Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

24 June 2015*

(State aid — Milk levy — Aid granted by Italy to milk producers — Aid scheme linked to the reimbursement of the milk levy — Conditional decision — Failure to comply with a condition which allowed the aid to be considered compatible with the internal market — De minimis aid — Existing aid — New aid — Alteration to existing aid — Procedure for reviewing State aid — Obligation to state reasons — Burden of proof)

In Case T-527/13,

Italian Republic, represented by G. Palmieri, acting as Agent, assisted by S. Fiorentino and P. Grasso, avvocati dello Stato,

applicant,

v

European Commission, represented by D. Grespan, D. Nardi and P. Němečková, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2013/665/EU of 17 July 2013 on State aid SA.33726 (11/C) [ex SA.33726 (11/NN)] granted by Italy (deferral of payment of the milk levy in Italy) (OJ 2013 L 309, p. 40),

THE GENERAL COURT (Third Chamber),

composed of S. Papasavvas, President, N.J. Forwood (Rapporteur) and E. Bieliūnas, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 January 2015,

gives the following

* Language of the case: Italian.

Judgment

Background to the dispute

1 In order to enable Italian milk producers to pay the additional levy of EUR 1 386 475 000 owed to the European Union for exceeding the milk quota allocated to the Italian Republic during the period 1995/1996 to 2001/2002, the Italian Republic sought authorisation from the Council of the European Union to establish a State aid scheme pursuant to the third subparagraph of Article 88(2) EC.

2 By Decision 2003/530/EC of 16 July 2003 on the compatibility with the common market of an aid that the Italian Republic intends to grant to its milk producers (OJ 2003 L 184, p. 15, 'the Council decision'), the Council authorised that Member State to 'itself mak[e] payment to the [European Union] of the amount due from them to the [European Union] by virtue of the additional levy on milk and milk products for the period 1995/1996 to 2001/2002' (Article 1 of the Council decision). The Council also authorised it to '[allow the interested parties] to repay their debt [in relation to the Italian Republic] by way of deferred payment over a number of years without interest' (Article 1 of the Council decision).

3 That statement of compatibility was subject to two sets of conditions. In the first place, the Council required the Italian authorities, first, to declare the amount corresponding to the additional levy owed by the milk producers to the European Agricultural Guidance and Guarantee Fund (EAGGF) and, secondly, to deduct their outstanding debt to the European Union and the interest thereon from the expenditure financed by the EAGGF (Article 2 of the Council decision). In the second place, it required the milk producers to repay in full their debt to the Italian Republic in yearly instalments of equal size and to do so over a period not exceeding 14 years starting from 1 January 2004 (Article 1 of the Council decision).

4 In that context, the Italian authorities adopted decreto-legge n. 49, riforma della normativa in tema di applicazione del prelievo supplementare nel settore del latte e dei prodotti lattiero-caseari (Decree-law No 49 reforming the rules on the application of the additional levy in the milk and dairy products sector) of 28 March 2003 (GURI No 75 of 31 March 2003, p. 4), and decreto ministeriale del 30 luglio 2003, disposizioni per il versamento del prelievo supplementare, dovuto e non versato per i periodi dal 1995/1996 al 2001/2002 di cui all'art. 10, comma 34, della legge n. 119/2003 (Ministerial Decree of 30 July 2003 on payment of the additional levy which is payable but unpaid for the period 1995/1996 to 2001/2002 and referred to in Article 10(34) of Law No 119/2003) (GURI No 183 of 8 August 2003, p. 33). The combined provisions of those two measures provided, in essence, that the amount of the additional levy borne by the Italian Republic would be fully repaid to it by the milk producers, without interest, in the form of annual payment instalments of the same amount deferred over a period not exceeding 14 years ('the system of staggered payments').

5 Having amended those provisions on several occasions, in particular to enable the persons concerned to request that their debt be staggered over a period of up to 30 years, and then by deferring by six months the payment of the annual instalments due on 30 June 2010, the Italian authorities adopted legge n. 10, Conversione in legge, con modificazioni, del decreto-legge 29 dicembre 2010, n. 225, recante proroga di termini previsti da disposizioni legislative e di interventi urgenti in materia tributaria e di sostegno alle imprese e alle famiglie (Law No 10, converting into law, with amendments, Decree-Law No 225 of 29 December 2010, extending time-limits laid down by legislative provisions and urgent interventions in tax matters and to support undertakings and families) of 26 February 2011 (GURI No 47 of 26 February 2011, Ordinary Supplement No 53), which entered into force the following day. The latter, in particular, inserted Article 1(12)k into Decree-Law No 225, which provided that, '[i]n order to address the serious crisis affecting the dairy

sector, the time-limits for payment of the amounts due on 31 December 2010 referred to in the instalment plans laid down by Decree-Law No 49 [and the subsequent legislation] have been extended until 30 June 2011' ('the deferral of payment').

6 The Italian authorities informed the European Commission that the 'grant equivalent' of that measure had been offset against the de minimis aid provided for that Member State by the annex to Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles [107 TFEU] and [108 TFEU] to de minimis aid in the sector of agricultural production (OJ 2007 L 337, p. 35). According to the Italian authorities, the 11 271 beneficiaries of the system of staggered payments included 1 291 milk producers benefitting from that measure, that is to say a proportion of 11.45%. Furthermore, the individual aid obtained on that basis ranged from between EUR 0.08 to EUR 694.19. Lastly, 1 187 of the 1 291 milk producers concerned received less than EUR 100, and 559 of them received less than EUR 12.

7 By Decision C (2011) 10055 final of 11 January 2012 on State aid SA.33726 (11/C) (ex SA.33726 (11/NN)) — Deferral of payment of the milk levy in Italy, a summary of which was published in the ***Official Journal of the European Union*** **on 10 February 2012 (OJ 2012 C 37, p. 30), the Commission initiated the procedure laid down in Article 108(2) TFEU. In the first place, it indicated, in essence, that it had doubts relating to the classification of the deferral of payment in the light of Article 107 TFEU, and to the compatibility of that measure with the internal market. In the second place, the Commission stated that that deferral of payment gave rise to an infringement of one of the conditions laid down in the Council decision, that that infringement transformed the whole system of staggered payments established by the Italian authorities into new aid, in so far as it related to milk producers who had benefitted from the deferral of payment, and that the compatibility of that new aid with the internal market had also not been established**.

