LEXCELLENCE

CJEU INTERPRETATIONS CONCERNING THE ENFORCEMENT OF STATE AID LAW BY NATIONAL COURTS

A SELECTION OF RECENT JUDGMENTS CONCERNING THE ROLE OF NATIONAL COURTS AND PROCEDURAL ISSUES

Budapest, 28 May 2019

I.1. APPLICATION OF INTERNAL MARKET RULES WITH DIRECT EFFECT TO AN AID SCHEME

Judgment of 2 May 2019, *A-Fonds*, C-598/17, EU:C:2019:352

Relevance: Applicability of internal market rules to an existing aid scheme, role of national courts if application of Article 63(1) TFEU would widen the scope of an existing aid scheme in a way that would create new aid

Facts

The preliminary ruling request has been made in proceedings between *A-Fonds* and the Netherlands tax administration concerning the refund of dividend tax withheld by the Netherlands tax administration. *A-Fonds* is a special collective investment fund without legal personality, all of its shares have been held by *BBB*. *BBB* is a body governed by German law, has a legal personality and is made up of a group of German municipalities. *BBB* held, through *A-Fonds*, shares in Netherlands companies which were entitled to refund of dividend tax. According to the Netherlands tax law, the public undertakings conforming to certain conditions were exempted from corporation tax and in connection with this exemption, these undertakings were entitled to the refund of dividend tax. *BBB* paid the dividend tax on the dividends that it received due to those companies' shares in respect of financial years 2002/2003 to 2007/2008. By several request, *BBB* sought the refund of that tax from the Netherlands tax administration, but it considered that this company was not entitled to claim that refund because it was not established in the Netherlands. *A-Fonds* made applications to the District Court for annulment of those decisions refusing the refund, and following rejection of those applications brought an appeal against those judgment. The Netherlands court ruling on the appeal considered that the tax administration's decisions refusing refund of the dividend tax on the ground that the applicant was established in a Member State other than the Netherlands infringed the free movement of capital. Furthermore, the Dutch court took into account that the law about the exemption from corporation tax was found by the Commission in an earlier decision to be existing aid, so the refund also constituted an existing aid scheme. This court wondered whether a decision to grant the request of *A-Fonds*/*BBB* for the dividend tax refund (in order not to violate the free movement of capital) constitutes an alteration of an existing aid scheme qualifying as new aid, and if that is the case, whether it is possible to adopt such decision and whether it is necessary to notify that decision to the Commission.

Held

The Court recalled that the assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, but it is for the national courts to ensure, without the assessment of the compatibility, that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission has been infringed. The national courts could assess whether the arrangements of an aid scheme comply with Treaty provisions which have direct effect other than those relating to State aid only if those arrangements can be evaluated separately (i.e. are not necessary for the attainment

of the objective of the aid scheme or for its functioning). By contrast, according to the case-law, when the arrangements are indissolubly linked to the object of the aid and it is impossible to evaluate them separately, their effect in the compatibility or incompatibility of the aid viewed as a whole must be assessed by the Commission. The Court laid down in the present case that the residence condition indissolubly linked to the very object of the exemption measures, which was to the advantage of national undertakings only. In the Court's view it did not appear to be possible to separate such a condition without adversely affecting the division of competence between the Commission and the national courts in the matter of State aid. It follows that the national court cannot assess whether such a residence condition complies with the free movement of capital principle, where the scheme for the refund of dividend tax concerned constitutes an aid scheme.

Findings of the Cour

"46 Whilst the assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, subject to review by the European Union Courts, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 108(3) EC has been infringed (see, to that effect, the judgment of 8 December 2011, *Residex Capital IV,* C-275/10, EU:C:2011:814, paragraph 27). Such disregard, if relied on by individuals and confirmed by the national courts, must lead those courts to draw from it all the consequences in accordance with their national law, without their decisions, however, implying an assessment of the compatibility of the aid with the internal market, which is a matter within the exclusive competence of the Commission, subject to review by the Court (see, to that effect, the judgment of 23 April 2002, *Nygård,* C-234/99, EU:C:2002:244, paragraph 59 and the case-law cited).

47 It is also clear from the case-law of the Court that a national court has competence to assess whether the arrangements of an aid scheme comply with Treaty provisions which have direct effect, other than those relating to State aid, only if those arrangements can be evaluated separately and thus, although forming part of the aid scheme in question, are not necessary for the attainment of its objective or for its functioning (see, to that effect, the judgments of 22 March 1977, *Iannelli & Volpi,* 74/76, EU:C:1977:51, paragraph 14, and of 23 April 2002, Nygård, C-234/99, EU:C:2002:244, paragraph 57).

