Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

1 March 2016*

(State aid — Rescuing firms in difficulty — Aid in the form of a State guarantee — Decision declaring the aid compatible with the internal market — Failure to initiate the formal investigation procedure — Serious difficulties — Procedural rights of the interested parties)

In Case T-79/14,

**Secop GmbH**, established in Flensburg (Germany), represented by U. Schnelle and C. Aufdermauer, avocats,

applicant,

v

**European Commission**, represented by L. Armati, T. Maxian Rusche and R. Sauer, acting as Agents,

defendant,

ACTION for annulment of Commission Decision C(2013) 9119 final of 18 December 2013, concerning State aid SA.37640 — Rescue aid for ACC Compressors SpA — Italy,

THE GENERAL COURT (First Chamber),

composed of H. Kanninen, President, I. Pelikánová (Rapporteur) and E. Buttigieg, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing of 8 September 2015,

gives the following

## Judgment

### Background to the dispute

1 ACC Compressors SpA is a company active since 1960 in the production and marketing of compressors for refrigerators for domestic use. It is a wholly-owned subsidiary of Household Compressors Holding SpA (HCH), which operates only as a holding company and has no production activity. ACC Compressors initially held 100% of the capital of ACC Austria GmbH and, through the latter, 100% of the capital of ACC Germany GmbH and ACC USA LLC.

* Language of the case: German.

2 In 2012, the ACC group encountered economic difficulties. In October 2012, insolvency proceedings were initiated against ACC Germany. On 20 December 2012, insolvency proceedings were initiated against ACC Austria. ACC Compressors was declared insolvent on 28 June 2013 and placed under special administration on 27 August 2013. HCH was declared insolvent 12 October 2013.

3 On 20 April 2013, following a call for tenders launched in the context of ACC Austria's insolvency proceedings, a purchase agreement for the assets of ACC Austria was signed between Secop Kompressoren GmbH, a subsidiary of the applicant, Secop GmbH, now called Secop Austria GmbH, and ACC Austria's insolvency administrators. That contract was made subject to the suspensive condition of a declaration by the European Commission that the transaction was compatible with the internal market.

4 On 5 November 2013, the Italian Republic notified the Commission of rescue aid in favour of ACC Compressors.

5 The measure notified consisted of a State guarantee of 6 months for credit lines in support of liquidity needs of a total amount of EUR 13.6 million. That guarantee was intended to enable ACC Compressors to continue its activities pending the preparation of a restructuring or liquidation plan.

6 By decision of 11 December 2013, the Commission decided not to raise objections to the acquisition of ACC Austria's assets by the company which had become Secop Austria (the 'merger decision'), thereby validating the contract entered into on 20 April 2013.

7 On 18 December 2013, by its decision C(2013) 9119 final, relating to State aid SA.37640 — Rescue aid to ACC Compressors SpA — Italy ('the contested decision'), the Commission decided not to raise objections to the notified measure. In particular, it held that the notified measure constituted State aid within the meaning of Article 107(1) TFEU, but that it met the conditions for being declared compatible with the internal market, as rescue aid for a firm in difficulty.

8 The acquisition of ACC Austria's assets by Secop Austria related in particular to patents used until then by ACC Compressors for its own production of compressors. Two sets of proceedings concerning those patents ('disputed patents') are in progress before the German and Italian courts between the Secop group and the ACC group, which disagree in particular as to whether they validly entered a licence agreement ('the patent dispute').

## Procedure and forms of order sought

9 By application lodged at the Court Registry on 5 February 2014, the applicant brought the present action.

10 On a proposal from the Judge-Rapporteur, the General Court (First Chamber) decided to open the oral part of the procedure and, within the framework of measures of organisation of procedure pursuant to Article 64 of its Rules of Procedure of 2 May 1991, put questions in writing to the parties. The parties answered within the period prescribed by the Court.

11 The parties presented oral argument and answered the questions put to them by the Court at the hearing of 8 September 2015.

12 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

13 After amendment to its claims at the stage of the rejoinder, the Commission claims that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

**Law**

14 In support of its action for annulment, the applicant raises three pleas in law alleging, firstly, infringement of Article 296 TFEU, infringement of essential procedural requirements and failure to state reasons, secondly, infringement of the Treaties and, thirdly, misuse of powers.

15 In the context of its response to the General Court's written questions, the applicant stated, on the one hand, that its first plea in law must be interpreted as alleging a failure to conduct a proper investigation, in infringement of Article 108(3) TFEU and Article 4(1) 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).