8 By Decision 2013/665/EU of 17 July 2013 on State aid SA.33726 (11/C) [ex SA.33726 (11/NN)] granted by Italy (deferral of payment of the milk levy in Italy) (OJ 2013 L 309, p. 40, 'the contested decision'), the Commission considered, following the exchange with the Italian authorities during the administrative procedure, that each of the two measures at issue, namely, the deferral of payment, on the one hand, and the system of staggered payments, on the other hand, constituted new and unlawful aid which was incompatible with the internal market (Article 1 of the contested decision). It therefore ordered the Italian Republic to ensure the immediate and effective recovery of the sums granted to milk producers who had benefitted from the deferral of payment, together with interest (Articles 2 and 3 of the contested decision).

Procedure and forms of order sought

9 By application lodged at the Registry of the General Court on 30 September 2013, the Italian Republic brought the present action.

10 The Italian Republic claims, in essence, that the General Court should:

— annul the contested decision in its entirety;

— in the alternative, annul the contested decision in so far as it requires the Italian Republic to recover the individual aid granted, in accordance with the aid scheme previously authorised by the Council decision, to the Italian milk producers who benefitted from the deferral of payment;

— order the Commission to pay the costs.

11 The Commission contends that the Court should:

— dismiss the action;

— order the Italian Republic to pay the costs.

Law

12 In support of its claims, the Italian Republic relies on two pleas in law. The first plea alleges infringement of Article 3(7) of Regulation No 1535/2007. The second plea alleges infringement of Article 3(2) of that regulation, infringement of Article 1(c) 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), infringement of Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 (OJ 2004 L 140, p. 1) and an inadequate statement of reasons.

The first plea

13 The Italian Republic submits that the contested decision is vitiated by an infringement of Article 3(7) of Regulation No 1535/2007, according to which '[d]e minimis aid shall not be cumulated with State aid in respect of the same eligible costs if such cumulation would result in an aid intensity exceeding that laid down by [European Union] rules in the specific circumstances of each case.' The Commission concluded that granting the deferral of payment infringed that provision, based on the assumption that the system of staggered payments previously authorised by the Council constituted the maximum level of aid that could be granted to milk producers. The Council decision does not, in any event, preclude the Italian authorities from establishing, so far as is necessary, new support measures for those producers. Therefore, the Commission wrongly took the view that the provision at issue precluded the granting of new aid to them. Furthermore, the Commission itself acknowledged that that aid was to be regarded as de minimis aid.

14 The Commission disputes the validity of that argument.

15 Article 3(1) of Regulation No 1535/2007 provides that '[a]id measures shall be deemed not to meet all the criteria of Article [107(1) TFEU] and shall therefore not fall under the notification requirement of Article [108(3) TFEU] where they fulfil the conditions laid down in paragraphs 2 to 7 of this Article'.

16 In that regard, it should be pointed out that, although it is for the Commission to prove that a measure fulfils the conditions necessary to be classified as State aid, it is then for the Member State which has provided or proposes to provide that aid to demonstrate that that measure escapes such classification or that it is compatible with the internal market.

17 In that regard, it is settled case-law that it is for the Member State, in particular, to provide all the information to enable the Commission to verify that the conditions for the derogation sought are fulfilled (judgments of 28 April 1993 in *Italy* v *Commission*, C-364/90, EU:C:1993:157, paragraph 20, and 29 April 2004 in *Italy* v *Commission*, C-372/97, EU:C:2004:234, paragraph 81), by establishing either that the measure at issue can be regarded as being compatible with the internal market in accordance with the provisions of Article 107(3) TFEU (judgments of 15 December 1999 in *Freistaat Sachsen and Others* v *Commission*, T-132/96 and T-143/96, EU:T:1999:326, paragraph 140, and 15 June 2005 in *Regione Autonoma della Sardegna* v *Commission*, T-171/02, EU:T:2005:219, paragraph 129), or even that it escapes the classification of State aid laid down in Article 107(1) TFEU

(judgments of 29 April 2004 in *Netherlands* v *Commission*, C-159/01, EU:C:2004:246, paragraph 43, and 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and the United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 143 to 152).

18 Where the Member State concerned fails to provide evidence of the validity of the derogation sought and, *a fortiori*, where it fails to meet its obligation to produce relevant information in that regard, which, as pointed out in Article 4(6) of Regulation No 1535/2007, applies in particular where the Member States claim that the aid granted to undertakings operating in the agricultural production sector is of a de minimis nature, the Commission is entitled to conclude that the granting of that derogation is not justified (see, to that effect, judgment in *Netherlands* v *Commission*, C-382/99, EU:C:2002:363, paragraphs 77 to 80).

19 In the present case, the contested decision considers that the deferral of payment constitutes State aid (recitals 28 to 32) and cannot be regarded as being de minimis (recitals 33 to 42), contrary to the submissions of the Italian authorities (recitals 14 to 20).

20 That conclusion is based on three sets of considerations.

21 First, the Commission considered that, although the individual aid linked to the deferral of payment may, when analysed in isolation, be regarded as de minimis aid, the Italian Republic had not provided the Commission with any evidence to establish the substance of its claim that the milk producers who benefitted from that deferral had not received other de minimis aid, resulting in them benefitting from a total amount of aid greater than the ceiling laid down in Article 3(2) of Regulation No 1535/2007 (recital 34 and first to third sentences of recital 35 of the contested decision), the second subparagraph of which provides that, '[w]here the total amount of aid granted for an aid measure exceeds the ceiling [of EUR 7 500 per period of three fiscal years] referred to in the first subparagraph, none of that amount — not even the fraction not exceeding the ceiling — may benefit from this Regulation'.