48 By contrast, the arrangements of an aid may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article 108 TFEU (see, to that effect, the judgment of 22 March 1977, *Iannelli & Volpi*, 74/76, EU:C:1977:51, paragraph 14).

49 In the present case, that is the case for a residence condition such as that laid down in the scheme for the refund of dividend tax at issue in the main proceedings, if the scheme is however regarded as constituting State aid, since that condition appears to be indissolubly linked to the very object of the exemption measures at issue, which is to the advantage of national undertakings only.

50 Furthermore, it should be observed that, in the case in the main proceedings, such a review would necessarily call into question, even if only indirectly, the residence condition laid down by Article 2 of the Wet Vpb 1969 for the exemption from corporation tax for public undertakings, which is a necessary condition for the achievement of

the objective and functioning of that aid scheme.

51 It does not therefore appear to be possible to separate such a condition, which is necessary for the attainment of the objective and functioning of that aid scheme, without adversely affecting the division of competences between the Commission and the national courts in the matter of State aid.

52 Consequently, it must be held that EU law precludes a national court from assessing whether a residence condition, such as that at issue in the main proceedings, complies with the free movement of capital, where the scheme for the refund of dividend tax concerned constitutes an aid scheme.”

I.2. ACTION FOR DAMAGES, EFFECT OF THE 10 YEAR LIMITATION PERIOD

Judgment of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, EU:C:2019:51

Relevance: Action for damages in absence of a Commission decision

Facts

In the main proceedings, *Fallimento Traghetti del Mediterraneo* ('FTDM') brought an action against the Italian Presidency of the Council of Ministers to claim compensation for the damages it suffered due to the grant, during the years 1976 to 1980, of subsidies to *Tirrenia de Navigazione* ('*Tirrenia'*), one of its competitors. The Court has already decided gave several preliminary rulings in this case, so it was clear that the measure was a State aid, however the Commission has never made a decision about it.

FTDM and *Tirrenia* were two maritime transport undertakings which, in the 1970s, ran regular ferry services between mainland Italy and the islands of Sardinia and Sicily. FTDM suffered damage as a result of the low-fare policy applied by *Tirrenia* between 1976 and 1980. According to FTDM, *Tirrenia* had abused its dominant position on the market in question by operating with fares well below cost owning to its having obtained public subsidies in breach of EU law. Therefore, FTDM brought an action against *Tirrenia* seeking compensation for the abovementioned damage, but after approximately 20 years, it lost the case. In 2002, the insolvency administrator of FTDM brought an action for damages against the Italian State based on the liability of the Italian State in its legislative capacity – for having granted aid under an Italian law –, in its judicial capacity – for having failed, through the previous judgement, to fulfil its obligation to refer questions to the Court –, and in its administrative capacity – for having failed to inform the Supreme Court of Cassation about initiation of infringement proceedings by the Commission in relation to that law, thereby failing to fulfil its obligation of loyal cooperation with the EU institutions. The Italian court upheld the claim based on the liability of the State in its legislative capacity, therefore ordered the State to pay FTDM the sum of around EUR 2.3 million with interest. In 2014, in the appeal procedure, the court set aside this judgement, but attributed the liability of the State in its legislative capacity. The representative of the Italian State lodged an appeal on a point of law against that judgement before the referring court, arguing, inter alia, that the aid granted to *Tirrenia* was wrongly classified as new aid and not as existing aid. For this reason, the Italian court referred questions to the Court for a preliminary ruling in relation to applicability and interpretation of the notion of existing aid laid down in the Regulation No 659/1999[1].

Held

In the first place, the Court mentioned that in accordance with the Article 15 of Regulation No 659/1999, any aid with regard to which the limitation period has expired is to be deemed to be existing aid. Any action of the Commission – or of the Member State acting at the request of the Commission – with regard to the unlawful aid interrupts that period. The Commission's powers to recover that aid is subject to a limitation period of 10 years.

