Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

31 May 2017*

(Appeal — State aid — Decision to take no further action — Refusal by the European Commission to continue to examine the applicant's complaint — Lack of aid at the end of the preliminary examination stage — Purely confirmatory decision — Legal conditions for the withdrawal of a decision to take no further action)

In Case C-228/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 22 April 2016,

Dimosia Epicheirisi Ilektrismou AE (DEI), established in Athens (Greece), represented by E. Bourtzalas, avocat, A. Oikonomou, E. Salaka, C. Synodinos and C. Tagaras, dikigoroi, and by D. Waelbroeck, avocat,

applicant,

the other party to the proceedings being:

European Commission, represented by A. Bouchagiar and É. Gippini Fournier, acting as Agents,

defendant at first instance,

THE COURT (First Chamber),

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

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 16 February 2017,

gives the following

* Language of the case: Greek.

Judgment

1 By its appeal, Dimosia Epicheirisi Ilektrismou AE (DEI) seeks the annulment of the order of the General Court of the European Union of 9 February 2016, DEI v Commission (T-639/14, not published, EU:T:2016:77 ('the order under appeal')), by which the General Court held that there was no longer any need to give a decision on its action for annulment of European Commission letter COMP/E3/ON/AB/ark *2014/61460 of 12 June 2014, rejecting DEI's complaints concerning State aid ('the 2014 decision').

Legal context

2 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), which was in force on the date on which the 2014 decision was adopted, provided, in Article 4, entitled 'Preliminary examination of the notification and decisions of the Commission':

'1. The Commission shall examine the notification as soon as it is received. Without prejudice to Article 8, the Commission shall take a decision pursuant to paragraphs 2, 3 or 4.

2. Where the Commission, after a preliminary investigation, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary investigation, finds that no doubts are raised as to the compatibility with the internal market of a notified measure, in so far as it falls within the scope of Article [107(1) TFEU], it shall decide that the measure is compatible with the [internal] market (hereinafter referred to as a "decision not to raise objections"). The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary investigation, finds that doubts are raised as to the compatibility with the [internal] market of a notified measure, it shall decide to initiate proceedings pursuant to Article [108(2) TFEU] (hereinafter referred to as a "decision to initiate the formal investigation procedure").

…'

3 Article 13 of Regulation No 659/1999, entitled 'Decisions of the Commission', provided as follows in paragraph 1:

'The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). …'

Background to the dispute and the 2014 decision

4 DEI is an electricity producer in Greece. Its customers include, in particular, Alouminion SA. Following a dispute between those two companies concerning the tariff for the electricity supplied by DEI, the Greek regulatory authority for energy ('the RAE') set an interim tariff. In a complaint addressed to the Commission on 15 June 2012 ('the 2012 complaint'), DEI argued that that tariff required it to supply electricity to Alouminion at a price lower than the market price, which constituted unlawful State aid.

5 On 31 October 2013, the arbitration tribunal instituted by DEI and Alouminion set the tariff for the electricity supplied by DEI, with retroactive effect, at a level even lower than that provisionally determined by the RAE.

6 On 23 December 2013, DEI lodged a second complaint with the Commission ('the 2013 complaint'), maintaining that the arbitration decision also constituted State aid.

7 On 6 May 2014, the Commission notified DEI of its preliminary assessment that there was no need to pursue the examination of the 2013 complaint since the arbitration decision did not constitute a measure attributable to the State and that it gave no advantage to Alouminion. In reply, DEI sent additional observations to the Commission by a letter of 6 June 2014.

8 By the 2014 decision, sent to DEI in the form of a letter, the Commission informed that company that, in particular, the observations in the letter of 6 June 2014 did not call into question the preliminary assessment set out in the letter of 6 May 2014 and that, 'in consequence, the services of the DG "Competition" concluded that that information [was] insufficient to justify a fresh examination of [the] complaint'.

The action before the General Court and the order under appeal

9 By application lodged at the Registry of the General Court on 22 August 2014, DEI sought the annulment of the 2014 decision.

10 By letter of 7 October 2014, addressed to the Registry of the General Court, DEI and the Commission both requested that the proceedings pending before the General Court be suspended for a period of six months, that is, until 7 April 2015, in order to enable the Commission to re-examine the matters raised in the application. That request was granted by order of the President of the Fourth Chamber of the General Court of 24 October 2014.

11 On 25 March 2015, the Commission adopted Decision C(2015) 1942 final relating to alleged State aid SA.38101 (2015/NN) (ex 2013/CP) granted to Alouminion SA in the form of electricity tariffs below cost following an arbitration decision ('the 2015 decision').

12 By letters of 27 April and 19 June 2015 addressed to the Registry of the General Court, the Commission asked the Court to find that, following the 2015 decision, the action brought against the 2014 decision had become devoid of purpose and that there was no longer any need to give a ruling in the matter. The applicant submitted its observations on that request by letter to the General Court of 3 July 2015.