16 The applicant stated, on the other hand, that its third plea in law must be interpreted as alleging errors of assessment, in that the Commission did not take into account essential elements of the case of which it had, or ought to have had, knowledge. Furthermore, it made clear, during the hearing, that it saw no barrier to the first and third pleas in law, as reclassified, being examined jointly.

17 It is therefore in this way that the pleas in law relied upon by the applicant will be examined below.

*Second plea in law, alleging infringement of the Treaties*

18 The second plea in law is divided into three parts alleging, respectively, infringement of Article 107(3)(c) TFEU, infringement of Article 108(2) and (3) TFEU and breach of the principle of equal treatment.

19 First, the first and second parts should be considered jointly. In fact, those two parts, in essence, are intended to challenge the substance of the Commission's decision not to initiate the formal investigation procedure.

The first and second parts of the second plea in law, alleging infringement of Article 107(3)(c) TFEU and infringement of Article 108(2) and (3) TFEU

20 The applicant claims, in essence, that the Commission was wrong to hold that the contested aid was compatible with the internal market and to refrain from initiating the formal investigation procedure.

21 The Commission disputes the applicant's arguments.

– The relevant case-law

22 As a preliminary matter, it must be observed that the Commission is required to initiate the formal investigation procedure in particular if, in the light of the information obtained during the preliminary examination procedure, it still faces serious difficulties in assessing the measure under consideration. That obligation follows directly from Article 108(3) TFEU, as interpreted by the case-law, and is confirmed by the provisions of Article 4(4) in conjunction with Article 13(1) of Regulation

No 659/1999, when the Commission finds, after a preliminary examination, that the measure in question raises doubts as to its compatibility (see, to that effect, judgment of 12 February 2008 in *BUPA and Others* v *Commission*, T-289/03, ECR, EU:T:2008:29, paragraph 328).

23 According to settled case-law, the procedure under Article 108(2) TFEU is obligatory if the Commission experiences serious difficulties in establishing whether aid is compatible with the internal market. The Commission may not, therefore, limit itself to the preliminary procedure under Article 108(3) TFEU in order to take a favourable decision on a State measure, unless it is in a position to reach the firm view, following an initial investigation, that the measure cannot be classified as aid within the meaning of Article 107(1) TFEU or, if it is classified as aid, that it is compatible with the internal market. By contrast, if that initial examination results in the Commission taking the contrary view, or if it does not put the Commission in a position to overcome all the problems raised by its assessment of the compatibility of the measure in question with the internal market, the Commission has a duty to obtain all the necessary views and, to that end, to initiate the procedure under Article 108(2) TFEU (judgments of 15 June 1993 in *Matra* v *Commission*, C-225/91, ECR, EU:C:1993:239, paragraph 33; 2 April 1998 in *Commission* v *Sytraval and Brink's France*, C-367/95 P, ECR, EU:C:1998:154, paragraph 39; and in *BUPA and Others* v *Commission*, cited in paragraph 22 above, EU:T:2008:29, paragraph 329).

24 Thus, it is for the Commission to decide, on the basis of the factual and legal circumstances of the case, whether the difficulties involved in assessing the compatibility of the aid warrant the initiation of that procedure (judgment of 19 May 1993 in *Cook* v *Commission*, C-198/91, ECR, EU:C:1993:197, paragraph 30). That decision must satisfy three requirements.

25 First, Article 108 TFEU restricts the Commission's power to find aid compatible with the internal market, upon the conclusion of the preliminary examination procedure, solely to aid measures that raise no serious difficulties; that criterion is thus exclusive. The Commission may not, therefore, decline to initiate the formal investigation procedure in reliance upon other circumstances, such as third party interests, considerations of economy of procedure or any other ground of administrative convenience (judgment of 15 March 2001 in *Prayon-Rupel* v *Commission*, T-73/98, ECR, EU:T:2001:94, paragraph 44).

26 Secondly, where it encounters serious difficulties, the Commission must initiate the formal procedure, having no discretion in that regard. If its powers are circumscribed as far as initiating the formal procedure is concerned, the Commission nevertheless enjoys a certain discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious difficulties. In accordance with the objective of Article 108(3) TFEU and its duty of good administration, the Commission may, inter alia, engage in talks with the notifying State or with third parties in an endeavour to overcome, during the preliminary procedure, any difficulties encountered (judgment in *Prayon-Rupel* v *Commission*, cited in paragraph 25 above, EU:T:2001:94, paragraph 45).

27 Thirdly, the concept of 'serious difficulties' is objective. Whether or not such difficulties exist requires investigation of both the circumstances in which the contested decision was adopted and its content. That investigation must be conducted objectively, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the internal market (see judgment in *Prayon-Rupel* v *Commission*, cited in paragraph 25 above, EU:T:2001:94, paragraph 47 and the case-law cited).