22 Secondly, the Commission considered, as a supplementary point, as demonstrated by the use of the word 'also' (third sentence of recital 35 of the contested decision), that that aid was not the only measure to be taken into account for the purposes of verifying compliance with the ceiling in question. It considered that the deferral of payment infringed the Council decision, that that infringement rendered unlawful part of the individual aid granted to milk producers under the system of staggered payments authorised by the Council and that it was also necessary to take the latter into account in the context of that verification (end of the third sentence to the fifth sentence of recital 35, and recital 50 of the contested decision).

23 Thirdly, and still as a supplementary point, as demonstrated by use of the expression 'also' (recital 36 of the contested decision), the Commission explained that the deferral of payment led, as a result of its cumulation with the system of staggered payments, to milk producers being granted aid of an 'intensity' exceeding that applicable in the specific circumstances of the present case (recitals 36 to 42 of the contested decision), in infringement of Article 3(7) of Regulation No 1535/2007.

24 The Italian Republic criticises that third consideration, based on Article 3(7) of Regulation No 1535/2007, but does not put forward any arguments to invalidate the analysis carried out at the same time by the Commission concerning Article 3(2) (see paragraph 21 above).

25 In the context of the present plea, the Italian Republic merely points out that, in the contested decision, the Commission accepted that the individual aid linked to the deferral of payment could be regarded as being de minimis if it were examined in isolation (paragraph 46 of the application). However, the Commission added that that aid had to be analysed in relation to any other de minimis aid that the milk producers received, and not in isolation (see paragraph 21 above).

26 Next, the Italian Republic itself accepts, in the context of its second plea, that the second subparagraph of Article 3(2) of Regulation No 1535/2007 precludes different types of aid, each of which is de minimis in nature, from being classified overall as de minimis aid where they are grouped together and their total amount exceeds the ceiling laid down in that provision (paragraph 53 of the application).

27 Lastly, the Italian Republic asserts, in its second plea, that, 'as demonstrated in the first plea, the conditions laid down in [Article 3(2) of Regulation No 1535/2007] have not been met', that, '[t]here is no evidence that the contested measure resulted in a total amount of aid granted that exceeds the ceiling referred to in [that article]' and that '[t]here are, on the contrary, data which show precisely the opposite' (paragraph 52 of the application). However, the Italian Republic fails to put forward, in the context of the present action, or demonstrate that it put forward, in the context of the administrative procedure, arguments or evidence which would make it possible to consider, or even merely to verify, that it has not granted other de minimis aid resulting in the ceiling set by that provision being exceeded, as the Commission rightly points out. On the contrary, in response to the questions raised by the General Court by way of measures of organisation of procedure, and then at the hearing, the Italian Republic merely submits, in essence, that the aid resulting from the deferral of payment is of such minimal significance that it should be presumed that the ceiling at issue was not exceeded. Such an argument cannot succeed, in the absence of any information relating to other aid from which the milk producers concerned may have benefitted and given the evidential requirements arising from the case-law (see paragraphs 17 and 18 above) and the combined provisions of Article 3(1) and (2) and of Article 4(6) of Regulation No 1535/2007.

28 Since the Commission was able to find, in the context of the analysis referred to in paragraph 21 above, that the aid connected to the deferral of payment could not be regarded as having been granted in accordance with Article 3(2) of Regulation No 1535/2007, because the Italian authorities failed to demonstrate to the requisite legal standard that that provision had been complied with, it is irrelevant whether the Commission was right or wrong to take the view, in the context of the analysis referred to in paragraph 23 above, that the granting of that aid also infringed Article 3(7) of that regulation.

29 Consequently, the present plea can only be rejected as irrelevant.

The second plea

30 The Italian Republic relies on two sets of complaints in the context of the second plea.

31 In the first place, the Italian Republic submits that the contested decision is vitiated by an infringement of Article 3(2) of Regulation No 1535/2007. First of all, it has not been demonstrated that the milk producers who benefited from the deferral of payment received, as a result of the cumulation of that measure with other measures, a total amount of aid greater than the ceiling laid down in that article. Next, that article is exclusively applicable to situations in which the cumulation of different measures each constituting de minimis aid results in a total amount of aid greater than the ceiling laid down in that article. Lastly, even if Article 3(2) of Regulation No 1535/2007 is applicable to any situation in which there is a cumulation of aid, whether or not that aid is de minimis, it cannot constitute a legal basis for the Commission to order a Member State which has granted de minimis aid to recover not only that aid, where it was granted unlawfully, but also the amount of previous aid which resulted in an authorisation decision.

32 In the second place, the contested decision is vitiated by an error of law, and at the very least by an inadequate statement of reasons, in so far as the Commission orders the Italian Republic to recover not only the individual aid linked to the deferral of payment, but also part of that granted previously, under the system of staggered payments. In the light of the limited scope of that deferral, the

Commission should have analysed it in isolation as new aid for the purposes of Article 1(c) of Regulation No 659/1999, instead of considering that it affected the very substance of the aid scheme previously authorised by the Council and, consequently, deciding that the entirety of that existing aid scheme was to be classified as new and unlawful aid to the milk producers who had benefitted from the deferral of payment. Furthermore, the Commission should have concluded that that new aid was exempt from the obligation of notification laid down in the FEU Treaty, in accordance with Article 4(1) of Regulation No 794/2004.

33 In reply, the Italian Republic adds, in essence, that the arguments which are relied on by the Commission in its defence confirm the substance of its complaints.

34 The Commission takes the view, in essence, that one of those two sets of complaints is unfounded and that the other is irrelevant.

35 In the first place, the Italian authorities failed, throughout the administrative procedure, to prove the substance of their claim that the ceiling set by Article 3(2) of Regulation No 1535/2997 was not exceeded as a result of the aid connected to the deferral of payment, and therefore the Commission did not err in failing to apply that provision.