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[1] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1-9

On the other hand, the Court noted that the national courts have a special role and enjoy a certain level of independence in relation to the Commission, particularly when hearing an action for damages in the absence of a Commission decision. The Court recalled that the national courts shall ensure that the rights of the individuals are safeguarded where the obligation to give prior notification of State aid to the Commission has been infringed. In fulfilling their tasks, the national courts may be required to uphold claims for compensation for damage caused by the unlawful State aid to competitors of the beneficiary. The Court stated that the possibility to claim damages is independent of any parallel investigation by the Commission concerning the aid. In that regard, according to the case-law of the Court, the initiation by the Commission of the formal examination procedure for State aid cannot release national courts from their duty to safeguard the rights of individuals. Furthermore, the Court highlighted that a Commission decision finding aid that was not notified to be compatible with the internal market does not have the effect of regularising *ex post facto* implementing measures which were invalid because they were taken in disregard of the prohibition laid down by the last sentence of Article 93(3) of the EEC Treaty, since otherwise the direct effect of that provision would be impaired and the interests of individuals, which are to be protected by national courts, would be disregarded. Therefore, when an applicant is able to demonstrate before the national court that he has suffered loss caused by the premature implementation of State aid and, more specifically, as a result of the illegal time advantage which the beneficiary gained from such an implementation, the action for damages can, in principle, be upheld even though the Commission has already approved the aid in question by the time the national court decides on the application. The Court expressed that when hearing an action for damages where there is no Commission decision, it must be held that the expiry of the 10-year limitation period merely sets a time limit on the Commission's powers regarding the recovery of State aid. This time limit cannot have effect of retroactively legalising State aid vitiated by illegality merely because it becomes existing aid and, consequently, of depriving of any legal basis an action for damages brought against the Member State concerned by individuals and competitors affected by the grand of the unlawful aid.

Findings of the Court

"55 In particular, the assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the EU judicature, whereas it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 93(3) of the EEC Treaty has been infringed (see, to that effect, judgment of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 38).

56 In fulfilling their tasks, national courts may be required to uphold claims for compensation for damage caused by the unlawful State aid to competitors of the beneficiary.

57 As the Advocate General stated, in essence, in points 82 and 84 of his Opinion, in the context of such actions for damages, those courts, in exercising their functions of safeguarding the rights of individuals, enjoy a degree of independence as regards intervention from the Commission so that the possibility to claim damages is, in principle, independent of any parallel investigation by the Commission concerning the aid in question.

58 In that regard, it is settled case-law of the Court that the initiation by the Commission of the formal examination procedure for State aid cannot release national courts from their duty to safeguard the rights of individuals faced with a possible breach of Article 93(3) of the EEC Treaty (judgment of 21 November

2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 32).

59 Similarly, it should be recalled that, concerning the level of independence of the national courts, a Commission decision finding aid that was not notified to be compatible with the internal market does not have the effect of regularising ex post facto implementing measures which were invalid because they were taken in disregard of the prohibition laid down by the last sentence of Article 93(3) of the EEC Treaty, since otherwise the direct effect of that provision would be impaired and the interests of individuals, which are to be protected by national courts, would be disregarded. Any other interpretation would have the effect of according a favourable outcome to the non-observance of that provision by the Member State concerned and would deprive it of its effectiveness (judgment of 5 October 2006, Transalpine *Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 41 and the case-law cited).

60 Therefore, when an applicant is able to demonstrate before the national court that he has suffered loss caused by the premature implementation of State aid and, more specifically, as a result of the illegal time advantage which the beneficiary gained from such an implementation, the action for damages can, in principle, be upheld even though the Commission has already approved the aid in question by the time the national court decides on the application.

61 It follows from the considerations set out in paragraphs 47 to 60 of this judgment that, having regard to the role played by the national courts in the State aid control system and their level of independence in relation to the Commission, particularly when hearing an action for damages where there is no Commission decision, it must be held, as the Advocate General noted in point 91 of his Opinion, that the expiry of the 10-year limitation period laid down in Article 15(1) of Regulation No 659/1999 merely sets a time limit on the Commission's powers regarding the recovery of State aid.

62 Therefore, the expiry of the limitation period provided for in Article 15(1) of Regulation No 659/1999 cannot have the effect of retroactively legalising State aid vitiated by illegality merely because it becomes existing aid within the meaning of Article 1(b)(v) and, consequently, of depriving of any legal basis an action for damages brought against the Member State concerned by individuals and competitors affected by the grant of the unlawful aid."

