Reports of Cases

ORDER OF THE GENERAL COURT (Fourth Chamber)

3 March 2015 *

(Actions for annulment — State aid — Aid granted by a Netherlands municipality in favour of a professional football club — Decision to open the formal examination procedure provided for in Article 108(2) TFEU — Aid measure completely implemented on the date of the decision — Admissibility — Challengeable act)

In Case T-251/13,

Gemeente Nijmegen (Netherlands), represented by H. Janssen and S. van der Heul, lawyers,

applicant,

v

European Commission, represented by S. Noë and B. Stromsky, acting as Agents,

defendant,

ACTION for partial annulment of Commission Decision C(2013) 1152 final of 6 March 2013 concerning the aid granted to Netherlands professional football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch between 2008 and 2011 (State aid SA.33584 (2013/C) (ex 2011/NN)).

THE GENERAL COURT (Fourth Chamber),

composed of M. Prek, President, I. Labucka (Rapporteur) and V. Kreuschitz, Judges,

Registrar: E. Coulon,

makes the following

Order

Background to the dispute

1 Following various complaints to the effect that a number of Netherlands municipalities had granted aid to professional football clubs having financial difficulties, on 27 May 2011 and 6 July 2011, the European Commission sent requests for information to the Kingdom of the Netherlands. It received answers to its questions on 26 and 28 July and 1 September 2011.

* Language of the case: Dutch.

2 One of the aid measures in question concerns the repurchase, on 28 September 2010, by the applicant, Gemeente Nijmegen, of a right to acquire ('the repurchase operation') a multi-purpose sports complex 'De Eendracht'. That right had been granted to the professional football club Nijmegen Eendracht Combinatie (NEC) under a lease agreement in respect of that complex binding the applicant and NEC.

3 By Commission Decision C(2013) 1152 final of 6 March 2013 concerning the aid granted to Netherlands professional football clubs Vitesse, NEC, Willem II, MVV, PSV and FC Den Bosch between 2008 and 2011 (State aid SA.33584 (2013/C) (ex 2011/NN)) ('the contested decision'), the Commission opened the formal examination procedure provided for in Article 108(2) TFEU pursuant to Article 4(4) 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), in respect of, inter alia, the repurchase operation.

4 After conducting a preliminary assessment, the Commission made a provisional finding, in the contested decision, that the repurchase operation constituted State aid, within the meaning of Article 107(1) TFEU (see recitals 45 to 50 of the contested decision) and that there were serious doubts as to its compatibility with the internal market.

Procedure and forms of order sought

5 By application lodged at the Registry of the General Court on 6 May 2013, the applicant brought the present action.

6 By separate document lodged at the Court Registry on 7 August 2013, the Commission raised a plea of inadmissibility under Article 114(1) of the Rules of Procedure of the General Court.

7 The applicant lodged its observations on that plea of inadmissibility on 26 September 2013.

8 On 26 May 2014, the Court asked the parties to submit their observations on the implications for the present case of the judgment of 21 November 2013 in *Deutsche Lufthansa* (C-284/12, ECR, EU:C:2013:755) and the order of 4 April 2014 in *Flughafen Lübeck* (C-27/13, EU:C:2014:240). The parties replied within the prescribed period.

9 In its application, the applicant claims that the Court should:

— annul the contested decision 'in so far as it concerns the alleged State aid [granted] to NEC';

— order the Commission to pay the costs.

10 The Commission contends that the Court should:

— dismiss the application as inadmissible;

— order the applicant to pay the costs.

11 In its observations on the plea of inadmissibility, the applicant contends that the Court should:

— reject the plea of inadmissibility;

— order the Commission to pay the costs.

Law

12 Pursuant to Article 114(1) of the Rules of Procedure, the Court may, if a party so requests, rule on the question of admissibility without considering the merits of the case. Under Article 114(3), unless the Court otherwise decides, the remainder of the proceedings is to be oral.

13 In the present case, the Court considers that the information in the documents before it is sufficient for there to be no need to proceed to the oral stage of the proceedings.

Arguments of the parties

14 In its plea of inadmissibility, the Commission begins by stating that the contested decision is a measure of a preliminary or purely preparatory nature, with its final position on the aid in question to be set out in the decision taken at the end of the formal examination procedure.