13 By application lodged at the Registry of the General Court on 29 June 2015, DEI sought the annulment of the 2015 decision by the case *DEI* v *Commission* (T-352/15), pending before the General Court.

14 By the order under appeal, the General Court held that there was no longer any need to rule on the action for annulment brought against the 2014 decision on the ground that the 2015 decision had annulled it and formally replaced it.

15 According to the General Court, the arguments put forward by the applicant did not make it possible to call that conclusion into question.

16 Firstly, it held that it did not have jurisdiction to rule on the legality of the 2015 decision which enjoys the presumption of legality of the acts of the institutions, as long as it has not been withdrawn. It therefore rejected the argument that the decision is unlawful, and the action in Case T-639/14 still had purpose.

17 Secondly, the General Court refuted the applicant's allegation that it retained an interest in bringing proceedings in order to avoid the illegality alleged happening again. In the view of the General Court, the allegedly unlawful ground, namely the inability to attribute the measure at issue to the State, does not appear in the 2014 decision. In any event, the question of whether the applicant had proved that there had been an infringement of the rules on State aid fell to be considered in the action against the 2015 decision.

18 Finally, thirdly, the General Court held that there was no longer any need to rule on the action in so far as it concerns the 2012 complaint since, by the 2015 decision, the Commission implicitly dismissed the 2012 complaint.

The forms of order sought

19 By its appeal, DEI claims that the Court of Justice should:

— set aside the order under appeal;

— order that the case be referred back to the General Court, so that it may rule on its submissions in the appeal, by which it seeks the annulment of the 2014 decision, and

— order the Commission to pay all the costs incurred both at first instance and on appeal.

20 The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

The appeal

Arguments of the parties

21 By its first ground of appeal, the applicant submits, in essence, that the General Court erred in law by holding, in paragraph 36 of the order under appeal, that the 2015 decision had formally replaced the 2014 decision. It failed, firstly, to verify the lawfulness and validity of that alleged replacement and, secondly, to examine the legal basis and legal procedure to be followed for the purposes of such a replacement.

22 Thus, the General Court wrongly concluded that the 2014 decision '[was] no longer part of the EU legal order' and that, in consequence, Case T-639/14 had become devoid of purpose.

23 Furthermore, the rejection of the first ground of appeal would mean that the error of law committed by the General Court would acquire the force of *res judicata*, which would directly affect the applicant's action in Case T-352/15. In fact, in that case, under its first plea in law, the applicant disputed that the 2015 decision could lawfully replace the 2014 decision. Thus, if the order under appeal were upheld, it would imply the automatic rejection of the first plea seeking annulment in Case T-352/15.

24 Furthermore, in the absence of any reasoning supporting that alleged replacement, the order under appeal is also vitiated by a failure to state reasons.

25 The Commission is of the opinion, on the contrary, that paragraphs 36 and 37 of the order under appeal are correctly reasoned since, on the one hand, it is apparent from the appeal that the applicant was perfectly able to understand the General Court's reasoning and, on the other, that Court's findings enable the Court of Justice to exercise its power of review. In reality, the applicant disagrees with the reasoning of the order under appeal.

26 That being the case, the General Court, rightly, refrained from examining the legality of the replacement of the 2014 decision by the 2015 decision inasmuch as the latter was not at issue in Case T-639/14. Its legality is the object of the action in Case T-352/15. As long as the 2015 decision has not been annulled, it must enjoy the presumption of validity attaching to the acts of the EU institutions and must produce its legal effects.

27 In addition, the annulment of the 2014 decision cannot give the applicant any advantage over its present situation since, by the adoption of the 2015 decision, the Commission in effect anticipated the possibility that the General Court might annul the 2014 decision on the ground that it was vitiated by a procedural defect. That decision was in fact a mere letter signed by an official and not an 'official decision' of the Commission, published as such. Thus, the annulment of the 2014 decision would in any event have required the Commission to adopt an official decision, such as the 2015 decision.

28 Having regard to those considerations, the Commission is of the opinion that the force of *res judicata* of the order under appeal is not liable to affect the pleas for annulment in Case T-352/15.

Findings of the Court

29 The Court thus held that Article 13(1) of Regulation No 659/1999 obliges the Commission, once any additional comments have been lodged by interested parties, or the reasonable period has expired, to close the preliminary examination stage by adopting a decision pursuant to Article 4(2), (3) or (4) of that regulation, that is to say, a decision stating that aid does not exist, raising no objections, or initiating the formal investigation procedure (judgment of 16 December 2010, *Athinaïki Techniki* v *Commission*, C-362/09 P, EU:C:2010:783, paragraph 63).

30 As is apparent, in particular, from paragraphs 15 to 18 of the order under appeal, by its 2014 decision, the Commission had closed the file, deciding to close the preliminary examination procedure triggered by the applicant's complaint, had held that in the inquiry opened it was not possible to conclude that there had been aid within the meaning of Article 107 TFEU and, accordingly, had refused to open the formal examination procedure provided for under Article 108(2) TFEU.

