

Lingua del documento :  ▼ ECLI:EU:C:2016:577JUDGMENT OF THE COURT (First Chamber)  
21 July 2016 (\*)

(Request for a preliminary ruling — State aid — Aid scheme in the form of reductions in environmental taxes — Regulation (EC) No 800/2008 — Categories of aid which may be regarded as compatible with the internal market and exempt from the obligation to notify — Mandatory nature of the conditions for exemption — Article 3(1) — Express reference to that regulation in the aid scheme)

In Case C-493/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzgericht (Federal Finance Court, Austria), made by decision of 31 October 2014, received at the Court on 6 November 2014, in the proceedings

**Dilly's Wellnesshotel GmbH**

v

**Finanzamt Linz,**

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, A. Arabadjiev, C.G. Fernlund, S. Rodin and E. Regan (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 21 January 2016,

after considering the observations submitted on behalf of:

Dilly's Wellnesshotel GmbH, by M. Kroner, Rechtsanwalt, and K. Caspari,

the Austrian Government, by C. Pesendorfer and M. Klamert, acting as Agents,

the Estonian Government, by K. Kraavi-Käerdi, acting as Agent,

the European Commission, by R. Sauer, P. Němečková and K. Herrmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 March 2016,

gives the following

**Judgment**

This request for a preliminary ruling concerns the interpretation of Article 17(1) and Article 25 of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles [107 TFEU and 108 TFEU] (General block exemption Regulation) (OJ 2008 L 214, p. 3).

The request has been made in proceedings between Dilly's Wellnesshotel GmbH, a service provider, and the Finanzamt Linz (Linz District Tax Office, Austria), concerning the rejection by the latter of an application for an energy tax rebate for 2011 submitted by that company.

**Legal context***EU law*

Regulation (EC) No 659/1999

Article 2 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), entitled 'Notification of new aid', provided:

'1. Save as otherwise provided in regulations made pursuant to Article [109 TFEU] or to other relevant provisions thereof, any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned ...'.

Regulation (EC) No 994/98

Recitals 4 to 7 of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles [107 TFEU and 108 TFEU] to certain categories of horizontal State aid (OJ 1998 L 142, p. 1) were worded as follows:

Whereas the Commission has applied Articles [107 TFEU and 108 TFEU] in numerous decisions and has also stated its policy in a number of communications; whereas, in the light of the Commission's considerable experience in applying Articles [107 TFEU and 108 TFEU] and the general texts issued by the Commission on the basis of those provisions, it is appropriate, with a view to ensuring efficient supervision and simplifying administration, without weakening Commission monitoring, that the Commission should be enabled to declare by means of regulations, in areas where the Commission has sufficient experience to define general compatibility criteria, that certain categories of aid are compatible with the [internal] market pursuant to one or more of the provisions of Article [107(2) and (3) TFEU] and are exempted from the procedure provided for in Article [108(3) TFEU] thereof;

Whereas group exemption regulations will increase transparency and legal certainty...;

Whereas it is appropriate that the Commission, when it adopts regulations exempting categories of aid from the obligation to notify provided for in Article [108(3) TFEU], specifies ... the conditions of monitoring, in order to ensure the compatibility with the [internal] market of aid covered by this Regulation;

Whereas it is appropriate to enable the Commission, when it adopts regulations exempting certain categories of aid from the obligation to notify in Article [108(3) TFEU], to attach further detailed conditions in order to ensure the

compatibility with the [internal] market of aid covered by this Regulation’.

Article 1 of Regulation No 994/98, entitled ‘Group exemptions’, provided:

‘1. The Commission may, by means of regulations adopted in accordance with the procedures laid down in Article 8 of this Regulation and in accordance with Article [107 TFEU], declare that the following categories of aid should be compatible with the [internal] market and shall not be subject to the notification requirements of Article [108(3) TFEU]:

aid in favour of:

...  
(iii) environmental protection;

...  
2. The Regulations referred to in paragraph 1 shall specify for each category of aid:

...  
the conditions of monitoring as specified in Article 3.

...’  
Article 3 of that regulation, entitled ‘Transparency and monitoring’, provided:

‘1. When adopting regulations pursuant to Article 1, the Commission shall impose detailed rules upon Member States to ensure transparency and monitoring of the aid exempted from notification in accordance with those regulations. Such rules shall consist, in particular, of the requirements laid down in paragraphs 2, 3 and 4.

