
 - (b) the moment when that decision is found to be unlawful and the administration is instructed to adopt a favourable decision; or
 - (c) the moment when the administration, upon the completion of the review of its initial decision, adopts a new decision favourable to the aid applicant.
- (9) As a preliminary remark to the first question, under Section 3.1 of the Temporary Framework, as long as State aid is granted before 30 June 2022, and if all the conditions set by the Commission Decisions authorising the aid scheme at hand are fulfilled, such aid can be found compatible in the circumstances of the case regardless of how much time has elapsed between the period with respect to which the aid is granted and the moment when it is granted.
- (10) Turning to the essence of the Senāts' questions, in accordance with settled case-law, '*aid must be considered to be granted at the time that the right to receive it is conferred on the beneficiary under the applicable national rules*' ⁽¹⁰⁾, regardless of when the aid was actually disbursed to the beneficiary. As clarified in the *Magdeburger Mühlenwerke* judgment, '*it is for the referring court to determine, on the basis of applicable national law, when that aid must be considered to be*

⁽¹⁰⁾ Judgment of the Court of Justice of 21 March 2013, *Magdeburger Mühlenwerke*, C-129/12, EU:C:2013:200, paragraph 40; see also the judgment of the Court of Justice of 19 December 2019, *Arriva Italia*, C-385/18, EU:C:2019:1121, paragraph 37.

granted. To that end, that court must take account of all the conditions laid down by national law for obtaining the aid in question.’ ⁽¹¹⁾

- (11) On the basis of that case-law, the Court of Justice found, in *Commission v European Food and Others*, that ‘*the decisive factor for establishing the date on which the right to receive State aid was conferred on its beneficiaries by a particular measure is the acquisition by those beneficiaries of a definitive right to receive that aid and to the corresponding commitment, by the State, to grant that aid*’ ⁽¹²⁾.
- (12) In the same vein, in *BSCA v Commission* the General Court held that ‘*the time of granting aid is that of a legally binding act by which the competent national authority undertakes to grant the aid to its recipient by an unconditional and legally binding promise. That criterion necessarily implies that, on the date of the granting of the aid, the recipient of the aid can be identified*’ ⁽¹³⁾.
- (13) It remains thus for the national courts to identify, based on the relevant provisions of national law, the point in time when the applicant acquired a legally binding and unconditional right to receive aid under the Aid Regulation.
- (14) In that regard, the Commission’s understanding (subject to the Senāts’ assessment) is that, in principle, in line with paragraph 23 of the Aid Regulation, the granting of the aid is deemed to take place when the State Revenue Service adopts a decision regarding the grant of such aid. In the case at hand, the initial decision regarding the grant of such aid (and refusing such grant) was adopted on 17 June 2021. The key issue here seems to be whether, at that moment, the applicant had a definitive right, pursuant to national law, to receive that aid, which would imply that the provisions applicable to the aid allowed a determination, with sufficient certainty, of the entitlement to the aid and of its amount.
- (15) The Commission underlines that, if it were established that the aid was not granted to the applicant before the expiry, on 30 June 2022, of the deadline laid down in point 22(d) of the Temporary Framework and specified in the Commission decisions approving the scheme in question and its amendments, then the award of such aid after that date would be in breach of the standstill obligation laid down in Article 108(3) TFEU ⁽¹⁴⁾. It would be the task of the national courts to prevent the disbursement of such aid to the applicant ⁽¹⁵⁾, under any form (in this regard, please also see the Commission’s opinion on question 4 below).

⁽¹¹⁾ Judgment in *Magdeburger Mühlenwerke*, paragraph 41.

⁽¹²⁾ Judgment of the Court of Justice of 25 January 2022, *Commission v European Food and Others*, C-638/19 P, EU:C:2022:50, paragraph 123.

⁽¹³⁾ Judgment of the General Court of 25 January 2018, *Brussels South Charleroi Airport (BSCA) v Commission*, T-818/14, EU:T:2018:33, paragraph 72 and case-law cited.

⁽¹⁴⁾ Article 108(3), third sentence, TFEU prevents Member States from granting State aid unless the Commission has adopted a final decision authorising such aid. In the case of the scheme at hand, the Commission’s authorisation only extends to State aid granted by 30 June 2022 (see recitals (12) and (24) of the Commission Decision in case SA.100596 (2021/N) (see footnote 6).

⁽¹⁵⁾ See points 71 to 73 of the Enforcement Notice and the case-law cited.