36 In the second place, the Italian Republic has misread the contested decision. It is clear from the grounds and the operative part of that decision — and from the decision to initiate the procedure laid down in Article 108(2) TFEU which preceded it — that the Commission examined two different measures, and then classified each of them as new, unlawful aid which was incompatible with the internal market. The first of those measures is the 'aid connected to the deferral of payment' (first and second indents of recital 13, recital 45 and recital 57 of the contested decision). The second is the 'new aid scheme determined by the infringement of [the Council] decision' (third indent of recital 13 and recital 57 of the contested decision).

37 As regards that second measure, the Commission rightly took the view that the Italian authorities had infringed one of the conditions laid down in the Council decision by granting a deferral of payment to the milk producers, that that condition was a *sine qua non* for the authorisation granted by the Council and that its infringement rendered the whole system of staggered payments incompatible with that decision, to the extent that it applied to milk producers who had benefitted from the deferral. The Commission rightly concluded from this that that system was to be classified, to that extent, as a new aid scheme which was unlawful and incompatible with the internal market and that the individual aid granted on that basis was to be recovered at the same time as that linked to the deferral of payment. It was not necessary, in the context of that analysis, to examine whether or not the deferral of payment affected the substance of the system of staggered payments or whether its de minimis character exempted it from the obligation of notification laid down in the FEU Treaty. Lastly, the Commission provided a sufficient statement of reasons for its decision on all of those points.

38 Given the arguments exchanged by the parties in the course of the procedure, it is necessary to clarify the scope of the present plea before examining the complaint relating to the statement of reasons for the contested decision, and then those relating to its substance.

The scope of the plea

39 In the first place, it should be noted that, although each of the complaints relied on by the Italian Republic in the context of the present plea is based on infringement of a different provision, they have in common the fact that they also allege, in essence, that the contested decision has no valid legal basis, in so far as it classifies the system of staggered payments as new and unlawful aid (Article 1(2) of the contested decision), and in so far as it orders the Italian Republic to recover that aid (Article 2(1) and (4)(a) to (d) of the contested decision).

40 In the second place, that criticism has been made since the application stage, even though the expressions 'legislative references' and 'positive point of support on which the [Commission] decision could, in principle, have been based' themselves appear only in the reply, in response to the arguments put forward by the Commission in its defence.

41 Thus, the Italian Republic states, in its first set of complaints, that 'the failure by the competent administrative authorities to apply the contested measure, in other words the interest costs relating to the default period … amounts, in itself, to the maximum consequence laid down by the Treaty for unauthorised aid, namely the withdrawal of the aid granted', that 'the withdrawal of the de minimis aid should not also lead to the cancellation of the aid lawfully granted' and that 'there is no evidence capable of establishing that the beneficiaries of the existing aid who benefitted from the contested measure are required to repay not only the amount corresponding to the contested measure, but also that received as part of the existing aid' (paragraphs 54 to 56 of the application).

42 Similarly, the Italian Republic submits, in its second set of complaints, that '[n]or is it possible to consider that the recovery decision may be extended to the existing aid as a legitimate result of a substantial alteration to that aid which is capable of resulting in those two measures being regarded as a single new aid, not notified to the Commission and therefore unlawful', that '[s]uch a conclusion is the clear result of a distortion of the concept of "alteration to the existing aid"' and that, '[i]n any event, the Commission is far from having provided an adequate statement of reasons as regards the fact that the factual conditions for the application of that concept have been met' (paragraphs 57 and 58 of the application).

43 In the third and last place, and in any event, it is settled case-law that a submission or argument which may be regarded as amplifying a plea made previously, whether directly or by implication, and which is closely connected therewith, will be declared admissible (judgments of 30 September 1982 in *Amylum* v *Council*, 108/81, EU:C:1982:322, paragraph 25, and 14 March 2007 in *Aluminium Silicon Mill Products* v *Council*, T-107/04, EU:T:2007:85, paragraph 60).

44 In those circumstances, the Italian Republic's arguments, first, that the Commission's defence confirms that '[its] decision is devoid of legislative references capable of justifying it', since 'the second subparagraph of Article 3(2) of Regulation No 1535/2007 … was, all things considered, the only positive point of support on which the decision could, in principle, have been based' and, secondly, that 'it is impossible to consider [the deferral of payment] as being an element of new aid, which also results in the beneficiaries losing the right to the aid authorised by the Council', since the Commission has not 'demonstrate[d] that the criteria relating to the concept of alteration of existing aid were met' (paragraphs 16, 17, 21 and 23 of the reply), must be regarded as developing, in the light of the defence, the arguments presented since the application stage.

The complaint relating to the statement of reasons for the contested decision

45 It is settled case-law that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to understand the justification for the measure and the court to ascertain whether it is well founded. The statement of reasons must be assessed on the basis of the circumstances of the case, and in particular the content of the measure at issue, the nature of the reasons given and the interest which its addressees, or other persons concerned, may have in obtaining explanations. It is not, however, necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU is assessed taking into account both the wording of that measure and its legal and factual context (judgments of 13 March 1985 in *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission*, 296/82 and 318/82, EU:C:1985:113, paragraph 19, and of 21 July 2011 in *Alcoa Trasformazioni* v *Commission*, C-194/09 P,

EU:C:2011:497, paragraph 96). It is, thus, sufficient if the institution which adopted the measure sets out the facts and the legal considerations having decisive importance in the context of its decision (judgments of 14 July 1972 in *Cassella Farbwerke Mainkur* v *Commission*, 55/69, EU:C:1972:76, paragraphs 22 and 23, and of 6 March 2003 in *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 280).

46 In the present case, the contested decision explains on seven occasions, clearly and unequivocally, the reasons why the Commission considered, both at the time of initiating the procedure laid down in Article 108(2) TFEU and at the end of that procedure, first, that the deferral of payment infringed one of the conditions which the Council had attached to its decision declaring the system of staggered payments compatible with the internal market and, secondly, that such an infringement 'transformed' the whole of that existing aid scheme into new unlawful aid or 'created' such aid, for the undertakings which benefitted from that deferral (third indent of recital 13, recital 28, third to fifth sentences of recital 35, end of recital 42, second sentence of recital 45, recital 50 and recital 57 of the contested decision).