15 Next, the Commission observes that, unlike a measure which is still in the course of implementation, the contested decision in the present case covers a measure which has been implemented in its entirety, with the result that that decision does not require Member States to suspend the application of the measure.

16 Similarly, in the Commission's submission, the national court will no longer be able to order suspension of the application of the aid in question, as it has already been granted.

17 As regards the implications for the present case of the judgment in *Deutsche Lufthansa*, paragraph 8 above (EU:C:2013:755), and the order in *Flughafen Lübeck*, paragraph 8 above (EU:C:2014:240), the Commission submits, in essence, that they are not decisive. It observes that, according to the case-law, a distinction must be drawn between aid measures which have been implemented, such as the repurchase operation, and aid measures which are in the course of implementation. The Commission also considers that the admissibility of the action turns on whether there is an action pending before the national courts to have the aid halted and the amounts already granted recovered, adding that it is still possible for the aid recipient to challenge a decision such as the contested decision through a reference for a preliminary ruling.

18 Lastly, the Commission submits that to allow the action as admissible would not be compatible with the allocation of jurisdiction as between the EU Courts and itself, or with the remedies provided for by the Treaty, and would not address the need for a sound administration of justice and proper conduct of the administrative procedure before it, in that the EU Court is being asked to examine questions on which it has not yet had the opportunity to rule. An examination of the merits of such an action would pre-empt argument on the merits and would give rise to confusion about the different phases of the administrative and judicial procedures.

19 The applicant submits, first of all, that, contrary to the Commission's assertions, it cannot be inferred from the General Court's case-law that a distinction must be drawn between aid measures which have been implemented and aid measures which are in the course of implementation.

20 In the applicant's submission, the possibility cannot be ruled out that a decision, such as the contested decision, may produce legal effects such as to make an action brought against that decision admissible.

21 Next, the applicant submits that the national court is bound by the Commission's position in the contested decision. As the Commission decided to open a formal examination procedure, the national court can and, where appropriate, must order provisional recovery of the aid in question. Should the

Commission and the national court differ in their assessments, the latter cannot dismiss an application for recovery of the aid without first referring a question to the Court of Justice for a preliminary ruling under Article 267 TFEU.

22 As regards the implications for the present case of the judgment in *Deutsche Lufthansa*, paragraph 8 above (EU:C:2013:755), and the order in *Flughafen Lübeck*, paragraph 8 above (EU:C:2014:240), the applicant submits that it follows from the case-law that a decision, such as the contested decision, has unconditional binding effect, which means that the national courts have an obligation to assume that an infringement of the obligation of suspension provided for in Article 108(3) TFEU has occurred and to take appropriate measures in the proceedings before them. In the applicant's submission, a national court is no longer permitted itself to ascertain whether or not, in a dispute before it, the measure in respect of which the Commission has decided to open the formal examination procedure constitutes State aid, even where the Commission's assessments in the decision are provisional in nature.

23 The applicant further submits that the contested decision has negative repercussions, given the considerable doubt surrounding the lawfulness of the measure in question. In the applicant's submission, the possibility of relying on the contested decision before the national courts and the effect on NEC's commercial relations are among the legal effects of that decision, independent from the obligation to suspend application of the measure in question.

24 The Commission submits in that regard that those are factual consequences which cannot be considered to be binding legal effects bringing about a significant change the applicant's legal position.

25 The applicant submits that the doubt surrounding the lawfulness of the measure in question also has negative repercussions for the review of lawfulness prescribed by municipal statute and carried out by its accountant. Thus, when the accountant identifies a risk of illegality in his check for which the applicant does not have an explanation, he must mention that in his report, with the result that the contested decision has repercussions on its situation.

26 Lastly, the applicant considers that the provisional nature of the Commission's assessment of whether there is State aid in the present case has no bearing on the issue of admissibility of the action, since the decision produces or will produce independent legal effects. The Court should, in principle, conduct a complete review of a decision to open the formal examination procedure, such as the contested decision. That review should, however, be limited to the issue whether, in the light of the information it had in its possession, the Commission could legally make a preliminary finding that there was aid or, at the very least, that there was considerable doubt.