3.2. On question 3 – role of a broader objective of mitigating COVID-19 impact

- (16) By its third question, the Senāts inquires about whether the objective of mitigating the effects of the COVID-19 pandemic (e.g. accumulated debts), which may have persisted also after the support period had lapsed and the related restrictions had come to an end, could justify the grant of State aid after 30 June 2022. That question would be relevant in the hypothesis that the aid in question had not been granted by 30 June 2022.
- (17) First, as a derogation from the general principle laid down in Article 107(1) TFEU that State aid is incompatible with the internal market, the rule allowing the aid to be granted only by 30 June 2022 must be interpreted strictly ⁽¹⁶⁾. It is neither for national courts, nor for the Commission to interpret that rule in a way that would allow aid under Section 3.1 of that Framework to be granted beyond the date laid down in its point 22(d) and in the Commission decisions authorising the scheme.
- (18) Second, given that under Section 3.1 of the Temporary Framework aid cannot be granted beyond 30 June 2022, the Senāts in essence asks if such aid can be found compatible under another legal basis. The third question therefore concerns the assessment of compatibility with the internal market of State aid that would be granted after the expiry of the deadline laid down in point 22(d) of the Temporary Framework. In this regard, it should be underlined that the exclusive competence for assessing such compatibility lies with the Commission and thus the assessment that the Senāts refers to in its third question falls outside of the competences of national courts ⁽¹⁷⁾.
- (19) It follows that aid granted after 30 June 2022 falls outside the scope of the Commission's authorisation, as well as of the compatibility criteria laid down in Section 3.1 of the Temporary Framework. Such aid cannot be granted under Section 3.1 of that Framework after 30 June 2022 regardless of whether it could still serve an objective of mitigating the impact of the COVID-19 pandemic. Such aid, if granted, would be considered unlawful.

3.3. On question 4 – on the possibility to grant compensation in lieu of State aid

- (20) The final question of the Senāts again concerns the hypothesis that the aid in question had not been granted by 30 June 2022. In such a case, the granting of the aid after that date would be outside the scope of the Commission's authorisation and so the applicant would not be able to obtain the aid, unlike other eligible undertakings that managed to receive aid before 30 June 2022. This could, in the Senāts' view, potentially infringe the principle of equality and could give rise to a claim for compensation of damage stemming from such infringement.
- (21) The Senāts submits in this regard that compensation of damage does not involve the granting of State aid. In that connection, the Commission points out that indeed,

⁽¹⁶⁾ See e.g. judgment of the Court of Justice of 14 October 2010, *Nuova Agricast and Cofra v Commission*, C-67/09 P, EU:C:2010:607, paragraph 74; judgment of the General Court of 9 September 2018, *HH Ferries and Others v Commission*, T-68/15, EU:T:2018:563, paragraph 142 and case-law cited.

⁽¹⁷⁾ See points 34 *et seq.* of the Enforcement Notice.

in line with the *Asteris* case-law, ‘State aid, that is to say measures of the public authorities favouring certain undertakings or certain products, is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals. [...] damages which the national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals do not constitute aid within the meaning of Articles [107 and 108 TFEU]’ ⁽¹⁸⁾.

- (22) However, as recognised by the Senāts ⁽¹⁹⁾ and as clarified in the Enforcement Notice, ‘[w]hile individuals may request national courts to order the payment of damages which they consider to be entitled to, such actions cannot have the effect of circumventing the effective application of EU State aid rules. In particular, individuals who might be entitled under national law to receive aid which has not been notified to and approved by the Commission, but who have not received such aid, cannot claim as compensation for damages the equivalent of the sum of the non-received aid, since this would constitute an indirect grant of unlawful aid. It follows that the *Asteris* case-law does not concern cases where the applicant requests a national court to award to it previous State aid, which the applicant has not received for whatever reason.’ ⁽²⁰⁾
- (23) In that vein, in its *DOBELES HES* judgment, the Court of Justice clarified that where national legislation has established State aid, the payment of a sum claimed before the courts as compensation for harm consisting of the complete non-payment of the advantage to which the applicant considers that it was entitled under that legislation, is of the same kind as that advantage and also constitutes State aid ⁽²¹⁾. It is irrelevant, for the purposes of determining whether such sums correspond to State aid, whether actions seeking payment of those sums are classified as ‘claims for compensation’ or as ‘claims for damages’ under national law ⁽²²⁾.
- (24) In this regard, the Senāts refers to a potential breach of the principle of equality. The Commission is not in a position to comment on whether a claim for damages could be based on a breach of the principle of equality under national law. The Commission notes, however, that if that breach were to stem from the fact that the applicant did not receive a certain grant while its competitors did, then it appears

⁽¹⁸⁾ Judgment of the Court of Justice of 27 September 1988, *Asteris and Others*, Joined Cases 106/87 to 120/87, EU:C:1988:457, paragraphs 23 and 24.

