Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber, Extended Composition)

13 November 2024*

(Action for failure to act – State aid – Common fisheries policy – Funding for shipowners fishing with beam trawl using electrical pulse current – Complaint – Admissibility – Definition of a position by the Commission – Clear and definitive nature of the position adopted – Competence of the Commission – Obligation to act)

In Case T-141/23,

Laurent Merlin, residing in Équihen-Plage (France), and the other applicants whose names are listed in the annex,[1] represented by F.-C. Laprévote, F. de Bure and T. Otmani, lawyers,

applicants,

v

European Commission, represented by B. Stromsky, M. Abenhaïm and C. Perrin, acting as Agents,

defendant,

THE GENERAL COURT (Eighth Chamber, Extended Composition),

composed of S. Papasavvas, President, A. Kornezov (Rapporteur), G. De Baere, D. Petrlík and S. Kingston, Judges,

Registrar: L. Ramette, Administrator,

having regard to the written part of the procedure,

further to the hearing on 15 May 2024,

gives the following

* Language of the case: French.

[1] The list of the other applicants is annexed only to the version sent to the parties.

Judgment

1 By their action under Article 265 TFEU, the applicants, Mr Laurent Merlin and the other natural and legal persons whose names are listed in the annex, ask the Court to declare that the European Commission unlawfully failed to adopt, following the examination of their complaints concerning alleged unlawful State aid granted by the Kingdom of the Netherlands to shipowners engaged in fishing with beam trawl using electrical pulse current ('electrical pulse fishing'), a decision under Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9).

Background to the dispute

2 The applicants are 36 French, Dutch and United Kingdom fishermen and the association of small European fishermen Low Impact Fishers of Europe (LIFE) which carry on their fishing activities in the waters of the Channel and the North Sea.

3 In March 2021, the applicants, using the form set out in Annex IV to Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 (OJ 2004 L 140, p. 1), submitted complaints to the Commission ('the complaints').

4 In their complaints, the applicants claimed, first of all, that the Netherlands authorities had granted fishing authorisations in breach of the rule that electrical pulse fishing was permitted only up to a maximum of 5% of the beam trawler fleet of each Member State, as provided for by Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms (OJ 1998 L 125, p. 1), replaced by Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005 (OJ 2019 L 198, p. 105) ('the 5% rule').

5 Next, in a section of the complaints entitled 'European aids that are illegal and incompatible with the internal market', the applicants complained of the fact that the Kingdom of the Netherlands had, since 2007, granted funding to Dutch beam trawlers engaged in electrical fishing in breach, inter alia, of the 5% rule and the rules governing the European Fisheries Fund (EFF) and the European Maritime and Fisheries Fund (EMFF). In their view, those trawlers could not therefore benefit from that funding under the EFF or the EMFF, with the result that that funding had to be classified as unlawful State aid incompatible with the internal market.

6 Lastly, in a section of the complaints entitled 'State aids that are incompatible with the internal market', the applicants complained of the existence of various aid measures granted by the Kingdom of the Netherlands to Dutch beam trawlers engaged in electrical pulse fishing which greatly exceeded the applicable *de minimis* thresholds and which therefore had to be classified as State aid.

7 By letter of 16 April 2021, the Commission's Directorate-General (DG) for Competition replied to the applicants, stating that it was apparent from the complaints that the funding complained of came within the scope of either the EFF or the EMFF and that, if a measure had been funded by the EFF or the EMFF, the rules governing those funds prevailed over the State aid rules. According to that Directorate-General, since those complaints raised questions relating to the rules governing the common fisheries policy (CFP), they had to be examined in accordance with the specific procedures under the CFP and not in accordance with State aid rules. To that end, DG Competition suggested that the applicants address those complaints to the competent service of the Commission, namely DG Maritime Affairs and Fisheries.