47 Those grounds set out to the requisite legal standard the considerations of fact and of law that are of essential importance in the general scheme of the contested decision. Furthermore, they allowed the Italian Republic to understand the justifications on which the Commission's reasoning was based, given the context of that reasoning and the legal rules governing the matter in question, and then to dispute them effectively before the EU judicature, as confirmed by the content of the application and the reply. Lastly, they are sufficient to allow the General Court to review the validity of that reasoning.

48 Therefore, it is necessary to examine the complaints relating to the merits of the contested decision.

The complaints relating to the merits of the contested decision

49 In the first place, given the reasoning on which the contested decision is based and which is referred to by the Commission before the General Court, it is appropriate to make four findings.

50 First, it is common ground that, until the Commission took the view that the system of staggered payments was to be regarded as new aid, that measure constituted an existing aid scheme, even though that classification is only implicitly referred to in the contested decision, in recital 4 and in the third indent of recital 13, according to which the aid 'approved by the Council' 'bec[a]me …' 'new aid' as a result of the deferral of payment.

51 Secondly, it is common ground that the declaration of compatibility for that existing aid scheme was not absolute, since the Council had made authorisation subject to compliance with certain conditions.

52 Thirdly, it is not disputed that the deferral of payment infringes one of those conditions and that it constitutes, taken in isolation, new aid. In its first plea, the Italian Republic submits that the Council decision and the de minimis rule allowed it to grant such new aid. In its second plea, the Italian Republic disputes, in the alternative, the legal consequences attached by the Commission to failure to comply with the Council decision, namely application of the classification of new aid to the whole system of staggered payments, in so far as it applies to producers who benefitted from the deferral of payment, as well as the order made to the Italian authorities to recover the individual aid granted on that basis. By contrast, the Italian Republic does not call into question the existence of that infringement.

53 Fourthly, it is not disputed and cannot be disputed that it was for the Commission to monitor the implementation of the aid scheme authorised by the Council, in particular by ensuring compliance with the conditions which enabled the Council to declare it compatible with the internal market and, where necessary, by drawing the appropriate conclusions from non-compliance with them, as pointed out in the Council decision itself (recitals 8 and 9, and Article 3).

54 Under the Treaty, the Commission is responsible for the constant review and supervision of State aid, and under Articles 107 TFEU and 108 TFEU the Commission is reserved the central role of determining whether those measures are compatible with the internal market, by derogation from the general principle of incompatibility laid down by those articles, while conferring on the Council, in that regard, power which is exceptional in nature and must, as such, be subject to strict interpretation (judgments of 29 June 2004 in *Commission* v *Council*, C-110/02, EU:C:2004:395, paragraphs 29 to 31, and of 10 December 2013 in *Commission* v *Ireland and Others*, C-272/12 P, EU:C:2013:812, paragraph 48). That exception merely enables the Council to decide, where justified by exceptional circumstances, that aid established or to be established by a Member State must be declared compatible with the internal market. Therefore, it is for the Commission, and the Commission alone, to ensure the proper implementation of existing aid or aid schemes, irrespective of whether they were authorised by the Commission or by the Council.

55 In the second place, in view of the arguments relied on by the Italian Republic, it is necessary to determine whether or not, in the present case, the Commission exercised that power in the manner provided for by the Treaty and according to the detailed rules for its implementation.

56 In that regard, Article 108 TFEU and Regulation No 659/1999 enable the Commission to draw several conclusions from the failure to comply with a decision that declared aid or an aid scheme compatible with the internal market subject to compliance with certain conditions.

57 First, it is clear from the second subparagraph of Article 108(2) TFEU and from Article 23 of Regulation No 659/1999, that if the Commission takes the view that a Member State has failed to comply with such a decision, it may, in derogation from the provisions of Articles 258 TFEU and 259 TFEU, refer the matter to the Court of Justice of the European Union direct (judgments of 12 October 1978 in *Commission* v *Belgium*, 156/77, EU:C:1978:180, paragraph 22, and of 4 February 1992 in *British Aerospace and Rover* v *Commission*, C-294/90, EU:C:1992:55, paragraph 11).

58 It is true that those provisions expressly provide for such an option only in the event that the decision which was not complied with was adopted by the Commission. However, it must also be considered possible to use that option in the event that the Council declared aid or an aid scheme compatible with the internal market, under the third subparagraph of Article 108(2) TFEU. It cannot be accepted that the Commission is not entitled to refer the matter directly to the Court of Justice of the European Union for the purposes of a declaration that a Member State has failed to comply with a decision taken as part of the monitoring of State aid in the event that the Council makes use, exceptionally, of the power which the Commission normally exercises. On the contrary, the spirit and general scheme of Article 108 TFEU imply that, in such a case, the means of recourse open to the Commission are not restricted to the more complicated procedure under Article 258 TFEU (see, by analogy, judgment of 2 July 1974 in *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraphs 16 and 17). Therefore, it must be possible in such circumstances to implement the means of redress provided under the second subparagraph of Article 108(2) TFEU, which is a variant of the action for a declaration of failure to fulfil Treaty obligations specifically adapted to the special problems which State aid poses (judgments of 14 February 1990 in *France* v *Commission*, C-301/87, EU:C:1990:67, paragraph 23, and 12 December 1996 in *Air France* v *Commission*, T-358/94, EU:T:1996:194, paragraph 60).

59 Where the Commission proceeds in that way, neither the second subparagraph of Article 108(2) TFEU nor Article 23 of Regulation No 659/1999 imposes on it any obligation other than that of establishing to the requisite legal standard that the Member State concerned did not comply with all or some of the conditions which enabled the Commission or the Council to declare the aid or the aid scheme at issue compatible with the internal market.