28 In this present case, the Commission considered, in the contested decision, that the contested aid was compatible with the internal market in that it complied with Article 107(3)(c) TFEU and the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2, 'the Guidelines').

29 It should be noted, in this respect, that Article 107(3) TFEU confers on the Commission broad discretion to allow aid by way of derogation from the general prohibition laid down in paragraph 1 of that article, inasmuch as the determination, in those cases, of whether State aid is compatible or incompatible with the internal market raises problems which make it necessary to examine and appraise complex economic facts and conditions. Judicial review by the European Union judicature must therefore, in this respect, be limited to checking that the rules on procedure and the statement of reasons have been complied with, that the facts are materially accurate, and that there has been no manifest error of assessment and no misuse of powers. It is, therefore, not for the Court to substitute its economic assessment for that of the Commission. The Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as the Guidelines, insofar as those measures contain rules indicating the approach which the institution is to take and they do not depart from the rules of the Treaty. In that context, it is for the Court to verify whether the rules which the Commission imposed upon itself have been observed (judgment of 30 January 2002 in *Keller and Keller Meccanica* v *Commission*, T-35/99, ECR, EU:T:2002:19, paragraph 77; see also, to that effect, judgment of 1 December 2004 in *Kronofrance* v *Commission*, T-27/02, ECR, EU:T:2004:348, paragraph 79 and the case-law cited).

– ACC's alleged new firm classification

30 Firstly, the applicant claims that, following the disposal of ACC Austria's assets, the patents at issue can no longer be used by ACC Compressors, which must, therefore, be considered to be a firm emerging from the liquidation of an existing firm and, consequently, a newly created firm, within the meaning of point 12 of the Guidelines. Indeed, failing the ability to use the disputed patents, ACC Compressors does not have sufficiently developed structures to be eligible for rescue aid and, in particular, cannot be assimilated to the firm with the same name which has made compressors since 1960.

31 Point 12 of the Guidelines is worded as follows:

'For the purposes of these Guidelines, a newly created firm is not eligible for rescue or restructuring aid even if its initial financial position is insecure. This is the case, for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over that undertaking's assets. A firm is in principle considered to be newly created for the first three years following the start of operations in the relevant field of activity. Only after that period will it become eligible for rescue or restructuring aid …'

32 Obviously, the objective of point 12 of the Guidelines is to prevent the creation of unviable undertakings or loss-making activities which, from the moment they are created, are dependent on State support. To that end, the clarification of the second sentence of that paragraph applies in particular to the situation of the disposal of the assets of an existing legal entity to another legal entity, newly created or pre-existing. Thus, it is the economic entity within which the assets acquired were newly incorporated that can, where relevant, be qualified as a new firm. As for the legal entity which disposes of the assets, the objective of such an operation could precisely be its rescue.

33 The applicant states, nevertheless, that the words 'for instance', appearing in point 12 of the Guidelines, show that the classification of a firm as 'new' can result not only from the taking over — by the recipient of the aid — of the assets of another company, but also from the transfer of assets of the beneficiary to another company, such as, here, the transfer of the assets of ACC Austria, a subsidiary of ACC Compressors, to Secop Austria.

34 For the reasons set out below, such an interpretation must be rejected in the present case.

35 First, ACC Compressors and ACC Austria were initially part of one and the same undertaking in that the two companies produced the same products, on two different sites, but under the same economic management. Upon the transfer of ACC Austria's earning assets, effective from 11 December 2013, the date of adoption of the merger decision (see paragraphs 3 and 6 above), it is true that the volume of activity of this firm had been reduced, since the activities corresponding to the production site located in Austria no longer formed part of it. Thus, the undertaking to which the contested aid, approved on 18 December 2013, was granted comprised only ACC Compressors' earning assets. Nevertheless, ACC Compressors managed the undertaking concerned, both before and after the transfer, and, as admitted by the applicant at paragraph 46 of the application, it carried on, after the date of the adoption of the contested decision, albeit in a reduced fashion, the production and marketing of compressors, which was the traditional activity of that undertaking. Therefore, contrary to the applicant's claims, it was the same undertaking as that which had been making compressors since 1960.

36 Second, the interpretation suggested by the applicant is contrary to the objective in point 12 of the Guidelines, as set out in paragraph 32 above. Indeed, in the situation in which the assets are transferred, it is not the entity formed of the economic activities retained by the transferor company that is relevant, for the purpose of the classification 'newly created firm' but the entity made up of the economic activities of the transferee company, within which the transferred assets were integrated. It is also normal and reasonable for a firm in difficulty to dispose of certain assets and focus its activity on its core business, whether from a geographical or sectoral perspective, in order to improve the chances of economic recovery. Point 39 of the Guidelines thus expressly envisages the divestment of assets as a means of preventing undue distortions of competition, in the context of the examination of a restructuring plan for the purpose of granting restructuring aid. It would be contrary to the overall purpose of the Guidelines for such a sale of assets to lead systematically to the exclusion of the transferring company from the benefit of rescue aid.

