Council of State, 3rd - 8th chambers combined, 03/18/2020, 396651

Council of State - 3rd - 8th chambers combined

No. 396651
ECLI:FR:CECHR:2020:396651.20200318
Mentioned in the tables of the Lebon collection

Reading for Wednesday, March 18, 2020

Rapporteur
Mr. Sylvain Monteillet

Public Rapporteur
Mr. Laurent Cytermann

Lawyer(s)
SCP BARADUC, DUHAMEL, RAMEIX; SCP POTIER DE LA VARDE, BUK LAMENT, ROBILLOT; SCP LYON-CAEN, THIRIEZ

Full text

FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE

In view of the following procedure:

The company Autocars R. Suzanne and the Autonomous Union of Passenger Transporters (SATV) have asked the Paris Administrative Court to annul for abuse of power the implicit decision by which the Ile-de-France region, contacted on 2 October 2008, refused to terminate the payment of aid it granted to companies operating regular road passenger transport lines, to repeal the deliberations establishing this aid scheme, to ensure that all sums paid to private companies or public authorities on the basis of these deliberations are recovered and to communicate the complete and detailed list of companies and authorities benefiting from this aid.

By judgment No. 0817138/2-1 of June 4, 2013, the Paris Administrative Court dismissed as inadmissible the submissions directed against the region's refusal to repeal the deliberations establishing an aid scheme as well as those directed against the region's refusal to communicate the list of aid beneficiaries. It annulled the region's implicit refusal to recover the aid already paid. Finally, it ordered the region to issue enforceable titles allowing the recovery of the aid paid from companies that had actually benefited from it within six months of notification of the judgment.

By judgment No. 13PA03172 of November 27, 2015, the Paris Administrative Court of Appeal, on appeal by the Ile-de-France region, partially annulled this judgment for irregularity and annulled the region's implicit refusal to recover the aid already paid. Finally, it ordered the region to determine, for each beneficiary company, the amounts to be repaid by that company or the legal entity taking over its rights, taking into account the nature of the subsidized investments and the type of transport activity carried out, and then to issue collection certificates allowing the recovery of this aid.

By a summary appeal, a supplementary brief and two other briefs, registered on February 2 and May 3, 2016, June 6, 2018 and September 12, 2019 at the litigation secretariat of the Council of State, the Ile-de-France region asks the Council of State:

1°) to annul this judgment;

2°) settling the case on the merits, to allow its appeal;

3°) to order SATV and the company Autocars R. Suzanne to pay the sum of 8,000 euros under Article L. 761-1 of the Code of Administrative Justice.

Having seen the other documents in the file;

Having seen:
- the Treaty establishing the European Community;
- the Treaty on the Functioning of the European Union;
- Council Regulation No. 1191/69 of 26 June 1969, amended by Council Regulation (EEC) No. 1893/91 of 20 June 1991;
- Commission Regulation No. 794/2004 of 21 April 2004;
- Decree No. 49-1473 of 14 November 1949;
- Commission Decision (EU) 2017/1470 of 2 February 2017 concerning aid schemes implemented by France for bus transport companies in the Ile-de-France region;
- the Code of Administrative Justice;

Having heard in public session:

- the report of Mr. Sylvain Monteillet, Master of Requests in extraordinary service,

- the conclusions of Mr. Laurent Cytermann, public rapporteur;

The floor having been given, before and after the conclusions, to SCP Potier de la Varde, Buk Lament, Robillot, lawyer for the Ile-de-France region and to SCP Baraduc, Duhamel, Rameix, lawyer for the company Autocars R. suzanne;

Considering the following:

1. It is clear from the documents in the case submitted to the trial judges that by a resolution of the regional council of 20 October 1994, amended by two resolutions of 1 October 1998 and 1 October 2001, the Ile-de-France region set up an aid scheme for the improvement of road public transport services operated by private or public companies. By a judgment of 10 July 2008, confirmed by a decision of 12 July 2010 of the Paris Administrative Court of Appeal which became final following the dismissal of the appeal lodged against it by a decision of the Council of State ruling on the disputes of 23 July 2012, the Paris Administrative Court annulled the decision of 17 June 2004 by which the President of the Regional Council rejected the request of the Autonomous Union of Passenger Transporters (SATV) to repeal these deliberations, considering that they had established an illegal State aid scheme in the absence of prior notification to the European Commission. By letter of 2 October 2008, SATV and the R. Suzanne Autocars company requested the Ile-de-France region, in particular, to recover all aid paid on the basis of the aforementioned deliberations. By a second judgment of June 4, 2013, the Paris Administrative Court annulled the region's implicit refusal to recover aid already paid and ordered the region to issue enforceable titles allowing the recovery of aid paid to companies that had actually benefited from it within six months of notification of the judgment. By a judgment of 27 November 2015, the Paris Administrative Court of Appeal, in Articles 1 and 2, admitted various interventions and annulled this judgment insofar as it ruled on the conclusions directed against the region's implicit refusal to recover the aid, then ruling by evocation, in Articles 3 to 6, annulled this implicit refusal and ordered the region, within nine months, to determine, for each beneficiary company, taking into account the nature of the subsidised investments and the type of transport activity carried out, the amounts to be repaid by this company or the legal entity succeeding to its rights, and then to issue collection certificates allowing the recovery of this aid. The Ile-de-France region is appealing this judgment. In view of the grounds raised, its appeal must be regarded as seeking only the annulment of Articles 3 to 6 of this judgment.

On the intervention of the companies Transports Marne et Morin, Cars Hourtoule, Daniel Meyer Transports and the Optile association

2. The companies Transports Marne et Morin, Cars Hourtoule and Daniel Meyer Transports, which are not in dispute having benefited from the aid and which may be required to repay it, as well as the professional transport organisation of Ile-de-France (Optile), an association bringing together companies engaged in regular road passenger transport, have an interest in the annulment of the contested judgment. Their intervention is therefore admissible.

On the conclusions seeking annulment of the contested judgment

3. Under paragraph 1 of Article 87 of the Treaty establishing the European Community, then applicable, which became Article 107 of the Treaty on the Functioning of the European Union: "Save as provided for in this Treaty, any aid granted by a State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall be incompatible with the common market in so far as it affects trade between Member States." Under Article 88 of the same Treaty, which became Article 108 of the Treaty on the Functioning of the European Union: "1. The Commission shall, together with the Member States, keep under constant review the aid schemes existing in those States (...) / 2. If (...) the Commission finds that aid granted by a State or through State resources is not compatible with the internal market (...), it shall decide that the State concerned must abolish or amend it within the period it determines (...). / 3. The Commission shall be informed, in sufficient time to submit its observations, of plans to introduce or amend aid. If it considers that a plan is not compatible with the internal market, (...) it shall immediately initiate the procedure provided for in the preceding paragraph. The Member State concerned may not put the planned measures into effect before this procedure has resulted in a final decision (...) ".

4. It follows from these provisions, as interpreted by the Court of Justice of the European Communities, in particular in its judgments of 5 October 2006, Transalpine Ölleitung in Österreich ea, C-368/04, and of the Grand Chamber of 12 February 2008, Centre d'exportation du livre français (CELF), C-199/06, that, while it falls within the exclusive competence of the European Commission to decide, subject to the review of the courts of the European Union, whether or not aid is, taking into account the derogations provided for by the Treaty, compatible with the internal market, it is, however, for the national courts to safeguard, until the Commission's final decision, the rights of individuals in the event of a breach of the obligation of prior notification of State aid to the Commission. It is up to these courts to sanction, where appropriate, the illegality of provisions of national law which have established or modified such aid in breach of the obligation, which these provisions impose on Member States, to notify the draft aid to the Commission prior to any implementation. When the Commission has adopted a decision which has become final establishing the incompatibility of this aid with the internal market, the sanction for this illegality involves the recovery of the aid implemented in breach of this obligation. Where the Commission has adopted a final decision establishing the compatibility of that aid with the internal market, the sanction for that illegality only implies, in the absence of national provisions requiring the recovery of aid in that case, that the beneficiaries of the aid be required to pay interest, calculated in accordance with Commission Regulation No 794/2004 of 21 April 2004 implementing Council Regulation (EU) No 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, which the undertaking would have paid if it had had to borrow the amount of the aid on the market between the date on which it was paid and that of the European Commission's decision.

5. In order to annul the implied decision by which the Ile-de-France region refused to recover the aid, the court noted that the illegality based on the failure to notify the Commission of the aid scheme implies the restitution by the companies which have actually benefited from it, of the aid paid on the basis of this scheme in the absence of exceptional circumstances likely to prevent this. By refraining from specifying the provisional nature of these restitutions,whereas the recovery of aid can only be ordered as a safeguard measure pending the Commission's decision on the compatibility of the aid scheme with the internal market, the Court made an error of law.