...’  
Regulation No 994/98 was amended by Council Regulation (EU) No 733/2013 of 22 July 2013 (OJ 2013 L 204, p. 11), and, subsequently, repealed by Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ 2015 L 248, p. 1).

Regulation No 800/2008

Recitals 5, 7 and 46 of Regulation No 800/2008 were worded as follows:

This Regulation should exempt any aid that fulfils all the relevant conditions of this Regulation, and any aid scheme, provided that any individual aid that could be granted under such scheme fulfils all the relevant conditions of this Regulation. In order to ensure transparency, as well as more efficient monitoring of aid, any individual aid measure granted under this Regulation should contain an express reference to the applicable provision of Chapter II and to the national law on which the individual aid is based.

State aid within the meaning of Article [107(1) TFEU] not covered by this Regulation should remain subject to the notification requirement of Article [108(3) TFEU] ...

In view of the sufficient experience gathered in the application of the Community guidelines on State aid for environmental protection, ... certain aid in the form of reductions in environmental taxes should be exempt from the notification requirement.’

Article 1 of Regulation No 800/2008, entitled ‘Scope’, which was in Chapter 1 of that regulation, entitled ‘Common Provisions’, provided at paragraph 1 thereof:

‘This Regulation shall apply to the following categories of aid:

...  
(d) aid for environmental protection,

...’  
Article 3 of that regulation, entitled ‘Conditions for exemption’, which was also in Chapter 1, provided in paragraph 1 thereof:

‘Aid schemes fulfilling all the conditions of Chapter I of this Regulation, as well as the relevant provisions of Chapter II of this Regulation, shall be compatible with the [internal] market within the meaning of Article [107(3) TFEU] and shall be exempt from the notification requirement of Article [108(3) TFEU] provided that any individual aid awarded under such scheme fulfils all the conditions of this Regulation, and the scheme contains an express reference to this Regulation, by citing its title and publication reference in the *Official Journal of the European Union*.’

Article 25 of Regulation No 800/2008, entitled ‘Aid in the form of reductions in environmental taxes’, which was in Section 4, entitled ‘Aid for environmental protection’, of Chapter II of that regulation, entitled, ‘Specific provisions for the different categories of aid’, provided:

‘1. Environmental aid schemes in the form of reductions in environmental taxes fulfilling the conditions of [Council] Directive 2003/96/EC [of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 L 283, p. 51)] shall be compatible with the [internal] market within the meaning of Article [107(3) TFEU] and shall be exempt from the notification requirement of Article [107(3) TFEU], provided the conditions laid down in paragraphs 2 and 3 of this Article are fulfilled.

...’  
Regulation No 800/2008 was amended by Commission Regulation (EU) No 1224/2013 of 29 November 2013 (OJ 2013 L 320, p. 22), as regards its period of application. That period was thereby extended until 30 June 2014. Regulation No 800/2008 was subsequently repealed by Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ 2014 L 187, p. 1).

*Austrian law*

Under the Budgetbegleitgesetz (Law accompanying the budget) of 30 December 2010, (BGBl. I No 111/2010, ‘the BBG 2011’), service providers were excluded from the energy tax rebate.

Paragraph 2(1) of the Energieabgabenvergütungsgesetz (Law on the rebate of energy taxes ‘the EAVG’), as amended by Article 72 of the BBG 2011, provides:

'Only undertakings whose activity is shown to consist primarily in the manufacture of goods shall be entitled to a rebate, and only in so far as those undertakings do not provide the energy resources set out in Paragraph 1(3) or heating (steam or hot water) produced from the energy resources set out in Paragraph 1(3).'

The temporal scope of Paragraph 2 is laid down in Paragraph 4(7) of the EAVG, which provides:

'Paragraphs 2 and 3 [of the EAVG] shall apply to rebate applications which relate to a period after 31 December 2010, subject to the approval of the European Commission.'

With regard to Paragraph 4(7) of the EAVG, the *travaux préparatoires* for the EAVG state as follows:

'The application of the amended provisions is subject to the approval of the European Commission. That amendment shall enter into force in respect of energy use after 31 December 2010. Applications from service providers for periods after 31 December 2010 shall therefore no longer be accepted. If the amendment to the EAVG is approved by the Commission as authorised State aid, the statutory restriction to production undertakings shall apply from 1 January 2011, with the result that, after that date, service providers will no longer be entitled to the energy tax rebate for energy used. If the amendment is not approved by the Commission, the current legal situation shall remain unchanged and both production undertakings and service providers shall be entitled to an energy tax rebate.'