37 The fact that a legal dispute over the disputed patents is under way between ACC Compressors and Secop Austria cannot lead to a different assessment.

38 Indeed, at the time the contested decision was adopted, the Commission could take into account only the factual and legal situation of ACC Compressors as it was at the date of that adoption; at the most, it had to take into account the foreseeable evolution of that situation, for the period for which rescue aid was granted, namely, six months (see paragraph 5 above). However, as the Commission correctly contends, at the date of the adoption of the contested decision, ACC Compressors was still using the disputed patents to manufacture compressors, which it was obliged to take into account, and there was nothing to indicate that this situation could have changed in the six following months.

39 In addition, the existence of the patent dispute was not relevant for the purposes of assessing the compatibility of the contested aid with the internal market. It is true that, had Secop Austria won the case in the patent dispute, it would have been conceivable that ACC Compressors could no longer have used the disputed patents and would, accordingly, have had to cease production of a significant range of compressors, known as 'Kappa'. However, this also depended on the question of whether, after a possible defeat in the courts, ACC Compressors could obtain a user license for those patents. Moreover, it could not be ruled out from the outset that it could offset the possible disposal of its activity producing 'Kappa' compressors against the development of other lines or activities. In any event, it must be considered that it was not for the Commission to anticipate the outcome of the patent dispute, pending before the national courts at the date of adoption of the contested decision, by substituting its assessment for that of the competent courts, seized of that dispute.

40 Finally, it is appropriate to reject the applicant's argument, put forward at the hearing, that the Commission ought to have taken into account that, in the context of the merger procedure, ACC Compressors itself had indicated that, if Secop Austria were to purchase the assets of ACC Austria, it could not pursue its production of compressors, since it would not then be able to use the disputed patents any longer.

41 In the merger decision, the Commission considered ACC Compressors' claims and found that, given, in particular, the patent dispute between the two parties, it was not inconceivable that an agreement on a licence should be concluded between them. The Commission had therefore already found, in the merger proceedings, that ACC Compressors' claims that it could not pursue the production of compressors when there was no licence for the disputed patents were hypothetical.

42 In these circumstances, those claims did not amount to crucial information for the assessment of the competitive relationship between ACC Compressors and Secop; accordingly, the Commission cannot be criticised for not taking them into account in the State aid procedure.

– Whether the contested aid allegedly only 'postpones the inevitable'

43 Secondly, the applicant claims that the contested aid should not have been granted in that it was merely 'postponing the inevitable', within the meaning of point 72 of the Guidelines.

44 Point 72 of the Guidelines reads as follows:

'Rescue aid is a one-off operation primarily designed to keep a company in business for a limited period, during which its future can be assessed. It should not be possible to allow repeated granting of rescue aids that would merely maintain the status quo, postpone the inevitable and in the meantime shift economic and social problems on to other, more efficient producers or other Member States. Hence, rescue aid should be granted only once ("one time, last time" condition) …'

45 In the scheme of the whole of point 72 of the Guidelines, the fact that the rescue aid must not be used merely to maintain the status quo and postpone the inevitable is therefore mentioned, for illustrative purposes, to justify the 'one time, last time' principle, laid down in point 72. Thus, according to the logic of that point, a request for a second rescue aid — within a 10-year period following the grant of a first rescue aid — may show that the first aid merely maintained the status quo and postponed the inevitable. In this case, it is sufficient to observe, first, that according to the findings made in paragraph 38 of the contested decision, undisputed by the applicant, the contested aid is the first rescue aid granted to ACC Compressors and, second, that the applicant merely stated that the aid only 'postponed the inevitable', without supporting that assertion. Finally, to the extent that the applicant based its claim on the patent dispute, it was found above that it was not relevant for the purposes of assessing the compatibility of contested aid with the internal market.

46 Consequently, this argument of the applicant's must be rejected.

– Consideration of the alleged earlier aid

47 Third, the applicant claims that the Commission has not taken into account the cumulative effect of the contested aid with benefits allegedly previously paid through Cassa Integrazione. In its view, Cassa Integrazione is a wages guarantee fund, whose benefit payments are considered, by the Commission, to be State aid.