Findings of the Court

27 It is clear from settled case-law that an action for annulment for the purposes of Article 263 TFEU must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (see judgment of 17 July 2008 in *Athinaïki Techniki* v *Commission*, C-521/06 P, ECR, EU:C:2008:422, paragraph 29 and the case-law cited).

28 More specifically, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision (see judgments of 11 November 1981 in *IBM* v *Commission*, 60/81, ECR, EU:C:1981:264, paragraph 10; 18 December 1992 in *Cimenteries CBR and Others* v *Commission*, T-10/92 to T-12/92 and T-15/92, ECR, EU:T:1992:123, paragraph 28; and order of 28 November 2005 in *Tramarin* v *Commission*, T-426/04, ECR, EU:T:2005:405, paragraph 25).

29 As regards a decision by the Commission to open a formal examination procedure on a State aid measure, such as the contested decision, it is clear from the case-law that such a decision may be a challengeable act in so far as it is liable to entail independent legal effects (see, to that effect, judgments of 9 October 2001 in *Italy* v *Commission*, C-400/99 ('judgment in *Tirrenia*'), ECR, EU:C:2001:528, paragraphs 62 and 69; 24 October 2013 in *Deutsche Post* v *Commission*, C-77/12 P, EU:C:2013:695, paragraph 53; and 23 October 2002 in *Diputación Foral de Álava and Others* v *Commission*, T-346/99 to T-348/99, ECR, EU:T:2002:259, paragraph 33 and the case-law cited), that is to say, when such a decision produces an effect which is immediate, certain and sufficiently binding in relation to the Member State to which it is addressed and the beneficiary or beneficiaries of the measure under examination.

30 That is particularly true of the Member State's obligation to suspend an aid measure which has been implemented without having been notified and which is still in the course of implementation on the date when the decision to open the formal examination procedure is adopted (see, to that effect, judgments in *Tirrenia*, paragraph 29 above, EU:C:2001:528, paragraphs 59 and 62, and *Deutsche Post* v *Commission*, paragraph 29 above, EU:C:2013:695, paragraph 52).

31 According to the case-law, a decision to initiate the formal examination procedure in relation to a measure in the course of implementation and classified by the Commission as new aid necessarily alters the legal implications of the measure under consideration and the legal position of the recipient firms, particularly as regards the continued implementation of the measure. As is clear from the case-law and as also acknowledged by the Commission, that is plainly the case not only where a measure in the course of implementation is regarded by the authorities of the Member State concerned as existing aid, but also where the authorities take the view that the measure in question does not constitute State aid (see, to that effect, judgments in *Tirrenia*, paragraph 29 above, EU:C:2001:528, paragraphs 57 to 59; *Deutsche Post* v *Commission*, paragraph 29 above, EU:C:2013:695, paragraph 52; and *Diputación Foral de Álava and Others* v *Commission*, paragraph 29 above, EU:T:2002:259, paragraphs 33 and 34).

32 Moreover, it has been held that where the Commission has initiated the formal examination procedure with regard to a measure which is in the course of implementation, national courts are required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure.

33 To that end, national courts may decide to suspend the implementation of the measure in question and order the recovery of payments already made. They may also decide to order provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's decision to initiate the formal examination procedure (judgment in *Deutsche Lufthansa*, paragraph 8 above, EU:C:2013:755, paragraphs 42 and 43).

34 It is in the light of those considerations that a determination must be made as to whether the contested decision, covering the measure in question, produces an effect which is immediate, certain and sufficiently binding in relation to the Member State to which it is addressed and the beneficiary or beneficiaries of the measure under examination.

35 In the present case, however, it is clear that the repurchase operation had already been completed at the time of adoption of the contested decision.

36 Moreover, that decision clearly covers an unnotified new aid measure, in respect of which the applicant has never alleged it was existing aid in order to infer that that decision entailed independent legal effects solely by virtue of the Commission's decision to use the procedure under Article 108(2) TFEU (see, to that effect, judgment of 30 June 1992 in *Spain* v *Commission*, C-312/90, ECR, EU:C:1992:282, paragraphs 20 to 24).

37 Unlike a decision to initiate the formal examination procedure in respect of a measure in the course of implementation, a decision of that nature in respect of a measure which is no longer in the course of implementation does not entail independent legal effects, since its scope is not immediate, certain and sufficiently binding in relation to the Member State to which it is addressed and the beneficiary or beneficiaries of the measure under examination.