⁽¹⁹⁾ Request for opinion, paragraph 14.

⁽²⁰⁾ Point 97 of the Enforcement Notice and case-law cited therein, i.e. the judgments of the Court of Justice of 29 June 2004, *Commission v Council*, C-110/02, EU:C:2004:395, paragraph 43; of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraphs 59 to 63; and of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, EU:C:2015:742, paragraphs 42 to 44, as well as the opinion of Advocate General Ruiz-Jarabo Colomer of 28 April 2005 in Joined Cases C-346/03 and C-529/03 *Atzeni and Others*, EU:C:2005:256, paragraph 198.

⁽²¹⁾ Judgment of the Court of Justice of 12 January 2023, *DOBELES HES*, Joined Cases C-702/20 and C-17/21, EU:C:2023:1, paragraphs 62, 63 and 65.

⁽²²⁾ *Idem*, paragraph 60.

that the damage would essentially seek to replace the grant that was refused to the applicant (as it would have been that amount that would have set the applicant on equal footing with its competitors). If so, then an action for damages would in fact concern the amount of aid that was not paid to the applicant. Consequently, the damages claimed in such an action would also have the nature of State aid, else State aid law would be circumvented.

- (25) Furthermore, it does not result from the explanations of the Senāts that the damages action in question would seek compensation for harm resulting from the non-payment of State aid, that would be distinct from the non-payment itself ⁽²³⁾.
- (26) It follows that if the aid requested by the applicant has not been granted by 30 June 2022, national courts cannot award, after 30 June 2022, in replacement of such aid, compensation for the applicant's damage consisting of the non-payment of that aid.

3.4. Conclusion

- (27) In conclusion, the answers to the questions from the Senāts, on the basis of the factual elements provided to the Commission by the latter, are as follows:
 - (a) State aid must be considered to be granted at the time that the right to receive it is conferred on the beneficiary under the applicable national rules, which circumstance is for the national courts to assess taking account of all the conditions laid down by national law for obtaining the aid in question;
 - (b) State aid cannot be granted under Section 3.1 of the Temporary Framework after 30 June 2022 regardless of whether such aid could still serve an objective of mitigating the impact of the COVID-19 pandemic; such aid, if granted, would be considered unlawful;
 - (c) if the aid requested by the applicant has not been granted by 30 June 2022, national courts cannot award, after 30 June 2022, in replacement of such aid, compensation for the applicant's damage consisting of the non-payment of that aid.

Finally, pursuant to point 129 of the Enforcement Notice, the Commission may also make its opinions publicly available on its website.

For this reason, the Senāts is requested to give its consent to the publication of the opinion at hand. Should the opinion contain information which is considered confidential including professional secrecy and data protected by Regulation (EU) 2018/1725 ⁽²⁴⁾ ('confidential information'), the Senāts is asked to provide the Commission services with a non-confidential version thereof or indicate which parts of the opinion would contain confidential information. The Commission would be grateful if the Senāts could reply at

⁽²³⁾ Hypothesis mentioned in the judgment of the Court of Justice of 12 January 2023, *DOBELES HES*, Joined Cases C-702/20 and C-17/21, EU:C:2023:1, paragraph 62.

⁽²⁴⁾ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (OJ L 295, 21.11.2018, p. 39).

its earliest convenience at the following mail address: COMP-AMICUS-STATE-AID@ec.europa.eu, preferably within 2 months after the date of this opinion, mentioning the reference number SA.106948.NC. In case of objections, the Court is kindly asked to give the reasons for its refusal.

To complement the envisaged publication of the opinion, the Commission also intends to publish the full judgment of the Senāts when it is given, cleared from confidential information, on the Commission's website, or to provide a link to the national website where that judgment is published, in order to give broader knowledge to the public and to share good practices with other jurisdictions. To this end, the Commission asks the Senāts to provide it with the judgement or with the link to the judgment if it has been published on a national website, at the following mail address: COMP-AMICUS-STATE-AID@ec.europa.eu. If national law does not foresee such publication, however, the Senāts is kindly requested to inform the Commission services thereof, in which case Commission will only publish the opinion at hand.

I trust that the clarifications provided above will be helpful in the resolution of the case at hand.

With kind regards,

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