II. PROCEDURAL ISSUES

II.1. ADMISSIBILITY OF A QUESTION FOR PRELIMINARY RULING (CONCERNING THE LEGALITY OF A COMMISSION DECISION ON STATE AID)

Judgment of 25 July 2018, *Georgsmarienhütte*, C-135/16, EU:C:2018:582

Relevance: Admissibility of a request for preliminary ruling (in case the applicants in the main proceeding could have challenged the Commission's decision directly before the General Court in an action for annulment)

Facts

The relevant German law provided for a mechanism to offset the costs stemming from the generation of electricity from renewable energy sources at the federal level. The mechanism was based on a levy ('the EEG-surcharge'), which was in principle passed on by electricity suppliers to purchasers and end consumers of electricity. By way of exception, under a special compensation scheme, it was possible to cap the EEG-surcharge for large electricity consumer active in electricity-intensive industries ('EEIs'). The cap was intended to limit the energy costs of those companies and thus preserve their international competitiveness. The EEG-surcharge could be capped upon application to the competent authority ('BAFA'). However, the Commission adopted a decision by which it held that the special compensation scheme constituted unlawful State aid, and ordered BAFA to recover the incompatible aid (including that granted to EEIs as a result of the cap) from the recipients. As in 2013 and 2014 the applicant companies benefitted from the cap on the EEG-surcharge, BAFA revoked its decisions on the cap granted to them. The applicants brought an action before the competent German court against the revocation decisions and they raised doubts as to the classification by the Commission of the cap on the EEG-surcharge as State aid. Therefore, the German court requested the Court to give preliminary ruling about the validity of the Commission's contested decision.

The Commission, relying on the judgement in *TWD Textilwerke Deggendorf*[2], submitted that the request for a preliminary ruling was inadmissible on the ground that the applicants in the main proceedings did not bring an action for annulment against the contested decision before the General Court of the European Union.

Held

The Court recalled that, in particular for reasons of legal certainty, it is not possible for a recipient of State aid (which was the subject of a Commission decision) who could undoubtedly have challenged that decision on the basis of Article 263 TFEU and who did not submit its application on time, effectively to call into question the legality of that decision before the national courts, in an action brought against the national measures implementing that decision. So, the Court examined whether the applicants in the main proceedings undoubtedly had standing to bring an action for annulment of the contested decision before the General Court.

[2] Judgment of 9 March 1994, *TWD Textilwerke Deggendorf*, C-188/92, EU:C:1994:90

The Court concluded that the applicants were directly concerned by the contested decision because they were large electricity consumers forming part of the energy sector affected by the aid scheme examined in that decision, and that they were individually concerned as actual recipients of the aid granted under that scheme, of which the Commission has ordered the recovery. It follows that the applicants undoubtedly had standing to seek the annulment of the contested decision.

The Court mentioned that the applicants brought actions for the annulment of the Commission's decision initiating the formal investigation procedure, however, that procedure was closed by the adoption of the contested decision. The Court also mentioned that the applicants even wanted to amend the forms of order sought in their original application (i.e. they wished to include an additional claim for annulment of the contested decision), but of course the Court rejected those requests. The Court also expressed that this rejection was without prejudice to the applicants' right to bring proceedings against that decision. Nevertheless, the applicants did not bring fresh proceedings before the Court, so they did not exercise their right laid down in Article 263 TFEU. Therefore, as follows from the *TWD Textilwerke Deggendorf* case-law, they could not rely on the invalidity of the contested decision in support of their actions before the national court against the national measures implementing that decision. Since the validity of that decision was not properly challenged before the national court, the Court declared the request for preliminary ruling inadmissible.

Findings of the Court

"12 The case in the main proceedings concerns, in essence, the validity of the contested decision in that it classified the cap on the EEG-surcharge as 'State aid' within the meaning of Article 107 TFEU.

13 The Commission, relying on the judgment of 9 March 1994, *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90), submits that the request for a preliminary ruling is inadmissible on the ground that the applicants in the main proceedings did not bring an action for annulment against the contested decision before the General Court of the European Union.

14 It should be noted that, in paragraph 17 of that judgment, delivered in a case bearing similarities to the case in the main proceedings, the Court in essence held that, in particular for reasons of legal certainty, it is not possible for a recipient of State aid — which was the subject of a Commission decision that was directly addressed solely to the Member State from which that recipient comes — who could undoubtedly have challenged that decision on the basis of Article 263 TFEU and who allowed the mandatory period provided for in the sixth paragraph of that provision to lapse, effectively to call into question the legality of that decision before the national courts, in an action brought against the national measures implementing that decision (see, also, judgment of 15 February 2001, *Nachi Europe*, C-239/99, EU:C:2001:101, paragraph 30, and of 5 March 2015, *Banco Privado Português and Massa Insolvente do Banco Privado Português,* C-667/13, EU:C:2015:151, paragraph 28).