8 By letter of 4 August 2021, the applicants claimed, in essence, that the specific mechanisms relating to the EFF and the EMFF did not preclude either the applicability of the State aid rules or the possibility of lodging a complaint under Regulation 2015/1589. In that regard, they referred to Article 7(2) of Council Regulation (EC) No 1198/2006 of 27 July 2006 on the EFF (OJ 2006 L 223, p. 1; 'the EFF Regulation'), applicable for the 2007 to 2013 programming period, and to Article 8(2) of Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the EMFF and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council (OJ 2014 L 149, p. 1) ('the EMFF Regulation'), applicable for the 2014 to 2020 programming period, under which, in their view, funding granted in breach of the EFF Regulation or the EMFF Regulation had to be examined in the light of State aid rules. Accordingly, it was for the Commission to identify the instruments through which the funding had been granted, be it the EFF, the EMFF or other instruments, and to determine, on that basis, which were to be regarded as State aid, on the ground that they did not come within the scope of the EFF or the EMFF.

9 By letter of 22 November 2021, DG Competition stated, while acknowledging that the Kingdom of the Netherlands had authorised the practice of electrical pulse fishing contrary to the conditions laid down in Regulation No 850/98, that no link could be established between, on the one hand, the funding provided under the EFF and the EMFF and, on the other hand, that practice. It concluded that it saw no potentially unlawful State aid element that would require further examination.

10 By letter of 4 April 2022, the applicants submitted, in seven annexes enclosed with that letter, additional information containing, inter alia, lists of Dutch beam trawlers engaged in electrical pulse fishing which had received EFF and EMFF funding, according to various documents and extracts from files relating to the funding granted under those funds. They also criticised the existence of an investment aid programme entirely funded by the Netherlands State and designed to equip five beam trawlers engaged in that type of fishing.

11 By letter of 9 September 2022, DG Competition stated that it had again examined in detail the funding of Dutch beam trawlers engaged in electrical pulse fishing on the basis of the additional information provided by the applicants on 4 April 2022, that it had concluded that there had been no infringement of the rules relating to the EFF and the EMFF and that, on that basis, it saw no element constituting potentially unlawful State aid and requiring further examination.

12 By letter of 8 November 2022, the applicants called upon the Commission, in accordance with the second paragraph of Article 265 TFEU and Regulation 2015/1589, in particular Articles 4, 12 and 15 thereof, to adopt, in response to the complaints, a decision under Article 4 of that regulation ('the call to act').

13 By letter of 14 February 2023, entitled 'Pre-closure letters to the complainants informing them that the Commission services intend to close the case', the Commission informed the applicants that it had completed its examination of the complaints.

14 In that regard, first, the Commission stated that it did not envisage proposing the initiation of 'infringement proceedings for failure to comply with EU law by [the Kingdom of the Netherlands]'. Second, it stated that it had again examined in detail the funding of Dutch beam trawlers engaged in electrical pulse fishing in the light of the additional information sent by the applicants on 4 April 2022 and had concluded that there had been no infringement of the rules applicable to the EFF and the EMFF. On that basis, it informed the applicants of its intention to close the file, while inviting them, if they had new information likely to be relevant to the re-examination of the file, to contact it within four weeks, at the end of which period the case could be closed.

Forms of order sought

15 The applicants claim, in essence, that the Court should:

– declare that the Commission unlawfully failed to adopt a decision under Regulation 2015/1589;

– order the Commission to take a decision, within two months, on the basis of that regulation;

– order the Commission to pay the costs.

16 The Commission contends that the Court should:

– dismiss the action as inadmissible;

– in the alternative, dismiss the action as unfounded;

– order the applicants to pay the costs.

Law

17 In support of the action, the applicants claim that, in accordance with the second subparagraph of Article 12(1), and Article 15(1) of Regulation 2015/1589, the Commission was required, first, to examine, within a reasonable period and fully and diligently, the information which they had sent to it in the complaints and in their subsequent exchanges, in which they criticised the existence of various aid measures, and, second, to adopt a final decision on the basis of Article 4(2), (3) or (4) of that regulation, setting out clearly its position in that regard.

18 In particular, according to the applicants, the Commission was wrong to take the view that the funding granted under the EFF and the EMFF to Dutch beam trawlers engaged in electrical pulse fishing was exempt, on the basis of Article 7 of the EFF Regulation and Article 8 of the EMFF Regulation, from the application of State aid rules. They submit that, if there were any uncertainty as to whether such funding had been carried out outside or in breach of the rules governing those funds, it would have to be classified as State aid, with the result that the Commission would be obliged to carry out its examination under Regulation 2015/1589.