6. It follows from the above that, without there being any need to examine the other grounds of appeal, the Ile-de-France region is entitled to request the annulment of Articles 3, 4, 5 and 6 of the judgment of the Paris Administrative Court of Appeal which it is challenging.

7. It is appropriate, in the circumstances of the case, to resolve, to this extent, the case on the merits in accordance with the provisions of Article L. 821-2 of the Code of Administrative Justice, to refer to and rule immediately on the conclusions of the applicants at first instance directed against the implied refusal of the Ile-de-France region to recover the aid in dispute.

On the admissibility of the conclusions at first instance directed against the refusal of the Île-de-France region to recover the aid

8. Contrary to what the Île-de-France region maintains, SATV and the company Autocars R. Suzanne are not seeking enforcement of the judgment of the Paris Administrative Court of 10 July 2008 mentioned in point 1 but the annulment, for abuse of power, of the refusal by the Île-de-France region to their request of 2 October 2008 for recovery of the aid. These conclusions are admissible.

On the legality of the implied refusal by the Île-de-France region to recover the aid

9. The legality of the refusal of a request for recovery of State aid when it has not been the subject of prior notification to the European Commission depends on the assessment by the latter, under the control of the Community judicature, of the compatibility of that aid with the internal market. The legality of this refusal, in order to draw the consequences of a decision of the Commission and the Community judge which may be subsequent to this refusal, must therefore be assessed by the national judge in the light of the applicable rules and the circumstances prevailing on the date of its decision.

10. By Decision (EU) 2017/1470 of 2 February 2017, the Commission considered, following a procedure initiated by the lodging of a complaint with it on 7 October 2008, that the aid scheme in question was compatible with the internal market but that it had been unlawfully implemented by France between 1994 and 2008, due to lack of prior notification. By five judgments T-289/17, T-291/17, T-292/17, T-309/17 and T-330/17 of 12 July 2019, which were not appealed, the General Court of the European Union dismissed the appeals of the Ile-de-France region and several companies benefiting from this aid system brought against this Commission decision, insofar as the latter classified the aid scheme in question as a State aid scheme and insofar as it found that this aid scheme constitutes a new aid scheme which was "unlawfully implemented". This decision has thus become final and is binding on the authorities and the national courts, insofar as it recognises the existence of an aid scheme compatible with the internal market but unlawfully implemented. Consequently, the defences based on the fact that the aid granted did not have the character of State aid, that it was exempt from prior notification to the Commission and that it should be regarded as existing aid within the meaning of that regulation can only be dismissed.

11. In view of the intervention of the Commission decision of 2 February 2017 mentioned in the previous paragraph and since no national provision requires the recovery, in addition to interest, of aid paid in the case of an aid scheme declared compatible with the internal market but unlawfully implemented, it follows from what has been said in paragraph 4 that the decision by which the Ile-de-France region refused to recover any aid granted pursuant to the deliberations of 20 October 1994, 1 October 1998 and 1 October 2001 is unlawful only insofar as it does not recover interest.

12. The Ile-de-France region and several intervening companies maintain, however, that exceptional circumstances precluded such recovery. First, they point out that the long period of implementation of the aid scheme and the delay of almost eight years between the Commission's decision to open a preliminary examination procedure and the Commission's decision to open a formal examination procedure may have given rise to legitimate expectations on the part of the aid beneficiaries in the regularity of the aid scheme. Second, they point out that the repayment of the interest would have placed the recipient authorities and the beneficiary companies in a difficult situation. Finally, they point out that the recovery of the interest would present technical difficulties.

13. However, on the one hand, the existence of an exceptional circumstance cannot in any event be accepted in the light of the principle of legitimate expectations, since, as the Court of Justice of the European Communities held, in particular in its judgment of 29 April 2004, Italy v Commission C-91/01, as long as the European Commission has not taken an approval decision and the time limit for appealing against such a decision has not expired, the beneficiary has no certainty as to the legality of the aid, so that this principle cannot be usefully invoked. On the other hand, the existence of an exceptional circumstance cannot be upheld in light of the principle of proportionality, since, as the Court of Justice of the European Union held, in particular in its judgment of 11 March 2010 Centre d'exportation du livre français (CELF II) C-1/09, the recovery of aid unlawfully granted, with a view to restoring the previous situation, cannot in principle be considered a disproportionate measure. Finally, by merely arguing that the recovery of interest would present technical difficulties and would place the recipient authorities and beneficiary undertakings in a difficult situation, the applicants have not established that the recovery of the interest in question is absolutely impossible.