48 Point 23 of the Guidelines reads as follows:

'Where unlawful aid has previously been granted to the firm in difficulty, in respect of which the Commission has adopted a negative decision with a recovery order, and where no such recovery has taken place in compliance with Article 14 of [Regulation No 659/1999], the assessment of any rescue and restructuring aid to be granted to the same firm shall take into account, first, the cumulative effect of the old aid and of the new aid and, secondly, the fact that the old aid has not been repaid.'

49 It must therefore be observed that point 23 of the Guidelines expressly provides for the consideration of the cumulative effect of earlier aid with a new rescue or restructuring aid for illegal aid, subject to a negative decision with a recovery order which has not been implemented by the Member State concerned. Pursuant to that provision, the Commission moreover asked the Italian authorities to declare that ACC Compressors had not been granted such unrecovered aid.

50 The parties agree that the benefits allegedly paid through Cassa Integrazione, of which the Commission states it had no knowledge, have not been the object of a negative decision by the latter. The wording of the Guidelines and, in particular, of point 23 thereof did not oblige the Commission to take into account the alleged aid.

51 As to the question whether it was necessary for such consideration to be taken into account, in the absence of any obligation to do so being expressly mentioned in the Guidelines, it should be noted that the specific features of rescue aid oppose taking into account the cumulative effect of earlier aid not covered by point 23 of the Guidelines. Indeed, point 15 of the Guidelines defines rescue aid as follows:

‘Rescue aid is by nature temporary and reversible assistance. Its primary objective is to make it possible to keep an ailing firm afloat for the time needed to work out a restructuring or liquidation plan. The general principle is that rescue aid makes it possible temporarily to support a company confronted with an important deterioration of its financial situation reflected by an acute liquidity crisis or technical insolvency. Such temporary support should allow time to analyse the circumstances which gave rise to the difficulties and to develop an appropriate plan to remedy those difficulties. Moreover, the rescue aid must be limited to the minimum necessary. In other words, rescue aid offers a short respite, not exceeding six months, to a firm in difficulty. The aid must consist of reversible liquidity support in the form of loan guarantees or loans, with an interest rate at least comparable to those observed for loans to healthy firms and in particular the reference rates adopted by the Commission. Structural measures which do not require immediate action, such as the irremediable and automatic participation of the State in the own funds of the firm, cannot be financed through rescue aid.’

52 It follows from this definition that, both by the restriction of eligible measures (loan guarantees or loans) and by their temporary and reversible nature (end of guarantee and loan repayment after a maximum of six months, subject to the submission, after this time, of a restructuring or liquidation plan) and their restriction to only those measures necessary for the temporary survival of the firm involved, rescue aid, such as the aid at issue, has very limited effects on the internal market, as the Commission rightly argues. It is these limited effects, together with the urgency of rescue aid, that justify the Commission normally examining them under a simplified procedure, in accordance with point 30 of the Guidelines, striving to take a decision within a period of one month, if the aid meets certain criteria. The consideration of the cumulative effect of any allegedly illegal possible earlier aid would make it impossible to meet that deadline and, therefore, would not be compatible with the urgency of this review and the limited impact of that aid on competition.

53 Furthermore, a consideration of earlier aid other than that defined in point 23 of the Guidelines — which is already the subject of a final negative decision by the Commission — requires the Commission to carry out, indirectly, a review of that earlier aid, the classification of which as aid and unlawful aid can be disputed between the Commission and the Member State concerned and must, where appropriate, be the object of a separate procedure and decision. This could lead, in the end, either to the refusal of rescue aid, on the basis of a cursory review of earlier aid, whereas the latter could later be proved lawful or not to constitute aid, or to undue delay of the decision on rescue aid. Therefore, such a way of proceeding appears incompatible too with the requirements arising from the principle of legal certainty.

54 For these reasons, it must be considered that the Commission cannot be required to take into account the cumulative effect of alleged earlier aid with rescue aid, beyond the cases covered in point 23 of the Guidelines.

55 Consequently, that argument of the appellant must be rejected as unfounded.

– Taking into account the practice of selling at a loss, allegedly practised by ACC Compressors

56 Fourth, the applicant considers that the Commission should have taken into account the risk that the contested aid may allow ACC Compressors to continue the policy of selling at a loss, which it allegedly has been practising since 2013.

57 It is sufficient to note, in that regard, that the applicant merely claims an alleged policy of selling at a loss by ACC Compressors, without presenting any explanation or evidence capable of supporting that allegation. Accordingly, that argument of the applicant should be rejected.

– The calculations submitted by the Commission

58 Fifth, the applicant claimed, in the application, that the calculations submitted by the Commission, when assessing the compatibility of the contested aid with the internal market, was in its view inaccurate and incomprehensible, because it did not have access to the file.