19 The Commission contends, principally, that the action is inadmissible in accordance with the second paragraph of Article 265 TFEU, on the ground, inter alia, that it adopted a position on the complaints before the present action was brought. In the alternative, it disputes the merits of the action.

Admissibility of the action

20 The Commission considers that it stated its position clearly and definitively, in its letter of 14 February 2023, on the call to act, with the result that the present action is inadmissible. In its view, it follows from reading all of the correspondence which it exchanged with the applicants that, in essence, it considered that it did not have the power to adopt a decision under Regulation 2015/1589, since, in accordance with Article 42 TFEU, Article 7 of the EFF Regulation and Article 8 of the EMFF Regulation, Articles 107 to 109 TFEU did not apply to payments made by Member States under the EFF or the EMFF.

21 The applicants submit in reply, first, that in the Commission's letter of 14 February 2023, that institution did not define its position on the call to act. In their view, in that letter, the Commission did not even refer to their request for the adoption of a decision under Article 4 of Regulation 2015/1589, nor did it indicate that it considered itself not to have the power to adopt such a decision. Second, they claim that, even if that letter were to be read as containing a statement of the Commission's position on that call to act, the position was not defined clearly and definitively. They submit that, by stating, in the letter in question, that it did not envisage initiating an 'infringement procedure for failure to comply with EU law by [the Kingdom of the Netherlands]', the Commission did not define its position on the request made in that call to act, which did not aim to invite it to initiate such a procedure. They submit, moreover, that the Commission drafted the letter in question in vague and prospective terms, in so far as it merely stated that it did not 'envisage' taking action on the complaints, that it had the 'intention' to close the file and that it invited them 'to contact' it if they had 'new information which might be relevant for the re-examination of the file', and that, in the absence of that information, the file 'could' be closed.

22 According to the case-law, Article 265 TFEU refers to failure to act or to define a position, not the adoption of a measure different from that desired or considered necessary by the person concerned (judgments of 13 July 1971, *Deutscher Komponistenverband* v *Commission*, 8/71, EU:C:1971:82, paragraph 2, and of 24 November 1992, *Buckl and Others* v *Commission*, C-15/91 and C-108/91, EU:C:1992:454, paragraph 17). Thus, it must be held that the institution has not failed to act, not only when it adopts a measure vindicating the applicant, but also when it refuses to adopt such a measure but answers the request made to it with a statement of the reasons why it considers that that measure should not be adopted or that it does not have the power to do so (orders of 21 December 2021, *Finiconsult* v *Commission*, T-504/21, not published, EU:T:2021:948, paragraph 6, and of 1 February 2023, *NO* v *Commission*, T-708/21, not published, EU:T:2023:49, paragraph 56).

23 Therefore, the conditions governing the admissibility of an action for failure to act, laid down in Article 265 TFEU, are not satisfied where the institution called upon to act has defined its position on that request before the action is brought, and the adoption of a measure different from that sought or considered necessary by the persons concerned, such as a duly reasoned refusal to act in accordance with the call to act, constitutes a definition of position putting an end to the failure to act (see judgment of 24 March 2022, *Wagenknecht* v *Commission*, C-130/21 P, EU:C:2022:226, paragraph 31 and the case-law cited).

24 In addition, the definition of a position, within the meaning of the second paragraph of Article 265 TFEU, must set out clearly and definitively the position of the institution concerned on the applicant's call to act (see judgment of 24 March 2022, *Wagenknecht* v *Commission*, C-130/21 P, EU:C:2022:226, paragraph 33).

25 In the present case, it should be noted that the applicants had challenged, in separate sections of the complaints, the existence, on the one hand, of 'European aids that are illegal and incompatible with the internal market', granted to Dutch beam trawlers engaged in electrical pulse fishing under the EFF and the EMFF, in breach, in particular, of the 5% rule ('the contested EFF and EMFF funding') and, on the other hand, 'national subsidies' for those trawlers, awarded by the Kingdom of the Netherlands, which should be classified as State aid ('the contested national aid').

26 In addition, in their letter of 4 April 2022, the applicants submitted to the Commission additional information relating both to the contested EFF and EMFF funding and to the contested national aid.