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

On 29 December 2011, Dilly's Wellnesshotel submitted an application for an energy tax rebate for 2011.

By decision of 21 February 2012, that application was rejected, with reference being made to the new legislation arising from the BBG 2011, in accordance with which, from 1 January 2011, the energy tax rebate was to be granted only to production undertakings. An appeal by Dilly's Wellnesshotel to the Unabhängiger Finanzsenat (Independent Finance Tribunal, Austria), which was succeeded by the Bundesfinanzgericht (Federal Finance Court, Austria), was dismissed.

By decision of 19 March 2013 (2013/15/0053), the Verwaltungsgerichtshof (Administrative Court, Austria) held that, following a judgment delivered by that court on 22 August 2012 (2012/17/0175), the energy tax rebate should still have been granted to service providers for January 2011. The Verwaltungsgerichtshof (Administrative Court, Austria) took the view that, for that month, the Commission had not yet given its approval for the new legislation as regards the notice issued under Regulation No 800/2008, which related only to the period commencing 1 February 2011.

Dilly's Wellnesshotel lodged a further administrative appeal before the Unabhängiger Finanzsenat (Independent Finance Tribunal), by which that company requested, in essence, that its application for the energy tax rebate for the period from January to December 2011 be granted in full. According to Dilly's Wellnesshotel, if the application of Paragraph 2(1) of the EAVG in conjunction with Paragraph 4(7) of the EAVG infringes EU law, the new legislation introduced by the BBG 2011 is not applicable and service providers could continue to benefit from the energy tax rebate for the whole of 2011 and beyond.

It is clear from the order for reference that Paragraph 2(1) of the original version of the EAVG (BGBl. No 201/1996) provided for an energy tax rebate for undertakings engaged essentially in the 'manufacture of goods'. The provision of services was excluded from the benefit of the tax rebate.

In its judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598), the Court held that national measures which provide for a rebate of energy taxes on natural gas and electricity only in the case of undertakings whose activity is shown to consist primarily in the manufacture of goods must be regarded as State aid within the meaning of Article 107 TFEU.

The Austrian legislation on energy tax rebates has subsequently been amended on several occasions.

In the present case, the referring court has doubts as to whether the new legislation on energy tax rebates arising from the BBG 2011 is compatible with Regulation No 800/2008.

In the first place, that court is doubtful whether the Republic of Austria is able to use the exemption provided for in Article 25 of Regulation No 800/2008 as regards the national legislation at issue in the main proceedings, while three requirements set out in Chapter I of that regulation have not been fulfilled.

First, the national legislation contains no reference to Regulation No 800/2008, or the publication reference in the *Official Journal of the European Union*. Secondly, although Article 9(1) of that regulation provides that a summary of the information regarding the aid measure at issue is to be forwarded to the Commission within 20 working days 'following the entry into force of an aid scheme', in the present case the summary was forwarded out of time. Thirdly, the referring court points out that the text of the aid scheme at issue was not published on the Internet in accordance with Article 9(2) of Regulation No 800/2008, since the Internet address notified to the Commission did not — and still does not — enable access to the text concerned.

In the second place, the referring court asks whether an aid measure may benefit from the exemption provided for in Article 25 of Regulation No 800/2008, while obligations laid down in Chapter II of that regulation are not met. In particular, the aid scheme at issue in the main proceedings was characterised by neither a reduction in the damage to the environment nor prevention of that damage, nor by a more efficient use of natural resources or energy saving. The referring court is, therefore, doubtful as to whether the national legislation at issue in the main proceedings constitutes aid for the purposes of 'environmental protection', within the meaning of Article 17(1) of that regulation.

In the third place, the referring court is uncertain as to whether the condition laid down in Article 25(3) of Regulation No 800/2008, according to which tax reductions are to be granted for maximum periods of ten years, has been met, since the tax scheme at issue in the main proceedings does not contain an express limitation of the period during which tax reductions are granted, nor reference to the period mentioned in the exemption notice forwarded to the Commission on 7 February 2011.

In those circumstances the Bundesfinanzgericht (Federal Finance Court, Austria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

Is EU law infringed if an aid scheme makes use of the special procedure under [Article 25 of] Regulation [No 800/2008] ... in order to be exempt from the obligation to notify under Article 108(3) TFEU, but does not comply

with various obligations of Chapter I of [that regulation] and, moreover, does not make any reference to [that regulation]?

Is EU law infringed if an aid scheme is based on the special procedure [under Article 25 of Regulation No 800/2008] which is applicable to environmental aid ... but the requirements laid down in Chapter II — namely the promotion of environmental protection measures and/or energy-saving measures under Article 17(1) [of that regulation] — are not satisfied?