38 First of all, it should be observed that, in the present case, it is common ground that the measure in question cannot be suspended because it had been implemented in its entirety on the date when the contested decision was adopted.

39 Therefore, as regards the suspension of the measure in question, the contested decision does not have an effect which is immediate, certain and sufficiently binding in relation to the Member State and, in particular, the national courts.

40 Secondly, given its content and scope, the contested decision cannot give rise to an obligation for the Member State concerned to recover the aid granted by the measure in question.

41 It is clear, first of all, from Regulation No 659/1999 that the Commission is subject to strict conditions when it envisages ordering the Member State concerned to proceed with provisional recovery of the aid.

42 In that connection, Article 11(2) of Regulation No 659/1999 requires that there be no doubts about the aid character of the measure concerned, that there be an urgency to act and that there be a serious risk of substantial and irreparable damage to a competitor.

43 Such conditions, while prescribed for the adoption of a separate decision different in scope from the contested decision, are evidence that there is no general obligation on the Member State to which that decision is addressed to recover the aid unlawfully paid, purely on the basis of that decision.

44 Next, even where the national court, before which such an application has been made, can order recovery of the aid in question, irrespective of whether the measure in question is in the course of implementation on the date of the decision to open the formal examination procedure, that does not confer on that decision an effect which is immediate, certain and sufficiently binding.

45 There is an obligation for the national court to adopt safeguard measures in a dispute involving an aid measure only if the conditions justifying such measures are satisfied, namely, that there is no doubt regarding the classification as State aid, that the aid is about to be, or has been, implemented, and that no exceptional circumstances have been found which would make recovery inappropriate (see, to that effect, judgment of 11 March 2010 in *CELF and Ministre de la Culture et de la Communication*, C-1/09, ECR, EU:C:2010:136, paragraph 36).

46 It should also be noted that there is no absolute, unconditional obligation requiring the national court automatically to follow the Commission's provisional assessment. In particular, it has been held that where they entertain doubts as to whether the measure at issue constitutes State aid within the meaning of Article 107(1) TFEU or as to the validity or interpretation of the decision to initiate the formal examination procedure, national courts may seek clarification from the Commission and, in accordance with the second and third paragraphs of Article 267 TFEU, as interpreted by the Court, they may or must refer a question to the Court for a preliminary ruling (judgment in *Deutsche Lufthansa*, paragraph 8 above, EU:C:2013:755, paragraph 44).

47 Lastly, it should in any event be noted that, in the present case, the applicant has not provided any evidence of an action brought before the national court.

48 Therefore, as regards the recovery of the aid, it is clear that the contested decision does not an entail an effect which is immediate, certain and sufficiently binding in relation to the Member State and, in particular, the national courts.

49 Thirdly, the change to NEC's commercial relations arising from the uncertainty as to the legality of the measure in question may be an independent legal effect of the contested decision.

50 No obvious causal link can be established between the legality of the measure in question and the repercussions on the applicant's legal position.

51 Moreover, the commercial uncertainty and perceptions of other traders of the situation of an aid recipient such as the applicant in the present case cannot be considered binding legal effects, as they are merely factual consequences and not legal effects which the decision to open the formal examination procedure is intended to produce (see, to that effect and by way of analogy, order of 7 July 1981 in *IBM* v *Commission*, 60/81 R and 190/81 R, ECR, EU:C:1981:165, paragraph 19; and judgments of 1 December 2005 in *Italy* v *Commission*, C-301/03, ECR, EU:C:2005:727, paragraph 30; and 20 May 2010 in *Germany* v *Commission*, T-258/06, ECR, EU:T:2010:214, paragraph 151).

52 Thus, the applicant cannot claim that the contested decision has produced any binding legal effects capable of affecting its interests by bringing about a distinct change in its legal situation.

53 Consequently, the contested decision in the present case cannot be categorised as a challengeable act.

54 In those circumstances the application must be dismissed as inadmissible.

Costs

55 Under Article 87(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful, it must be ordered to pay its own costs and those incurred by the Commission, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby orders:

1. The action is dismissed as inadmissible.

2. Gemeente Nijmegen is ordered to pay the costs.

Luxembourg, 3 March 2015.

E. Coulon
Registrar

M. Prek
President