27 In the call to act, the applicants, referring in particular to the complaints and the information that was attached to them, and to the additional information sent to the Commission in their letter of 4 April 2022, including the seven annexes enclosed therewith, which, in their view, provided tangible evidence of the existence of State aid, called upon the Commission, in accordance with the second paragraph of Article 265 TFEU and Regulation 2015/1589, in particular Articles 4, 12 and 15 thereof, to adopt a decision under Article 4 of that regulation.

28 Accordingly, it is necessary to examine whether the Commission defined its position, clearly and definitively, before the action was brought, on all the measures challenged in the complaints and in the applicants' letter of 4 April 2022, namely, first, on the contested EFF and EMFF funding and, second, on the contested national aid.

Whether a position was defined in respect of the contested EFF and EMFF funding

29 In the complaints and in the subsequent correspondence with the Commission, the applicants claimed, in essence, that the contested EFF and EMFF funding did not comply with the rules governing those funds, inasmuch as it was paid in breach of the 5% rule, and that, because of that non-compliance, that funding had to be classified as State aid and examined under Regulation 2015/1589. In the call to act, referring in particular to those complaints and to their letter of 4 April 2022, the applicants asked the Commission to adopt a decision under Article 4 of Regulation 2015/1589.

30 In that regard, the Commission stated, in essence, in its exchanges with the applicants, that it considered, first, that it was not competent, under Regulation 2015/1589, to adopt a decision relating to the contested EFF and EMFF funding and, second, that that funding did not infringe the rules relating to the EFF and the EMFF.

31 Thus, in its letter of 16 April 2021, the Commission stated that, in its view, the rules applicable to the CFP, in particular the rules relating to the EFF and the EMFF, took precedence over those relating to State aid, since the EFF and EMFF Regulations provided for specific control mechanisms under which Member States were required to recover undue payments made under those funds and that, therefore, the examination of the conformity of the contested EFF and EMFF funding had to be carried out in accordance with the specific procedures laid down in those regulations, and not in accordance with those applicable to State aid.

32 In addition, in its letters of 22 November 2021 and 9 September 2022, the Commission set out the reasons why, in its view, the contested EFF and EMFF funding did not infringe the EFF and EMFF Regulations. In that regard, the letter of 14 February 2023 essentially repeated the same reasons as those set out in the letter of 9 September 2022.

33 It is true, as the applicants observe, that, in its letter of 14 February 2023, considered in isolation, the Commission did not expressly refuse to adopt a decision under Regulation 2015/1589, nor did it state that it was not competent to adopt such a decision in respect of the contested EFF and EMFF funding.

34 However, the letter of 14 February 2023 must be read in the light of the previous exchanges. Indeed, first, in that letter, the Commission referred to its letters of 22 November 2021 and 9 September 2022. Second, it is clear from the case-law that, for the purposes of ascertaining whether a position has been adopted and whether it is clear and definitive, account may be taken of the exchanges between the applicants and the Commission which preceded the adoption of a position (see, to that effect, orders of 16 June 2020, *CJ* v *Court of Justice of the European Union*, C-634/19 P, not published, EU:C:2020:474, paragraphs 30 and 31, and of 1 February 2023, *NO* v *Commission*, T-708/21, not published, EU:T:2023:49, paragraphs 71 and 72).

35 Thus, in the circumstances of the present case, it must be held that the Commission, in its letter of 14 February 2023, essentially confirmed its previously clearly expressed position that, first, it was not competent, under Regulation 2015/1589, to adopt a decision relating to the contested EFF and EMFF funding and, second, that that funding did not infringe the rules relating to the EFF and the EMFF and that, on that basis, it had decided to conclude its examination of the complaints, as it stated in that letter.

36 According to the case-law cited in paragraph 22 above, the institution concerned has not failed to act when it refuses to adopt the decision requested but answers the request made to it by stating the reasons why it considers that it does not have the power to do so.

37 The fact that the position adopted has not satisfied the applicants is of no relevance in this respect because Article 265 TFEU refers to failure to act in the sense of failure to take a decision or to define a position, not the adoption of a measure different from that desired or considered necessary by the persons concerned (see, to that effect, orders of 13 December 2000, *Sodima* v *Commission*, C-44/00 P, EU:C:2000:686, paragraph 83, and of 6 April 2017, *Brancheforeningen for Regulerkraft i Danmark* v *Commission*, T-203/16, not published, EU:T:2017:279, paragraph 22).