59 Given that, in its reply to the written questions of the Court, the applicant withdrew that complaint, having regard to the explanations provided by the Commission in its defence, there is no longer any need to adjudicate in this respect.

60 Since all the complaints made under the first and second parts of the second plea in law must be rejected, those parts must be rejected in their entirety.

The third part of the second plea in law, alleging infringement of the principle of equal treatment

61 The applicant states that it has not had the opportunity to present its views in the State aid procedure, initiated for the benefit of ACC Compressors, in order to oppose the grant of the contested aid to the latter, if necessary, in the formal investigation procedure. On the other hand, ACC Compressors has had the opportunity, as part of the merger procedure, to oppose the takeover of ACC Austria's assets by Secop Austria. In its view, it is a violation of the principle of equal treatment, since the competitive relationship between the ACC group and the Secop group ought to have been assessed in both procedures.

62 According to settled case-law, the principle of equal treatment, as a general principle of EU law, requires comparable situations not to be treated differently and different situations not to be treated in the same way, unless such treatment is objectively justified (see judgment of 16 December 2008 in *Arcelor Atlantique et Lorraine and Others*, C-127/07, ECR, EU:C:2008:728, paragraph 23 and the case-law cited).

63 In that regard, in the first place, it should be noted that, both in the context of a State aid procedure and in a merger procedure, the competitors of the firms at issue have no right to be automatically associated with the procedure, and this is particularly so in the context of the initial phase of the procedure, in the course of which the Commission makes a preliminary assessment of either the aid at issue, or the notified merger.

64 Indeed, first, as far as concerns State aid, according to settled case-law, on the one hand, the preliminary stage of the procedure for examining aid under Article 108(3) TFEU, merely intended to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, on the one hand, must be distinguished from the actual investigation stage referred to by Article 108(2), on the other hand. It is only in connection with the latter phase, which is designed to allow the Commission to be fully informed of all the facts of the case, that the FEU Treaty imposes an obligation, for the Commission, to give interested parties notice to submit their comments (judgments in *Cook* v *Commission*, cited in paragraph 24 above, EU:C:1993:197; paragraph 22; *Commission* v *Sytraval and Brink's France*, cited in paragraph 23 above, EU:C:1998:154, paragraph 38; and of 13 December 2005 in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, C-78/03 P, ECR, EU:C:2005:761, paragraph 34). It follows that interested parties, other than the Member State concerned, including competitors of the aid recipient, such as the applicant in the present case, have no right to be associated with the procedure in the preliminary examination stage.

65 Secondly, as regards mergers, Article 18(4) of Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1, 'the Merger Regulation'), specified by Article 11(c) of Commission Regulation (EC) No 802/2004 of 21 April 2004 on the implementation of Regulation No 139/2004 (OJ 2004 L 133, p. 1), provides that the Commission may hear — on its own motion — natural or legal persons other than the notifiers and other parties to the proposed merger, but it is obliged to do so only on the two conditions that those persons have a sufficient interest and that they make such a request (see, to that effect, judgment of 27 November 1997 in *Kaysersberg* v *Commission*, T- 290/94, ECR, EU:T:1997:186, paragraphs 108 and 109).

66 In the second place, however, it should be noted that ACC Compressors' position in the merger procedure was not only that of a competitor of Secop Austria, the undertaking notifying the merger, but also one of an 'interested party' within the meaning of Article 11(b) of Regulation No 802/2004, in that, as ACC Austria's parent company, all assets of which were to be sold, it had to be assimilated to the vendor of those assets and, therefore, had the status of party to the proposed merger. However, unlike its competitors, at the end, in accordance with Article 18(1) of the Merger Regulation, interested parties have the right to express their view at all stages of the procedure, including the preliminary phase (see, to that effect, judgments of 24 March 1994 in *Air France* v *Commission*, T-3/93, ECR, EU:T:1994:36, paragraph 81, and 20 November 2002 in *Lagardère and Canal+* v *Commission*, T-251/00, ECR, EU:T:2002:278, paragraphs 93 and 94).

67 It must therefore be stated that the situation of the applicant, under the State aid procedure that led to the contested decision, is different from that of ACC Compressors under the merger procedure that led to the decision on the merger, in that ACC Compressors had a right to be heard before the adoption of that latter decision. Consequently, the fact that the Commission did not, before adopting the contested decision, give the applicant the opportunity to state its point of view does not infringe the principle of equal treatment.