Does EU law preclude national rules which contain no temporal restriction and also no reference to the period stated in the exemption notice, with the result that the limitation of the energy tax refund to 10 years, required in Article 25(3) [of Regulation No 800/2008], is to be inferred only from the exemption notice?'

### **Consideration of the questions referred**

#### *The first question*

By its first question, the referring court asks, essentially, whether Article 3(1) of Regulation No 800/2008 must be interpreted as meaning that the absence, in an aid scheme such as that at issue in the main proceedings, of an express reference to that regulation, by citing its title and publication reference in the *Official Journal of the European Union*, precludes that scheme from being considered to fulfil the conditions for exemption, under Article 25(1) of that regulation, from the obligation to notify laid down in Article 108(3) TFEU.

In that regard, it should be recalled, first, that the obligation to notify is one of the fundamental features of the system of control put in place by the FEU Treaty in the field of State aid. Under that system, Member States are under an obligation, first, to notify to the Commission each measure intended to grant new aid or alter aid for the purposes of Article 107(1) TFEU and, secondly, not to implement such a measure, in accordance with Article 108(3) TFEU, until that institution has taken a final decision on the measure (judgment of 8 December 2011 in *France Télécom v Commission*, C-81/10 P, EU:C:2011:811, paragraph 58).

The obligation of the Member State concerned to notify any new aid to the Commission is set out in Article 2 of Regulation No 659/1999.

In accordance with Article 109 TFEU, the Council of the European Union is authorised to make any appropriate regulations for the application of Article 107 TFEU and Article 108 TFEU and may in particular determine the conditions in which Article 108(3) TFEU is to apply and the categories of aid exempt from the procedure under that provision.

In addition, as provided in Article 108(4) TFEU, the Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109 TFEU, determined may be exempt from the procedure provided for in Article 108(3) TFEU.

Consequently, Regulation No 994/98, in accordance with which Regulation No 800/2008 was subsequently adopted, had itself been adopted pursuant to Article 94 of the EC Treaty (subsequently Article 89 EC and now Article 109 TFEU).

It follows from this that, notwithstanding the obligation of prior notification of each measure intended to grant or alter new aid, which is incumbent on the Member States under the Treaties and is one of the fundamental features of the system of monitoring in the field of State aid, if an aid measure adopted by a Member State fulfils the relevant conditions provided for in Regulation No 800/2008, that Member State may rely on the possibility of being exempt from its obligation to notify. Conversely, it is apparent from recital 7 of Regulation No 800/2008 that State aid not covered by that regulation should remain subject to the obligation to notify laid down in Article 108(3) TFEU.

Consequently, as the Advocate General observed in point 1 of his Opinion, as a qualification of the general rule that there is the obligation to notify, Regulation No 800/2008 and the conditions laid down by it must be interpreted strictly.

Such an approach is supported having regard to the aims of the general block exemption regulations, as set out in recitals 4 and 5 of Regulation No 994/98. While the Commission is authorised to adopt such regulations, with a view to ensuring efficient supervision of the competition rules concerning State aid and simplifying administration, without weakening Commission monitoring in that area, the aim of such regulations is also to increase transparency and legal certainty. Fulfilling the conditions laid down by those regulations, including, therefore, those laid down by Regulation No 800/2008 enables those aims to be fully achieved.

In the present case, it is common ground that the national legislation at issue was not notified to the Commission under Article 2 of Regulation No 659/1999 and that the only exemption from the obligation to notify which could apply is that provided for in Article 25 of Regulation No 800/2008.

In accordance with Article 25(1) of Regulation No 800/2008, in Chapter II of that regulation, entitled 'Specific provisions for the different categories of aid', environmental aid schemes in the form of reductions in environmental taxes fulfilling the conditions laid down in Directive 2003/96 and in Article 25(2) and (3) of Regulation No 800/2008 are compatible with the internal market and are to be exempt from the notification requirement of Article 108(3) TFEU.

Without its being necessary to assess the conditions referred to in Article 25 of Regulation No 800/2008, which are the subject of the second and third questions, it must be noted that under Article 3(1) of Regulation No 800/2008, which is in Chapter I of that regulation, entitled 'Common provisions', an aid scheme may be exempt from the obligation to notify provided only that, in particular, that scheme contains an express reference to that regulation, by citing its title and publication reference in the *Official Journal of the European Union*.