38 Similarly, the fact pointed out by the applicants that, in its letter of 14 February 2023, the Commission stated that it did not envisage proposing the initiation of an 'infringement procedure for non-compliance with EU law by the [Kingdom of the Netherlands]', whereas, in the call to act, the applicants had not asked it to do so, is irrelevant in the present case, given that the Commission, in other passages of that letter, read in conjunction with the exchanges which preceded it, took a clear position on the request for the adoption of a decision under Regulation 2015/1589 concerning the contested EFF and EMFF funding.

39 It follows that, before the action was brought, the Commission defined its position, within the meaning of Article 265 TFEU, on the contested EFF and EMFF funding.

40 The applicants' arguments seeking to show that the position defined was not clear and definitive must also be rejected.

41 Indeed, as regards the clear nature of the position in question, it is apparent from paragraphs 7, 31 and 35 above that the Commission clearly stated that it did not consider that it had the power to adopt a decision under Regulation 2015/1589 as regards the contested EFF and EMFF funding. In addition, it should be noted that the applicants did understand, as is apparent from their letter of 4 August 2021, that the Commission considered that it lacked competence to adopt such a decision. This is demonstrated by the fact that the subject of that letter was the 'rejection of competence in respect of complaints lodged in March 2021 concerning unlawful State aid or misuse of aid for fishing using electric pulse trawls' and the fact that, in the same letter, the applicants set out the reasons why they considered that the position thus expressed by the Commission was incorrect. Therefore, the clarity of the Commission's position cannot be called into question.

42 As regards the definitive nature of the position in question, it is true, as the applicants state, that, in its letter of 14 February 2023, the Commission informed them of its 'intention' to close the file and invited them to communicate to it 'new information which might be relevant for the re-examination of [their] file', failing which the file 'could' be closed.

43 However, the fact remains that, in its letter of 14 February 2023, the Commission stated that it had completed its examination of the complaints. It is thus apparent that the Commission had formed a definitive opinion on the contested EFF and EMFF funding.

44 Therefore, the mere fact that the Commission gave the applicants a final opportunity to submit, if they had it, new information capable of justifying the 're-examination' of the file does not call the foregoing into question, since the Commission clearly stated, in its letter of 14 February 2023, that it had completed its examination of the complaints and set out its definitive analysis of the contested EFF and EMFF funding.

45 According to the case-law, a statement in a letter from the Commission to the effect that the applicant was requested to consider that the exchange of correspondence with the Commission was closed 'in the absence of new evidence' does not as such negate the clear and definitive nature of the position expressed by the Commission (see, to that effect, judgment of 30 September 2003, *Fiocchi munizioni* v *Commission*, T-26/01, EU:T:2003:248, paragraphs 76 and 78).

46 Furthermore, and in any event, it is common ground that, following the letter of 14 February 2023, the applicants did not provide any new information to the Commission and that they therefore could not expect the Commission to reconsider its position in any way.

47 In those circumstances, the applicants' arguments challenging the definitive nature of the Commission's position regarding the contested EFF and EMFF funding must be rejected.

48 Accordingly, it must be held that the letter of 14 February 2023, irrespective of whether or not it is well founded, must be regarded as establishing clearly and definitively the Commission's position as regards the contested EFF and EMFF funding in response to the call to act.

49 The action for failure to act must therefore be declared inadmissible in so far as it seeks a declaration that the Commission failed to act in relation to its failure to adopt a decision under Regulation 2015/1589 concerning the contested EFF and EMFF funding.

Whether a position was defined in respect of the contested national aid

50 As has been pointed out in paragraphs 6 and 25 above, in addition to the contested EFF and EMFF funding, the applicants also brought to the attention of the Commission, in a separate section of the complaints, the existence of several measures of national aid, which it challenged. In that regard, they listed five aid measures granted by the Netherlands authorities, the amounts of which varied, according to the applicants, from EUR 880 000 to EUR 74 million, and referred to various sources which, in their view, attested to the existence of those measures.