60 Secondly, it is clear from the case-law that, if the Commission considers that a Member State which was authorised to implement aid or an aid scheme has subsequently failed to fulfil its obligation to comply with the conditions attached to that authorisation, the Commission is not, in any event, required to refer the matter directly to the Court of Justice of the European Union.

61 In particular, where, as in the present case, the infringement which the Commission considers to have been committed is linked to the granting of new aid, the Court of Justice has ruled that the Commission was entitled to exercise the powers conferred on it by Article 108 TFEU for the purposes of reviewing the compatibility of that aid with the internal market. In that context, the Commission must take into account all relevant matters, including, where appropriate, the circumstances already considered in any previous decision and any conditions which that decision may have imposed on the Member State concerned. Furthermore, the Commission may take into account any new information likely to alter the analysis previously carried out. In the absence of such information, the Commission is entitled to base its new decision on the assessments made in the earlier decision and on the failure to comply with the conditions imposed by that decision (judgments of 3 October 1991 in *Italy* v *Commission*, C-261/89, EU:C:1991:367, paragraphs 2 to 4, 17 and 20 to 23, and *British Aerospace and Rover* v *Commission*, cited in paragraph 57 above, EU:C:1992:55, paragraphs 11 to 14; see also, to that effect, judgment of 13 September 1995 in *TWD* v *Commission*, T-244/93 and T-486/93, EU:T:1995:160, paragraphs 51 to 52, 56 and 59 to 60, and, on appeal, judgment of 15 May 1997 in *TWD* v *Commission*, C-355/95 P, EU:C:1997:241, paragraphs 25 to 27).

62 However, if the Commission exercises its monitoring powers, it is required to do so in accordance, first, with the procedures laid down by the Treaty and the rules adopted for its application (judgments in *British Aerospace and Rover* v *Commission*, cited in paragraph 57 above, EU:C:1992:55, paragraph 14, and *TWD* v *Commission*, cited in paragraph 61 above, EU:T:1995:160, paragraphs 57 and 58) and, secondly, with the substantive requirements to which the exercise of those powers is subject.

63 In the present case, given the findings set out in paragraphs 49 to 53 above and the general scheme of Regulation No 659/1999, as clarified by the case-law, the Commission had the possibility of recourse to several procedural remedies.

64 First, since the system of staggered payments was authorised by the Council decision and therefore constituted an existing aid scheme for the purposes of Article 1(b) of Regulation No 659/1999, on the one hand, and the deferral of payment infringed one of the conditions attached to that authorisation, on the other hand, the Commission was entitled, in the context of the constant review of existing aid schemes laid down in Article 108(1) TFEU, to examine whether or not, as a result of that infringement, that scheme was still compatible with the internal market and, where appropriate, to find that it was incompatible. In that regard, it should be pointed out, for the sake of completeness, in so far as the Italian Republic has not in the present case disputed the proportionality of the contested decision and in so far as it is therefore not necessary to examine that issue, that the decision adopted at the end of that procedure must comply with general principles of law, and in particular the principle of proportionality applicable to any act of the institutions of the European Union (judgments of 29 June 2010 in *Commission* v *Alrosa*, C-441/07 P, EU:C:2010:377, paragraphs 36 and 37, and 17 July 2014 in *Westfälisch-Lippischer Sparkassen- und Giroverband* v *Commission*, T-457/09, EU:T:2014:683, paragraphs 346 and 347).

65 Consequently, the Commission could have used the '[p]rocedure regarding existing aid schemes', laid down in Chapter V of Regulation No 659/1999. However, it is common ground that the contested decision was taken on the basis of Article 108(2) TFEU, as is clear from both its preamble and its grounds (recitals 4, 8, 13, 28, 33, 35, 37, 45 and 57 of the contested decision) and as the Commission confirmed in response to a written question from the General Court.

66 Secondly, since the deferral of payment infringed the Council decision, the Commission was entitled, in accordance with the first subparagraph of Article 108(2) TFEU, to determine whether or not it was necessary to consider that the system of staggered payments authorised by the Council had been misused as a result of such an infringement. For that purpose, the Commission could have used the '[p]rocedure regarding misuse of aid', laid down in Chapter IV of Regulation No 659/1999.

67 Although Article 1(g) of Regulation No 659/1999 confines itself to classifying as 'misuse of aid', '[f]or the purpose of this Regulation', 'aid [which was] used by [its] beneficiary' in contravention, in particular, of a 'conditional decision', based on Article 7(4) of that regulation, and to enabling the Commission to order the withdrawal or alteration of that aid (see, to that effect, judgment of 11 May 2005 in *Saxonia Edelmetalle and ZEMAG* v *Commission*, T-111/01 and T-133/01, EU:T:2005:166, paragraphs 84 to 86 and 95 to 97), it is clear from the case-law that the concept of 'misuse of aid', which appears in the first subparagraph of Article 108(2) TFEU, must be given a wider scope than the definition given to it by Article 1(g) of Regulation No 659/1999, in so far as failure by a Member State to comply with the conditions imposed at the time of approval of aid also constitutes a form of misuse (judgment of 15 March 2012 in *Ellinika Nafpigeia* v *Commission*, T-391/08, EU:T:2012:126, paragraph 165, not disputed on that point in the context of the appeal which gave rise to the judgment of 28 February 2013 in *Ellinika Nafpigeia* v *Commission*, C-246/12 P, EU:C:2013:133).

68 Nevertheless, it is common ground that the Commission did not base its decision on those provisions, as it confirmed in response to a written question from the General Court, but that it took the view that the system of staggered payments had become new aid as a result of the deferral of payment and in so far as it applied to the milk producers who had benefitted from that deferral. That classification and that of misuse of aid are mutually exclusive, since misuse may relate only to pre-existing aid, as pointed out in recital 15 of Regulation No 659/1999.

69 Thirdly, since the infringement attributed to the Italian Republic consisted in the granting of a measure likely to be classified as new aid, the Commission was entitled to use the 'procedure regarding unlawful aid' laid down in Chapter III of Regulation No 659/1999, in order to examine that measure, as it decided to do in the present case.