68 Accordingly, the third part of the second plea in law and, consequently, this plea must be rejected in its entirety.

*The first and third pleas in law, as reclassified, alleging failure to conduct a proper preliminary investigation and errors of assessment*

69 The applicant complains that the Commission, in that regard, did not take into account the information in the merger decision (see paragraph 6 above), which was, however, relevant and essential for the purpose of assessing the compatibility of the contested aid with the internal market, and that it merely relied upon, in that regard, the information provided by the Italian authorities and by ACC Compressors as beneficiary. In particular, the Commission should have taken into

consideration the fact that ACC Compressors had indicated, in the merger procedure, that, if it failed to obtain licences for the disputed patents, it would no longer be able to continue its activities in the market for refrigeration compressors for household appliances (see paragraph 40 above) .

70 The Commission disputes the applicant's arguments.

71 It should be noted, at the outset, that the Commission does not dispute the facts alleged by the applicant in the first plea in law, namely, that it did not take into account, in the present State aid case, the information it had collected in the procedure leading to the merger decision. The parties therefore disagree on two issues only, namely, first, whether the Commission had the right (and even the duty) to take into account that information and, second, whether that information was relevant for the purposes of assessing the compatibility of the contested aid with the internal market.

The extent of the Commission's duty to investigate in the preliminary examination phase

72 Since the first plea in law, as reclassified, alleges failure to make preliminary inquiries, the extent of the Commission's duty to investigate in the preliminary examination phase must first of all be delimited.

73 As has been noted in paragraph 64 above, the preliminary examination phase of aid, under Article 108(3) TFEU, is merely intended to enable the Commission to form a prima facie opinion on the partial or complete compatibility with the Treaty of planned aid notified to it.

74 It also follows from the case-law that, in order to obtain approval, in derogation from the Treaty rules, of new or modified aid, it is for the Member State concerned, pursuant to its duty to cooperate with the Commission under Article 4(3) TEU, to provide all the information necessary to enable that institution to verify that the conditions for the derogation are satisfied (see, to that effect, judgments of 28 April 1993 in *Italy* v *Commission*, C-364/90, ECR, EU:C:1993:157, paragraph 20; 6 April 2006 in *Schmitz-Gotha Fahrzeugwerke* v *Commission*, T-17/03, ECR, EU:T:2006:109, paragraph 48 and 12 September 2007, *Olympiaki Aeroporia Ypiresies* v *Commission*, T-68/03, ECR, EU:T:2007:253, paragraph 36).

75 The procedural obligations mentioned above are moreover referred to and given specific definition, in respect of the preliminary procedure, in Articles 2(2) and 5(1) and (2) of Regulation No 659/1999.

76 It follows that, under the preliminary examination procedure, the Commission may generally confine itself to taking into account the information provided by the Member State at issue — if necessary, following an additional request from the Commission (judgment of 15 June 2005 in *Regione autonoma della Sardegna* v *Commission*, T-171/02, ECR, EU:T:2005:219, paragraphs 40 and 41) — and is not required to conduct on its own initiative preparatory inquiries into all the circumstances if the information provided by the notifying Member State enables it to satisfy itself, after an initial examination, that the measure in question either does not constitute aid within the meaning of Article 107(1) TFEU or, if it is classified as aid, is compatible with the internal market (see case-law cited in paragraph 23 above).

77 Furthermore, if it were to become apparent, subsequently, that the information provided by the Member State concerned was incomplete or erroneous on essential points, to the extent of calling into question the Commission's assessment as regards the compatibility of the aid with the internal market as it has in fact been implemented, this would then be new non-notified aid and therefore illegal within the meaning of Article 1(f) of Regulation No 659/1999, which would justify the opening of a new procedure by the Commission (see, to that effect, judgment of 20 September 2011 in *Regione autonoma della Sardegna and Others* v *Commission*, T-394/08, T-408/08, T-453/08 and T-454/08, ECR, EU:T:2011:493, paragraphs 177 to 180).

78 In this case, as is clear from the considerations set out in paragraphs 37 and 39 above, the fact that a legal dispute over disputed patents is ongoing between ACC Compressors and Secop Austria could not affect the outcome of the assessment of the compatibility of the contested aid with the internal market. Consequently, there was no obligation for the Commission to take into account the claims made by ACC Compressors in that regard in the merger procedure.

Prohibition for the Commission of using the information obtained in a merger procedure for other purposes

79 Furthermore, in accordance with Article 17(1) of the Merger Regulation, information obtained under that regulation can be used only for the purposes of the request for information, investigation or hearing.

80 This provision prohibited in principle the Commission from using, in the context of the State aid procedure, the information that had been submitted to it in connection with the merger procedure.

