

JUDGMENT OF THE COURT (Second Chamber)

2 April 2009 (*)

(State aid for employment – Guidelines on aid to employment – Guidelines on national regional aid – Regulation (EC) No 2204/2002 – Notion of ‘job creation’ – Calculation of the increase in the number of jobs)

In Case C-415/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Tribunale ordinario di Nocera Inferiore (Italy), made by decision of 20 July 2007, received at the Court on 10 September 2007, in the proceedings

Lodato Gennaro & C. SpA

v

Istituto nazionale della previdenza sociale (INPS),

SCCI,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of Chamber, K. Schiemann, P. Kūris (Rapporteur), L. Bay Larsen and C. Toader, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 October 2008,

after considering the observations submitted on behalf of:

- Lodato Gennaro & C. SpA, by M.A. Calabrese, avvocato,
- the Istituto nazionale della previdenza sociale (INPS) and SCCI, by A. Sgroi, F. Correra and A. Coretti, avvocati,
- the Italian Government, by I.M. Braguglia, acting as Agent, and by W. Ferrante, avvocato dello Stato,
- the Commission of the European Communities, by G. Conte and E. Righini, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 November 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of the guidelines on aid to employment (OJ 1995 C 334, p. 4), the guidelines on national regional aid (OJ 1998 C 74, p. 9) and also Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment (OJ 2002 L

337, p. 3).

- 2 The reference was made in the course of proceedings brought by Lodato Gennaro & C. SpA ('Lodato') against a notice of assessment issued by the Istituto nazionale della previdenza sociale (INPS) (National social welfare institution) further to a report drawn up by the INPS.

Legal context

Community law

- 3 Point 17 of the guidelines on aid to employment states as follows:

'... It should be made clear that job creation refers to net job creation, i.e. the creation of an additional job in relation to the (average) workforce (over a period of time) of the firm concerned. Simply replacing a worker without actually increasing the workforce, and hence without creating new jobs, does not constitute genuine job creation.'

- 4 The third indent of point 21 of those guidelines provides that in assessing employment aid the Commission of the European Communities must inter alia scrutinise the terms of the employment contract, in particular the obligation to maintain the newly-created job for a minimum period after its creation.

- 5 The Community guidelines on State aid for small and medium-sized enterprises (OJ 1996 C 213, p. 4) state, in footnote 8 to point 3.2, that 'the number of employees is the number of annual work units (AWUs), that is to say the number of wage- and salary-earners employed full-time for a whole year, with part-time or seasonal work being counted as fractions of a unit'.

- 6 Point 4.12 of the guidelines on national regional aid states:

'Job creation means a net increase in the number of jobs ... in a particular establishment compared with the average over a period of time. Any jobs lost during that period must therefore be deducted from the apparent number of jobs created during the same period ...'

- 7 Footnote 33 of those guidelines states that 'the number of jobs corresponds to the number of annual labour units (ALU), i.e. the number of persons employed full-time in one year, part-time and seasonal work being ALU fractions'.

- 8 Point 4.14 of those guidelines provides that 'aid for job creation must be made conditional, through its method of payment or through the conditions associated with its acquisition, on the maintenance of the employment created during a minimum period of five years'.

- 9 Article 4(6)(b) and (c) of Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises (OJ 2001 L 10, p. 33) provides that 'the investment project shall lead to a net increase in the number of employees in the establishment concerned, compared with the average over the previous twelve months' and that 'the employment created shall be maintained during a minimum period of five years'.

- 10 Article 4(4)(a) and (b) of Regulation No 2204/2002 provides that 'the employment created must represent a net increase in the number of employees, both in the establishment and in the enterprise concerned, compared with the average over the past 12 months' and that 'the employment created shall be maintained for a minimum period of three years, or two years in the case of [small and medium-sized enterprises]'. Under Article 2(e) of that regulation, the 'number of employees' means the 'number of annual working units (AWU), namely the number of persons employed full-time in one year, part-time and seasonal work being AWU fractions'.

- 11 The same definition of ‘number of employees’ appears in footnote 52 of the guidelines on national regional aid for 2007-2013 (OJ 2006 C 54, p. 13), which state at point 58, that ‘job creation’ means ‘a net increase in the number of employees ... directly employed in a particular establishment compared with the average over the previous 12 months’ and that ‘any jobs lost during that 12 month period must therefore be deducted from the apparent number of jobs created during the same period’.