70 However, the Commission had to comply, in that context, with the substantive conditions enabling it to classify not only the deferral of payment taken in isolation but also the whole of the pre-existing system of staggered payments as aid or as an aid scheme which is new and unlawful.

71 In that regard, Article 1(b) and (c) of Regulation No 659/1999 classifies as existing aid 'authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council', and as new aid 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

72 In accordance with the Treaty and the provisions of Chapter II of Regulation No 659/1999 relating to the '[p]rocedure regarding notified aid', such alterations must be notified to the Commission prior to their implementation, subject to the cases which are exempt from notification laid down in Article 4(1) of Regulation No 794/2004, and may, at the end of the formal investigation procedure, be the subject of a declaration of incompatibility, or 'negative decision', based on Article 7(5) of Regulation No 659/1999.

73 Where the aid is not notified, it constitutes unlawful aid and may be the subject, at the end of the '[p]rocedure regarding unlawful aid', governed by Chapter III of Regulation No 659/1999, not only of a 'negative decision', as provided in Article 13 of that regulation, but also of a 'recovery decision', under Article 14 thereof.

74 In all those situations, it is not the 'altered existing aid' but, in accordance with the unequivocal text of Article 1(c) of Regulation No 659/1999 and as recalled in the settled case-law, only the alteration as such that is liable to be classified as new aid (judgments of 30 April 2002 in *Government of Gibraltar* v *Commission*, T-195/01 and T-207/01, EU:T:2002:111, paragraphs 109 and 110, and 16 December 2010 in *Netherlands and NOS* v *Commission*, T-231/06 and T-237/06, EU:T:2010:525, paragraph 177; see also, to that effect, judgment of 20 May 2010 in *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraphs 42 to 49). For its part, the earlier measure, which could be properly put into effect, is regarded as existing aid or an existing aid scheme (judgments of 9 August 1994 in *Namur-Les assurances du crédit*, C-44/93, EU:C:1994:311, paragraph 13, and 17 June 1999 in *Piaggio*, C-295/97, EU:C:1999:313, paragraph 48).

75 By way of exception, in the event that the alteration affects the actual substance of the existing aid or existing aid scheme, that measure is transformed as a whole into new aid or into a new aid scheme. However, there can be no question of such a substantive alteration where the new element is clearly severable from the pre-existing measure (judgments in *Government of Gibraltar* v *Commission*, cited in paragraph 74 above, EU:T:2002:111, paragraphs 111 and 114, and *Alcoa Trasformazioni* v *Commission*, T-332/06, EU:T:2009:79, paragraph 128; see also, to that effect, on appeal, judgment in *Alcoa Trasformazioni* v *Commission*, cited in paragraph 45 above, EU:C:2011:497, paragraphs 111 and 112) or where it is purely formal or administrative in nature and is not capable of influencing the assessment of the compatibility of that measure with the internal market (judgment of 20 March 2014 in *Rousse Industry* v *Commission*, C-271/13 P, EU:C:2014:175, paragraphs 31 to 38).

76 It follows that the possibility, for the Commission, of classifying as new, and where necessary unlawful, aid not only the alteration of existing aid, but also all the existing aid to which that alteration relates, is subject, as regards the substance, to the condition that the Commission establish that that alteration affects the very substance of the pre-existing measure. Furthermore, in the event that the Member Sate concerned submits, during the administrative procedure, either that that alteration is clearly severable from the pre-existing measure, or that it is purely formal or administrative in character and is not capable of influencing the assessment of the compatibility of that measure with the internal market, the Commission must justify why those arguments appear to it to be unfounded.

77 In the present case, three findings must be made in that regard.

78 First of all, the only recitals of the contested decision capable of relating to the issue of whether or not the deferral of payment affected the actual substance of the system of staggered payments merely state that '[t]he Commission does not share [the] opinion' of the Italian authorities that 'the deferral of payment should be regarded as a stand-alone measure', on the ground that it is 'directly linked' to the aid previously authorised by the Council and 'cannot therefore be considered as being entirely unrelated' to it (recitals 38 and 39). Although the existence of a 'direct link' and of a 'relationship' between the deferral of payment and the system of staggered payments is indisputable, it does not mean, in itself, that the second of those measures substantially alters the first.

79 Next, that assessment by the Commission was made in the context of the examination of a different question, relating to the issue of whether or not the aid resulting from the deferral of payment was to be assessed in isolation from other aid which could have benefitted milk producers for the purposes of verifying compliance with the de minimis ceiling laid down in Article 3(2) of Regulation No 659/1999.

80 Lastly, the Commission itself confirms, in the defence (paragraphs 24, 32, 35 and 39) and in the rejoinder (paragraph 10), that under no circumstances did it seek to examine whether the deferral of payment substantially altered the system of staggered payments or whether it was, on the contrary, severable from it, since it considered that question to be 'irrelevant' and 'misplaced'.

81 In doing so, the Commission not only misconstrued the concept of 'new aid' by reclassifying an existing aid scheme as new unlawful aid without complying with the substantive conditions laid down in Regulation No 659/1999 and the case-law on that subject, as claimed by the Italian Republic.

82 The Commission also, and consequently, wrongly ordered the recovery, from the milk producers who benefitted from the deferral of payment, not only of that new and unlawful aid, but also of the individual aid granted, in addition, under that existing aid scheme, as the Italian Republic also asserts.

83 None of the arguments put forward by the Commission is likely to call that conclusion into question.

84 In particular, the Commission is not justified in arguing that the failure, by the Italian authorities, to comply with one of the conditions attached to the declaration of compatibility adopted by the Council entails, in essence, the 'reclassification' of the existing aid scheme, which until then benefitted from that conditional approval, as new and unlawful aid.