14. It follows from the foregoing that the contested decision of the Ile-de-France region must be annulled solely insofar as it does not recover the interest.

On the claims for an injunction

15. The implementation of this decision necessarily implies, without the limitation rules of Article 2224 of the Civil Code being able to be usefully invoked at this stage, an order to the Ile-de-France region to take, within six months of notification of this decision, the necessary measures to ensure the payment, by each undertaking having carried out an activity on a market open to competition and having benefited from the aid scheme unlawfully implemented, of the amounts corresponding to the interest, calculated in accordance with Commission Regulation No. 794/2004 of 21 April 2004 implementing Council Regulation (EU) No. 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, which the undertaking would have paid if it had had to borrow the amount of its subsidy on the market between the date on which it was paid and that of the European Commission's decision, that is to say, February 2, 2017, taking into account, however, the fractions of the aid which, where applicable, gave rise, before this latter date, to a reduction in the operating subsidy as depreciation and taking into account the possible deduction, on this occasion, of financial interest.

On the conclusions presented under the provisions of Article L. 761-1 of the Code of Administrative Justice

16. The provisions of Article L. 761-1 of the Code of Administrative Justice prevent a sum from being charged in this respect to SATV and the Société des Autocars R. Suzanne, which are not, in the present proceedings, the losing parties.

17. It is appropriate, in the circumstances of the case, to charge the Ile-de-France region the sum of 3,000 euros to be divided equally between SATV and the Société des Autocars R. Suzanne under the same provisions.

DECIDES:

Article 1: The intervention of the company Transports Marne et Morin, the company Cars Hourtoule, the company Daniel Meyer Transports and the professional organization of transport of Ile-de-France is admitted.
Article 2: Articles 3 to 6 of the decision of the Paris Administrative Court of Appeal of November 27, 2015 are annulled.
Article 3: The decision by which the Ile-de-France region refused to recover the aid granted pursuant to the deliberations of October 20, 1994, October 1, 1998 and October 1, 2001 is annulled only to the extent that it does not recover the interest.
Article 4: The Ile-de-France region is hereby ordered to take, within six months of notification of this decision, the necessary measures to ensure payment, by each undertaking which has operated on a market open to competition and which has benefited from the aid scheme unlawfully implemented, of the amounts corresponding to the interest, calculated in accordance with Commission Regulation No. 794/2004 of 21 April 2004 implementing Council Regulation (EU) No. 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, which the undertaking would have paid if it had had to borrow the amount of its subsidy on the market between the date on which it was paid and 2 February 2017, taking into account, however, the fractions of the aid which, where applicable, gave rise, before this latter date, to a reduction in the operating subsidy as depreciation and taking into account the possible deduction, on this occasion, of financial interest.
Article 5: The Ile-de-France region will pay the sum of 3,000 euros, to be divided equally between the Autonomous Union of Passenger Transporters and the Autocars R. Suzanne company, under Article L. 761-1 of the Code of Administrative Justice.
Article 6: The conclusions presented under Article L. 761-1 of the Code of Administrative Justice by the Ile-de-France region, on appeal and before the Council of State, as well as by the intervening companies, before the Administrative Court of Appeal, are rejected.
Article 7: This decision will be notified to the Ile-de-France region, to the Autonomous Union of Passenger Transporters, to the company Autocars R, Suzanne, to the company Transports Marne et Morin, to the company Cars Hourtoule, to the company Daniel Meyer Transports, to the professional organization of transport of Ile-de-France, to the company RATP Développement, to the company Transdev Ile-de-France, to the company Transports Rapides automobiles, to the company Cars Lacroix, to the company Transports Interurbains Val d'Oise, to the company Courriers d'Ile-de-France, to the company Ceobus, to the company Compagnie des transports voyageurs interurbains du Mantois, to the company Transports de Saint-Quentin-en-Yvelines, to the company Les Cars Perrier, to the company Tim Bus, to the company Keolis Val d'Oise, to the company Garrel et Navarre, to the company Athis Cars, to the company Transports par autocars, the company Transports Voyageurs Devillairs, the company Keolis Yvelines, the company Versaillaise de Transports urbains and the company Transports voyageurs du Mantois.

ECLI:FR:CECHR:2020:396651.20200318

Analysis

Abstracts

Summary

Case law references