The Commission’s decisions on the aid schemes at issue in the main proceedings

- 12 By its decision of 10 August 1999, the Commission decided not to raise any objections to the aid scheme for the creation of employment set out in Article 3(5) and (6) of Law No 448 of 23 December 1998 (ordinary supplement to GURI No 302 of 29 December 1998) and notified to the Commission by the Italian Republic on 16 December 1998.
- 13 Article 3(5) of that law provided that, in respect of new employees recruited from 1999 to 2001 by way of increase in the number of employees as at 31 December 1998, all private employers and public economic entities operating in the regions of Campania, Basilicata, Sicily, Apulia, Calabria and Sardinia were to be granted for a period of three years from the date on which the individual employee was recruited full relief from the contributions due from them to the INPS in respect of remuneration subject to contributions to the Fondo pensioni lavoratori dipendenti (Employees’ Pension Fund). In the regions of Molise and Abruzzi, that provision was to apply only to new employees recruited in 1999.
- 14 Article 3(6) of that law laid down the requirements to be satisfied in order to benefit from aid. Following the exchange of views between the Italian authorities and the Commission, the requirement to increase the number of employees was expressed as follows:
- ‘An undertaking, even where newly established, shall increase its number of full-time employees. Job creation shall be calculated by reference to the average number of employees of an undertaking during the 12 months preceding recruitment. The average for that number of employees shall be expressed in annual working units (AWU) ... in accordance with the concept set out in footnote 8 to point 3.2. of the Community guidelines on State aid for small and medium-sized enterprises.’
- 15 By decision of 6 December 2002, the Commission also decided to regard as compatible with the EC Treaty a new aid scheme set out in Article 44 of Law No 448 of 28 December 2001 (ordinary supplement to GURI No 301 of 29 December 2001), notified to the Commission by the Italian Republic on 28 November 2001, and which extended the earlier aid scheme. That new scheme retained the conditions laid down under the earlier one. In particular, as a result of the Commission’s observations, the requirement to increase the number of employees was expressed in the same terms as set out above, but on this occasion by reference to point 4.12 and footnote 33 of the guidelines on national regional aid.
- 16 In its two decisions, the Commission laid down a distinction between aid for the creation of jobs not connected to an investment project and aid conditional on the carrying out of such a project. It examined the first type of aid in the light of the guidelines on aid to employment and the second type in the light of the guidelines on national regional aid, and in its decision of 6 December 2002 also by reference to Regulation No 70/2001. The Commission found that the aid schemes proposed were compatible with the common market in light of the derogations set out in Article 87(3)(a) and (c) EC.

The dispute in the main proceedings and the question referred

- 17 Lodato is an undertaking in the canned food sector, whose main activity is the processing and canning of tomatoes in the Campania region. At the present time, its business experiences a seasonal peak each year, from July to October, causing it to recruit seasonal workers during that period. Lodato benefited from both aid schemes at issue in the main

proceedings, as a result of the recruitment of seven workers under the first scheme and two additional workers under the second.

18 Since they considered that not all of the workers recruited resulted in an increase in Lodato's workforce, on 21 November 2005 the INPS inspectors compiled the report forming the basis of the notice of assessment which is the subject of the action pending before the national court.

19 It is apparent from the order for reference that, in support of its action, Lodato submits in particular that, in order to check whether the requirement to increase the number of employees had been satisfied, the INPS had compared the average AWU for the year preceding the recruitment with the total number of employees as at the date of recruitment, and had thus failed to make a comparison on like terms, instead of comparing the average AWU for the year preceding the recruitment with the average AWU for the year following such recruitment.

20 In its decision, the national court is uncertain as to how the Community legislation is to be interpreted in relation to the second term in the comparison of the number of employees that must be used in order to ascertain that the requirement to increase the number of employees has been satisfied. It considers, first, that the method used by the INPS is illogical and discriminates against undertakings carrying out seasonal work, and, second, that a 'comparison between the AWU [figure] for the year preceding the employment of new workers and the AWU for the following year is more consistent with the underlying purpose of the aid, which is to promote the creation of new employment for a specified period'.

21 However, since it considers there to be doubt as to the exact interpretation of the Community legislation in that regard, the Tribunale ordinario di Nocera Inferiore (District Court, Nocera Inferiore) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the Community law laid down in the guidelines on aid to employment, the guidelines on national regional aid and ... Regulation No 2204/2002 ... to be interpreted as meaning that, in order to determine whether there has been an increase in employment, a comparison must be made between the average AWU for the year preceding the recruitment of new workers and the average AWU for the year following their recruitment, or are those provisions to be interpreted instead as meaning that a comparison must – or may – be made between the average AWU for the year preceding the recruitment of new workers and the exact number of workers present in the undertaking on the specific day on which those new workers were recruited?'

The question referred for a preliminary ruling

22 First of all, it must be pointed out that the Commission's decisions authorising the aid schemes at issue in the main proceedings refer to both the guidelines on aid to employment and the guidelines on national regional aid but not to Regulation No 2204/2002, since that regulation was adopted after the decisions. It follows that there is no need to interpret that regulation in the present case.