In the main proceedings, it is common ground that the aid scheme at issue does not contain such a reference to Regulation No 800/2008.

In that regard, the Austrian Government stated, at the hearing, that an implementing measure was subsequently adopted at the national level, in order to remedy the lack of a reference to Regulation No 800/2008 in the aid scheme at issue in the main proceedings and that that measure was notified to the Commission in the course of 2014, under Regulation No 651/2014.

However, it is sufficient to point out that, whatever the legal nature of that measure, it cannot, in any event, compensate for the failure to refer to Regulation No 800/2008 in the national legislation at issue in the main proceedings for the period concerned.

The Court also points out, as the Advocate General observed in points 54 and 55 of his Opinion, that the mandatory nature of a reference to Regulation No 800/2008 in a given aid scheme, in order for a Member State to be able to benefit from an exemption under that regulation as regards that scheme, is apparent from the very wording of Article 3(1) of that regulation, which provides that aid schemes fulfilling, inter alia, 'all the conditions' laid down in Chapter I of Regulation No 800/2008 are to be exempt from the notification requirement, provided that any individual aid awarded under such scheme fulfils 'all the conditions' of that regulation and the scheme 'contains an express reference' to Regulation No 800/2008.

That reading is supported by both the aim of Article 3(1) of Regulation No 800/2008 and the context of that provision.

As regards, in the first place, the context of that provision, it must be noted, first, that Article 3 of Regulation No 800/2008 is entitled 'Conditions for exemption', which implies that the conditions laid down in that article must be fulfilled in order for a given aid measure to be exempt, under that regulation, from the obligation to notify. Secondly, Article 3(1) of Regulation No 800/2008 must be read in the light of the recitals of that regulation and, in particular, recital 5 thereof, according to which Regulation No 800/2008 should exempt any aid that fulfils 'all the relevant conditions' of that regulation, and any aid scheme, provided that any individual aid that could be granted under such scheme fulfils all 'the relevant conditions of th[at] regulation'.

As regards, in the second place, the aim of the requirement for an express reference to Regulation No 800/2008, that aim may also be deduced from recital 5 of that regulation, which states that '[i]n order to ensure transparency, as well as more efficient monitoring of aid, any individual aid measure granted under this Regulation should contain an express reference to the applicable provision of Chapter II and to the national law on which the individual aid is based'.

In addition, more generally, Article 3(1) of Regulation No 994/98 provides that '[w]hen adopting regulations pursuant to Article 1, the Commission shall impose detailed rules upon Member States to ensure transparency and monitoring of the aid exempted from notification in accordance with those regulations ...'. Similarly, recital 5 of that regulation states that 'group exemption regulations will increase transparency and legal certainty ...'.

As the Commission contends and the Advocate General observed in point 58 of his Opinion, an express reference to Regulation No 800/2008 in a given aid measure enables the recipients, and their competitors, to understand the reasons why that measure may be implemented even though it was not notified to the Commission or authorised by it. Such a reference thereby enables not only the Commission to review, but also third parties to be informed of, the proposed aid measures, so that they may exercise their procedural rights.

In the light of all the foregoing considerations, it must be found that the condition, laid down in Article 3(1) of Regulation No 800/2008, which stipulates that in order for an aid scheme to be exempt from the obligation to notify under Article 108(3) TFEU, it must contain an express reference to that regulation, does not amount to a mere formality, but is mandatory in nature, so that the failure to fulfil that condition precludes an exemption from being granted under that regulation.

The answer to the first question is, therefore, that Article 3(1) of Regulation No 800/2008 must be interpreted as meaning that the absence, in an aid scheme such as that at issue in the main proceedings, of an express reference to that regulation, by citing its title and publication reference in the *Official Journal of the European Union*, precludes that scheme from being considered to fulfil the conditions for exemption, under Article 25(1) of that regulation, from the obligation to notify laid down in Article 108(3) TFEU.

#### *The second and third questions*

In view of the answer given to the first question, there is no need to answer the second and third questions.

#### **Costs**

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:

**Article 3(1) of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles [107 TFEU and 108 TFEU] (General block exemption Regulation) must be interpreted as meaning that the absence, in an aid scheme such as that at issue in the main proceedings, of an express reference to that regulation, by citing its title and publication reference in the *Official Journal of the European Union*, precludes that scheme from being considered to fulfil the conditions for exemption, under Article 25(1) of that regulation, from the obligation to notify laid down in Article 108(3) TFEU.**

[Signatures]

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\* Language of the case: German.