85 As is clear from the case-law referred to in paragraphs 57 to 62 and 74 to 75 above, where the Commission detects a failure to comply with a decision which declared aid or an aid scheme compatible with the internal market subject to certain conditions, it may either obtain a direct finding of that failure by the Court of Justice or, if that failure consists in the granting of new aid, exercise the powers enabling it to monitor the latter, provided that it meets the related substantive and procedural requirements. If the Commission chooses to exercise its monitoring powers, it must in principle confine itself to examining the new aid. It is only provided that it is demonstrated that the latter has altered the actual substance of existing aid or an existing aid scheme that the Commission is, by way of exception, entitled to declare that all of that pre-existing measure, as altered, is incompatible with the internal market, to find that it is unlawful if the Commission was also not made aware of that alteration prior to its implementation and to order, therefore, the withdrawal or modification of the altered aid or aid scheme.

86 By contrast, the Commission is not entitled to take the view that failure to comply with a condition imposed at the time of approving an existing aid scheme involves, *ipso facto*, the 'reclassification' of that measure as new aid, and still less to consider the latter as unlawful *ab initio* and to order its recovery as if it were aid that had been unlawfully implemented and not aid authorised in advance.

87 As stated in the case-law, any existing aid is covered by the authorisation decision relating to it, except where the Commission considers that it has been misused (see judgment of 29 April 2004 in *Italy* v *Commission*, C-298/00 P, EU:C:2004:240, paragraph 47 and the case-law cited) or that its very substance has been altered by new aid (see paragraphs 74 and 75 above). Subject to those two situations, such aid must therefore be regarded as lawful so long as the Commission has not found that it is incompatible with the internal market (judgment of 18 July 2013 in P, C-6/12, EU:C:2013:525, paragraphs 40 and 41; see also, to that effect, judgment in *Tirrenia di Navigazione and Others* v *Commission*, T-265/04, T-292/04 and T-504/04, EU:T:2009:48, paragraph 75).

88 Next, it is for the purpose of enabling the Commission — or exceptionally the Council — to consider 'an aid … compatible with the [internal] market' that that institution 'may attach to a positive decision conditions' and obligations, as is clear from the actual wording of Article 7(4) of Regulation No 659/1999 and from the case-law preceding the adoption of that regulation (judgments in *TWD* v *Commission*, cited in paragraph 61 above, EU:T:1995:160, paragraph 55, and in *TWD* v *Commission*, cited in paragraph 61 above, EU:T:1995:160, paragraph 25). In the present case, it is therefore 'if the conditions laid down in [the Council decision]' are fulfilled that the Council 'consider[ed] the aid

which the Italian Republic intend[ed] to grant to [its] milk producers … to be compatible' (recital 8 of the Council decision and recital 10 of the contested decision). Having regard to the objective pursued by such conditions, any subsequent failure to comply with them can lead the Commission to call into question, by having recourse to one of the various legal remedies provided for by the FEU Treaty and Regulation No 659/1999, only the benefit of the declaration of compatibility with the internal market granted to the measure at issue, and not its classification as existing aid, subject to the exception referred to in paragraph 85 above.

89 Furthermore, since the existing aid may, in accordance with Article 108(1) TFEU, be properly implemented as long as the Commission has not found it to be incompatible (judgments of 15 March 1994 in *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 20, and of 29 November 2012 in *Kremikovtzi*, C-262/11, EU:C:2012:760, paragraph 49), that declaration of incompatibility can produce effects only in the future (see, to that effect, judgments of 15 September 1998 in *Ryanair* v *Commission*, T-140/95, EU:T:1998:201, paragraph 86, relating to the failure to comply with a decision which approved, subject to conditions, aid designed to be released in subsequent tranches, and of 6 March 2002 in *Diputación Foral de Álava and Others* v *Commission*, T-127/99, T-129/99 and T-148/99, EU:T:2002:59, paragraph 172).

90 Failing that, a properly implemented aid scheme and individual aid lawfully granted under that scheme before the Member State concerned fails to fulfil its obligations would be retroactively deemed to constitute aid which is unlawful and incompatible with the internal market. Such a result would amount to revocation of the decision authorising the implementation of those measures. As is clear from recital 10 and Article 9 of Regulation No 659/1999, such a sanction was provided for by the legislature only in the specific situation where a decision taken as part of State aid monitoring is based on incorrect information.

91 Lastly, it is necessary to point out that Regulation No 659/1999 was adopted, inter alia, in order to ensure legal certainty in procedural matters, in particular as regards the treatment of existing aid and unlawful aid (recitals 3, 4, 11, 14 and 17 of Regulation No 659/1999). Furthermore, that regulation lays down a set of rules enabling the Commission to ensure compliance with decisions adopted in the context of monitoring State aid, and in particular to deal with a situation such as that which faced it in the present case and to draw from it all the appropriate legal conclusions (see paragraphs 57, 64, 66 to 67 and 69 to 75 above). In that context, accepting the theory put forward by the Commission in the present case would amount to enabling it to circumvent the procedures established by the legislature in order to ensure, in compliance with the principle of legal certainty, the effectiveness of State aid monitoring.

92 Having regard to the foregoing, the present plea must be upheld.

93 Therefore, it is necessary, in the first place, to reject the Italian Republic's principal head of claim and, in the second place, to uphold its alternative head of claim, by annulling Article 1(2) of the contested decision and Articles 2 to 4 thereof in so far as they concern, first, the aid scheme referred to in Article 1(2), and, secondly, the individual aid granted under that provision.

Costs

94 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present case, as both parties have been unsuccessful in some of their heads of claim, they shall each bear their own costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls Article 1(2) of Commission Decision 2013/665/EU of 17 July 2013 on State aid SA.33726 (11/C) [ex SA.33726 (11/NN)] granted by Italy (deferral of payment of the milk levy in Italy);**

2. **Annuls Articles 2 to 4 of that decision in so far as they concern, first, the aid scheme referred to in Article 1(2) thereof and, secondly, the individual aid granted under that aid scheme;**

3. **Dismisses the action as to the remainder;**

4. **Orders the Italian Republic and the European Commission to bear their own costs.**

Papasavvas Forwood Bieliūnas

Delivered in open court in Luxembourg on 24 June 2015.

[Signatures]