81 However, the applicant submits that the case-law of the Court has reduced the scope of Article 17 of the Merger Regulation inasmuch as, when the Commission incidentally gains knowledge of certain information in a procedure under competition law, and if this information indicates the existence of an infringement of other competition rules, it may then open a second procedure to verify the accuracy of the information or to supplement it, in particular by asking for the same documents and using them for purposes of evidence.

82 It should be noted, in that regard, that, even if the information gathered under the Merger Regulation may not be directly used as evidence in a procedure not governed by that regulation, they nevertheless amount to factors that may, where appropriate, be taken into account to justify the opening of a procedure under another legal basis (see, by analogy, in the situation of the use by a national competition authority of information gathered in the course of EU level cartel proceedings, judgments of 17 October 1989 in *Dow Benelux* v *Commission*, 85/87, ECR, EU:C:1989:379, paragraphs 18 to 20, and 16 July 1992 in *Asociación Española de Banca Privada and Others*, C-67/91, ECR, EU:C:1992:330, paragraphs 39 and 55).

83 In the present case, the applicant does not allege that the Commission failed to open a State aid procedure on the basis of information gathered as part of the merger procedure, but alleges that the Commission did not take the latter into account in the aid procedure already under way. Therefore, it must be held that, under the case-law cited in paragraph 82 above, the Commission was at least entitled, in the State aid procedure, to request the production of information or documents that had come to its knowledge in the merger procedure, if that information or those documents were relevant for the assessment of the aid in question.

84 Furthermore, the applicant claims, relying on various judgments of the courts of the EU, that a derogation may be made from the prohibition in Article 17(1) of the Merger Regulation if there are associative links between various procedures before the Commission. In the present case, the HCH group's restructuring and the disposal of assets of the former ACC Austria, and the consequences that ensued for ACC Compressors, constitute such associative links between the merger and the State aid procedures.

85 On that basis, it follows from the case-law that the Commission must, as a matter of principle, avoid the inconsistencies that can arise in the implementation of the various provisions of EU law. That obligation for the Commission to maintain the consistency between the provisions of the Treaty relating to State aid and other provisions of the Treaty is all the more necessary when the other

provisions also have undistorted competition in the internal market as their aim (see judgment of 31 January 2001 in *RJB Mining* v *Commission*, T-156/98, ECR, EU:T:2001:29, paragraph 112 and the case-law cited).

86 It follows in particular that, when adopting a decision on the compatibility of aid with the internal market, the Commission is not to ignore the risk of individual traders undermining competition in the internal market (judgment in *RJB Mining* v *Commission*, cited in paragraph 85 above, EU:T:2001:29, paragraph 113). By analogy, it must be considered that, by adopting a decision on the compatibility of State aid, the Commission must take into account the consequences of a merger that it is assessing under another procedure, insofar as the conditions of this merger are of such a kind as to influence the assessment of the effect on competition the aid at issue may have. Where appropriate, the Commission may then be required to ask a question of the Member State concerned, in order to introduce the information at issue in the State aid procedure.

87 Given that the patent dispute was not relevant for the purposes of assessing the compatibility of the aid at issue with the internal market (see paragraphs 37 and 39 above), such an obligation did not exist in this case.

88 It follows that the first and third pleas in law, as reclassified, must be rejected.

89 Because all the applicant's pleas in law must be rejected, the action must be dismissed in its entirety.

**Costs**

90 Under Article 134(1) 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. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (First Chamber),

hereby:

**1. Dismisses the action;**

**2. Orders Secop GmbH to pay the costs.**

Kanninen Pelikánová Buttigieg

Delivered in open court in Luxembourg on 1 March 2016.

[Signatures]

# Table of contents

Background to the dispute ..... 2

Procedure and forms of order sought ..... 2

Law ..... 3

Second plea in law, alleging infringement of the Treaties ..... 3

The first and second parts of the second plea in law, alleging infringement of Article 107(3)(c) TFEU and infringement of Article 108(2) and (3) TFEU ..... 3

– The relevant case-law ..... 3

– ACC's alleged new firm classification ..... 5

– Whether the contested aid allegedly only 'postpones the inevitable' ..... 7

– Consideration of the alleged earlier aid ..... 7

– Taking into account the practice of selling at a loss, allegedly practised by ACC Compressors . 9

– The calculations submitted by the Commission ..... 9

The third part of the second plea in law, alleging infringement of the principle of equal treatment . 9

The first and third pleas in law, as reclassified, alleging failure to conduct a proper preliminary investigation and errors of assessment ..... 10

The extent of the Commission's duty to investigate in the preliminary examination phase ..... 11

Prohibition for the Commission of using the information obtained in a merger procedure for other purposes ..... 12

Costs ..... 13