51 In its letter of 16 April 2021, the Commission stated that it was apparent from the complaints that the measures challenged in those complaints came 'within the scope of either the [EFF] or the [EMFF]'. Thus, and as it indeed confirmed at the hearing, it interpreted those complaints as relating only to the contested EFF and EMFF funding.

52 In so doing, the Commission undertook an incomplete reading of the complaints and thus failed, in its letter of 16 April 2021, to comment on the part of those complaints which related to the contested national aid.

53 Next, in their letter of 4 August 2021, the applicants claimed, inter alia, that it was for the Commission to identify the instruments by which the funding in question had been granted 'whether it be the EFF and the EMFF or other instruments', to determine on that basis what funding was to be regarded as State aid because it did not come within the scope of the EFF or the EMFF, and to examine its compatibility with the internal market.

54 Similarly, in their letter of 4 April 2022, the applicants submitted additional information challenging, in point VI of that letter, the existence of a programme of investment aid entirely financed by the Netherlands State the purpose of which was to equip five vessels with electric beam trawl. In that regard, they referred to a letter of 25 May 2011 from the Minister for Economic Affairs, Agriculture and Innovation to the President of the House of Representatives of the Kingdom of the Netherlands, from which it was apparent that the Netherlands authorities took the view that the EFF Regulation did not authorise the grant of funding for investment in electric pulse trawls and that, for that reason, that programme had been financed entirely by State aid. That letter was enclosed as Annex VI with the applicants' letter of 4 April 2022.

55 Lastly, in the call to act, the applicants referred specifically to the information contained in the complaints and to the various other items of evidence sent to the Commission by their letter of 4 April 2022 and its seven annexes, which, in their view, provided tangible evidence of the existence of State aid. As is apparent from paragraphs 50 and 54 above, the contested national aid was featured among that information and evidence. Accordingly, that call to act clearly related to all the measures criticised in those complaints and in that letter, including the contested national aid.

56 In its letter of 9 September 2022, which was sent in reply to the additional information sent by the applicants on 4 April 2022, and in its letter of 14 February 2023, which was sent in reply to the call to act, the Commission neither referred to the contested national aid nor expressed any opinion in its regard.

57 Although the Commission stated, in its letters of 9 September 2022 and 14 February 2023, that it had 'again examined in detail the financing of Dutch vessels, on the basis of the information provided [by the applicants] on 4 April 2022', it confined itself to analysing the rules applicable to the EFF and the EMFF, even though the contested national aid was not, according to the applicants, granted under those funds, but was financed entirely by the Netherlands State. Thus, the reasoning set out by the Commission in those letters did not concern the contested national aid.

58 It must therefore be held that the Commission did not define its position on the contested national aid, either in its letter of 14 February 2023 or in its prior exchanges with the applicants. If an institution called upon to act adopts a position in respect of part of a call to act and fails to define its position in respect of another part, the action is admissible in so far as it concerns the latter part (see, to that effect, judgment of 24 January 1995, *Ladbroke Racing* v *Commission*, T-74/92, EU:T:1995:10, paragraphs 54 to 63).

59 In its reply to a measure of organisation of procedure and at the hearing, the Commission argued that the aid granted by the Kingdom of the Netherlands to five beam trawlers in order to finance their electrical pulse trawling equipment, which had been criticised in the complaints and in the applicants' letter of 4 April 2022, was in fact covered by an existing aid scheme SA.24076 N/2007 – Netherlands – Aid for investment in trawl fishing gear using electrical pulse current, authorised by decision of 17 March 2008 (OJ 2008 C 246, p. 1).

60 However, it must be stated that, as indeed the Commission acknowledged at the hearing, the Commission did not at any time, during its exchanges with the applicants, state that it considered that the aid referred to in paragraph 59 above was in fact existing aid already authorised and that, for that reason, it did not intend to adopt a decision under Regulation 2015/1589. On the contrary, as the Commission confirmed in its reply to a measure of organisation of procedure, it considered that the subject matter of the complaints was only the contested EFF and EMFF funding, and not the contested national aid, which, according to the applicants, had not been granted under those funds. As follows from paragraphs 6, 26 and 51 to 53 above, that position was based on an incomplete reading of those complaints, with the result that the Commission failed to examine some of the measures criticised in them.