31 In so doing, the Commission adopted a definitive position on the applicant's request for a finding of infringement of Articles 107 TFEU and 108 TFEU. Moreover, as the 2014 decision prevented the applicant from submitting its observations in a formal examination procedure, it produced binding legal effects capable of affecting the applicant's interests. Accordingly, that decision constitutes an act open to challenge for the purposes of Article 263 TFEU (see judgment of 16 December 2010, *Athinaïki Techniki* v *Commission*, C-362/09 P, EU:C:2010:783, paragraph 66).

32 Although the Court has held that the Commission may withdraw a decision to take no further action on a complaint regarding alleged unlawful aid in order to remedy illegality affecting that decision (judgment of 16 December 2010, *Athinaïki Techniki* v *Commission*, C-362/09 P, EU:C:2010:783, paragraph 70), the adoption of a purely confirmatory decision cannot be regarded as being such a withdrawal.

33 In that regard, it must be recalled that a measure is purely confirmatory of an existing measure if it contains no new factors as compared with the existing measure (judgment of 3 April 2014, *Commission* v *Netherlands and ING Groep*, C-224/12 P, EU:C:2014:213, paragraph 69 and the case-law cited).

34 However, a decision by which all or part of the claim of the person concerned is upheld is not confirmatory of a previous rejection decision (see, to that effect, judgment of 28 May 1980, *Kuhner* v *Commission*, 33/79 and 75/79, EU:C:1980:139, paragraph 9).

35 Furthermore, an action against a confirmatory decision is inadmissible only if the confirmed decision has become final in relation to the person concerned because no action has been brought within the prescribed period. Otherwise, the person concerned is entitled to challenge either the confirmed decision, or the confirmatory decision, or both (judgment of 18 December 2007, *Weißenfels* v *Parliament*, C-135/06 P, EU:C:2007:812, paragraph 54).

36 In the present case, it must be noted that the 2015 decision merely confirms the 2014 decision since, following a review of the information provided to it, the Commission simply reiterated its refusal to open a formal examination procedure without, in fact, adding anything new. Consequently, the 2014 decision was not withdrawn by the 2015 decision.

37 Moreover, to accept that, in such a situation, the adoption by the Commission of a new decision would mean a ruling that there was no need to adjudicate on the action for annulment brought against the initial decision would be to impede the effectiveness of the judicial review.

38 It would be sufficient for the Commission to decide to take no further action on a complaint lodged by an interested party and then, after that party brought an action, to reopen the preliminary examination stage and repeat those operations as many times as are necessary in order to avoid any judicial review of its actions (see judgment of 16 December 2010, *Athinaïki Techniki* v *Commission*, C-362/09 P, EU:C:2010:783, paragraph 68).

39 The same is true, a fortiori, where, as in the present case, the Commission, during the proceedings before the General Court concerning an action for annulment of a decision to take no further action on a complaint, asks that those proceedings be stayed to allow it to re-examine the case, then purely and simply confirms its initial decision.

40 It could be different only if the Commission withdrew a decision to take no further action on a complaint in order to remedy illegality affecting that decision, while stating the nature of the illegality vitiating that decision (see, to that effect, judgment of 16 December 2010, *Athinaïki Techniki* v *Commission*, C-362/09 P, EU:C:2010:783, paragraph 70).

41 Nonetheless, and in any event, it is not apparent from the 2015 decision that, by its adoption, the Commission sought to withdraw the 2014 decision in order to remedy illegality vitiating that decision.

42 Accordingly, it would have been permissible for the General Court, in the present case, in order to ensure sound administration of justice, in particular, to ask the applicant whether, following the 2015 decision, it intended to amend its pleadings so as, in addition, to seek an order against that decision, as an applicant may request to do under Article 86 of the Rules of Procedure of the General Court where a measure against which an action for annulment has been brought is replaced or amended by a measure having the same object.

43 In the light of the foregoing considerations, the General Court wrongly held, in paragraphs 36 and 37 of the order under appeal, that the 2015 decision had formally replaced the 2014 decision and that, accordingly, the action had become devoid of purpose, such that there was no longer any need to rule in that dispute.

44 In consequence, the appeal must be upheld and the order under appeal set aside, without it being necessary to examine the other grounds of appeal and lines of arguments.

The action before the General Court

45 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

46 Since that is not the situation in the present case, as the General Court held that there was no longer any need to adjudicate without having examined the admissibility of the action or the substance of the dispute, the Court considers that the state of the proceedings do not permit final judgment to be given in the matter and that it is appropriate to refer the case back to the General Court and to reserve the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Sets aside the order of the General Court of the European Union of 9 February 2016, *DEI* v *Commission* (T-639/14, not published, EU:T:2016:77);**

2. **Refers the case back to the General Court of the European Union;**

3. **Reserves the costs.**

[Signatures]