23 Second, it should be recalled that the proceedings before the national court relate to aid for the creation of jobs not linked to an investment project and which the Commission scrutinised in the light of the guidelines on aid to employment. Even though the question referred for a preliminary ruling in fact concerns only the interpretation of the guidelines on aid to employment, these should be interpreted in close conjunction with the guidelines on national regional aid, since the notion of job creation is common to both sets of guidelines, which in essence define job creation by referring, at points 17 and 4.12 of the respective texts, to the net increase in the number of jobs compared with an average over a period of time.

- 24 Third, it must be pointed out that the Commission's decisions of 10 August 1999 and 6 December 2002 regarded both of the aid schemes at issue in the main proceedings, as notified to the Commission and supplemented by information subsequently provided by the national authorities, as compatible with the common market. In addition, as regards the formula that must be used to calculate the increase in the number of jobs, the decision of 10 August 1999 refers specifically to footnote 8 to point 3.2 of the Community guidelines on State aid for small and medium-sized enterprises, while the decision of 6 December 2002 contains an equally specific reference to the essentially identical formula at footnote 33 of point 4.12 of the guidelines on national regional aid.
- 25 In so far as the question referred for a preliminary ruling concerns the second term to be used in comparing an undertaking's workforce in order to verify that there has indeed been a net increase in employees in relation to an average over a period of time, it must be pointed out that no precise details in that regard are provided by either the text of point 17 of the guidelines on aid to employment or indeed that of Article 4(6)(b) of Regulation No 70/2001, which formed the basis of the Commission's decision of 6 December 2002 on the second aid scheme at issue in the main proceedings.
- 26 By contrast, the guidelines on national regional aid define the second term of comparison more precisely. First, at point 4.12, they specify that job creation means a net increase in the number of jobs in a particular establishment compared with the average over a period of time, and that any jobs lost during that period must therefore be deducted from the apparent number of jobs created during the same period. Second, the guidelines state, at footnote 33, that the number of jobs corresponds to the number of annual labour units (ALU), that is to say the number of persons employed full-time in one year, part-time and seasonal work being ALU fractions.
- 27 It follows that, according to the guidelines on national regional aid, job creation means the net increase in the number of persons employed full-time in one year (part-time and seasonal work being ALU fractions) in an establishment compared with the average over a period of time. Accordingly, under those guidelines, the second term in the comparison of the number of employees at the given time is therefore established not by the number of employees of an undertaking on the day of recruitment, but rather by the number of employees calculated in terms of ALU over the period of a year.
- 28 Furthermore, it must be pointed out that that definition of the second term of the comparison of the number of employees is also the same as subsequently used in Article 4(4)(a) of Regulation No 2204/2002, read in conjunction with Article 2(e) of that regulation, and also at point 58 of the guidelines on national regional aid for 2007-2013.
- 29 From examining the different provisions it can be seen that the Commission has gradually clarified the method for calculating the net increase of the number of jobs or employees. As a result of such clarification, the second term in the comparison of the number of employees of an undertaking at the given time is also an AWU figure like the first term in the comparison, and therefore that both terms in that comparison correspond to a period of one year.
- 30 Thus, that method of calculating an increase in the number of jobs or employees is based on the comparison of similar data, and enables the effort invested over time in job creation by the undertaking receiving aid to be measured, whereas the method that involves comparing the average AWU for the year preceding recruitment with the specific figure for the number of employees on the day of recruitment would have a more uncertain effect in that regard, since that figure is more affected by seasonal variations and therefore less representative of the undertaking's true employment position.
- 31 The first method of calculation is also consistent with an intention to promote job stability and permanence, expressed in particular at the third indent of point 21 of the guidelines on aid to employment, and is also reflected in the obligation, set out in the guidelines that have been discussed, to maintain the newly-created jobs for a minimum period. For that reason, the

method does not discriminate against undertakings whose business is seasonal, since seasonal employment is also included as a fraction of AWU in the second term of the comparison which is used in order to check that the requirement of a net increase in employment is satisfied. As the Advocate General has in essence noted in points 51 to 71 of his Opinion, unequal treatment between those undertakings and others would not be justified, given that they are subject to the same obligation to maintain newly-created jobs for a minimum period in order to receive aid.

32 In light of the above considerations, the answer to the question referred is that, in order to determine whether there has been an increase in employment, the guidelines on aid to employment should be interpreted as meaning that the average AWU for the year preceding recruitment should be compared with the average AWU for the year following that recruitment.

Costs

33 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

In order to determine whether there has been an increase in employment, the guidelines on aid to employment should be interpreted as meaning that the average number of annual working units for the year preceding recruitment should be compared with the average number of annual working units for the year following such recruitment.

[Signatures]