61 Moreover, and in any event, the aid referred to in paragraph 59 above is only one of the measures of national aid criticised in the complaints, with the result that the Commission's argument, put forward for the first time in the course of the proceedings, relates to only one of those measures.

62 In addition, the Court cannot accept the Commission's argument, raised in the alternative, that its letter of 14 February 2023 must be regarded as a letter of 'pre-closure' sent to the applicants on the basis of the second subparagraph of Article 24(2) of Regulation 2015/1589 and constitutes a clear and definitive position within the meaning of Article 265 TFEU.

63 It must be stated, first, that, in its letter of 14 February 2023, the Commission did not rely on the second subparagraph of Article 24(2) of Regulation 2015/1589.

64 Second, the Commission cannot argue both that it lacked the competence to adopt a decision under Regulation 2015/1589 in response to the complaints submitted to it, and, in the alternative, that its letter of 14 February 2023 should nevertheless be regarded as a letter based on the second subparagraph of Article 24(2) of that regulation.

65 Lastly, the fact that, in its letter of 14 February 2023, the Commission stated that it had completed its examination of the complaints and that it intended to close the file does not mean that it adopted a position on all the measures complained of in those complaints or in the applicants' letter of 4 April 2022 in so far as concerns the contested national aid. Indeed, at no time during its numerous exchanges with the applicants did the Commission refer to, let alone analyse, the contested national aid. On the contrary, all the considerations which it set out in its correspondence with the applicants related to the contested EFF and EMFF funding. Yet such considerations are unrelated to the contested national aid, which was not, according to the applicants, granted under those funds but was financed entirely by the Netherlands State. Accordingly, those considerations do not make it possible to identify a position of any kind taken by the Commission in that regard.

66 It follows that, as regards the contested national aid, the Commission had not defined a clear and definitive position, within the meaning of Article 265 TFEU, on the call to act.

67 The action must therefore be declared admissible in so far as it seeks a declaration that the Commission failed to act in relation to its failure to act under Regulation 2015/1589 with regard to the contested national aid.

Substance

68 In order to rule on the substance of the claim for a declaration of failure to act, it is necessary to determine whether, at the time the Commission was called upon to act, within the meaning of Article 265 TFEU, it was under an obligation to act (see judgment of 21 December 2022, *Ekobulkos* v *Commission*, T-702/21, EU:T:2022:842, paragraph 27 and the case-law cited).

69 In the field of State aid, the situations in which the Commission is required to act in respect of aid that is unlawful or incompatible with the internal market are governed by Regulation 2015/1589 (judgment of 21 December 2022, *Ekobulkos* v *Commission*, T-702/21, EU:T:2022:842, paragraph 28).

70 The second subparagraph of Article 12(1) of Regulation 2015/1589 provides, in particular, that the Commission is to examine without undue delay any complaint submitted by any interested party, in accordance with Article 24(2) of that regulation. That provision, relating to the rights of interested parties, provides inter alia that, if the facts and points of law put forward by the interested party do not provide sufficient grounds to show, on the basis of a prima facie examination, the existence of unlawful State aid or misuse of aid, the Commission is to inform the interested party thereof and call upon it to submit comments within a prescribed period which is not normally to exceed one month. If the interested party fails to make known its views within the prescribed period, the complaint shall be deemed to have been withdrawn (judgment of 21 December 2022, *Ekobulkos* v *Commission*, T-702/21, EU:T:2022:842, paragraph 29).

71 The first sentence of Article 15(1) of Regulation 2015/1589 provides that the examination of possible unlawful aid is to result in a decision pursuant to Article 4(2), (3) or (4) of that regulation, according to which the Commission is to examine the notification as soon as it is received and take either (i) a decision finding that the measure does not constitute aid, (ii) a decision not to raise objections if the measure does not raise doubts as to its compatibility with the internal market, or (iii) a decision to initiate the formal investigation procedure if that measure raises doubts as to its compatibility with the internal market (judgment of 21 December 2022, *Ekobulkos* v *Commission*, T-702/21, EU:T:2022:842, paragraph 30).

72 It must therefore be ascertained whether, in the present case, the Commission received a complaint or was provided with information concerning aid that was allegedly unlawful or incompatible with the internal market, facts which should have been followed up by a decision based on the second subparagraph of Article 12(1) of Regulation 2015/1589 or the first sentence of Article 15(1) of that regulation (see, to that effect, judgments of 29 September 2011, *Ryanair* v *Commission*, T-442/07, not published, EU:T:2011:547, paragraph 37, and of 21 December 2022, *Ekobulkos* v *Commission*, T-702/21, EU:T:2022:842, paragraph 31).

73 In the present case, as stated in paragraphs 3 to 6 above, the Commission received complaints, submitted using the form set out in Annex IV to Regulation No 794/2004, which concerned, inter alia, several contested measures of national aid. In addition, as noted in paragraph 10 above, the applicants submitted further information in their letter of 4 April 2022.

74 It should be noted in that regard that the Commission does not dispute that it was competent to examine, under Regulation 2015/1589, whether the contested national aid constituted State aid and, as the case may be, its lawfulness and compatibility with the internal market. Similarly, if, during that examination, the Commission were to consider that that aid or some of it constituted existing aid, within the meaning of Article 1(b) of that regulation, it was required to inform the applicants thereof, indicating to them, in accordance with Article 24(2) of that regulation, that, for that reason, the facts and points of law put forward by them did not provide sufficient grounds to show, on the basis of a prima facie examination, the existence of unlawful State aid or misuse of aid.

75 Therefore, having duly received complaints informing it of the existence of alleged unlawful aid or of the alleged misuse of such aid, the Commission was required to act in accordance with the second subparagraph of Article 12(1), Article 15(1) and Article 24(2) of Regulation 2015/1589. That examination should have led the Commission to take one of the steps provided for by the abovementioned provisions or to adopt a decision thereunder (see, to that effect, judgment of 29 September 2011, *Ryanair* v *Commission*, T-442/07, not published, EU:T:2011:547, paragraph 67).

76 Since the Commission did not take any action with regard to the contested national aid or, a fortiori, adopt a decision under Regulation 2015/1589, although it was required to do so, it had, at the end of the period of two months following the call to act, failed to act.

77 It follows that the applicants' claims seeking to demonstrate that the Commission failed to fulfil its obligation to act under Regulation 2015/1589 are well founded in so far as concerns the contested national aid.

78 It follows from all of the foregoing that the action must be dismissed as inadmissible in so far as it seeks a declaration that the Commission failed to act in relation to the contested EFF and EMFF funding, and upheld in so far as it seeks a declaration that the Commission failed to act in relation to the contested national aid.

79 Lastly, as regards the applicants' second head of claim, by which they request the Court to order the Commission to adopt, within two months, a decision on the basis of Regulation 2015/1589, it should be recalled that, in actions under Articles 263 and 265 TFEU, the Courts of the European Union do not have jurisdiction to issue directions to the institutions, bodies, offices and agencies of the European Union. It is for the institution concerned to take the necessary measures to comply with a judgment handed down by the Courts of the European Union, and this applies

both to actions for annulment and to actions for failure to act (see orders of 9 July 2012, *Pigui* v *Commission*, T-382/11, not published, EU:T:2012:350, paragraph 29 and the case-law cited, and of 13 April 2022, *Alauzun and Others* v *Commission*, T-695/21, not published, EU:T:2022:233, paragraph 51 and the case-law cited). Accordingly, the applicants' second head of claim must be rejected on the ground that the Court has no jurisdiction to hear and determine it.

Costs

80 Pursuant to Article 134(3) of the Rules of Procedure, the General Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads.

81 In the present case, since each of the parties has failed in part, the Court considers it fair, having regard to the circumstances of the case, to order each party to bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

1. **Declares that the European Commission has failed to fulfil its obligations under Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU by failing to act under that regulation in so far as concerns the alleged State aid referred to in paragraph 6(a) under the heading 'State aids that are incompatible with the internal market' of the applicants' complaints and under point VI of their letter of 4 April 2022;**

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

3. **Orders each party to bear its own costs.**

Papasavvas Kornezov De Baere

Petrlík Kingston

Delivered in open court in Luxembourg on 13 November 2024.

[Signatures]