15 In particular, the Court held that, in such a case, to find otherwise would enable the recipient of the aid to overcome the definitive nature which a decision necessarily assumes, by virtue of the principle of legal certainty, once the time limit laid down for bringing proceedings has passed (judgments of 15 February 2001, *Nachi Europe*, C-239/99, EU:C:2001:101, paragraph 30, and of 5 March 2015, *Banco Privado Português and Massa Insolvente do Banco Privado Português*, C-667/13, EU:C:2015:151, paragraph 28 and the case-law cited).

16 However, the exception referred to in paragraph 14 above is also justified where the

recipient of the aid relies, before a national court, on the invalidity of the Commission decision before the expiry of the time limit for challenging that decision, provided for in the sixth paragraph of Article 263 TFEU.

17 Thus, the possibility for a person to rely, in an action brought before a national court, on the invalidity of provisions contained in a measure of the European Union, which constitutes the basis of a national decision taken concerning him, presupposes either that he has also brought, pursuant to the fourth paragraph of Article 263 TFEU, an action for annulment of that EU measure within the prescribed time limits, or that he has not done so, as a result of not having the right to bring such an action (see, to that effect, judgments of 29 June 2010, E and F, C-550/09, EU:C:2010:382, paragraphs 46 and 48; of 17 February 2011, *Bolton Alimentari*, C-494/09, EU:C:2011:87, paragraphs 22 and 23; and of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 67 and the case-law cited).

18 Consequently, where a person seeking to challenge an EU measure undoubtedly has standing under the fourth paragraph of Article 263 TFEU, that person is bound to make use of the remedy provided for in that provision by bringing an action before the General Court."

"36 […] the applicants in the main proceedings are not only concerned by the contested decision in that they are EEIs forming part of the energy sector affected by the aid scheme examined in that decision. They are individually concerned as actual recipients of the aid granted under that scheme, of which the Commission has ordered the recovery (see, to that effect, judgments of 19 October 2000, *Italy and Sardegna Lines v Commission,* C-15/98 and C-105/99, EU:C:2000:570, paragraph 34, and of 29 April 2004, *Italy v Commission*, C-298/00 P, EU:C:2004:240, paragraph 39).

37 It follows from the foregoing that the applicants in the main proceedings undoubtedly had standing to seek the annulment of the contested decision.

38 It is admittedly not disputed that each of the applicants in the main proceedings brought an action before the General Court for the annulment of Commission Decision C(2013) 4424 final of 18 December 2013 to initiate the formal investigation procedure provided for in Article 108(2) TFEU in respect of the measures implemented by the Federal Republic of Germany for the support of renewable electricity and energy-intensive users (State aid SA. 33995 (2013/C) (ex 2013/NN)).

39 The formal investigation procedure having in the meantime been closed by the adoption of the contested decision, the General Court, however, by orders of 9 June 2015, *Stahlwerk Bous v Commission* (T-172/14, not published, EU:T:2015:402); of 9 June 2015, Georgsmarienhütte v Commission (T-176/14, not published, EU:T:2015:414); of 9 June 2015, *Harz Guss Zorge v Commission* (T-177/14, not published, EU:T:2015:395); and of 9 June 2015, *Schmiedag v Commission* (T-183/14, not published, EU:T:2015:396), found that there was no need to adjudicate on the actions brought by the applicants in the main proceedings, on the ground that they had become devoid of purpose.

40 In addition, those actions were supplemented by requests, submitted in the course of the proceedings by the applicants in the main proceedings, seeking to amend the forms of order sought, so that they also include a claim for annulment of the contested decision. However, the General Court, in the orders cited in the previous paragraph, rejected those requests as inadmissible on the ground that the contested decision did not amend or replace the decision initiating the formal investigation procedure mentioned in paragraph 38 of the present judgment and that it did not have the same subject matter either.

41 It should also be pointed out that the General Court was careful to state, in an identical manner in paragraphs 23 or 24 of the orders referred to in paragraph 39 of the present judgment, that the rejection of the

requests for amendment seeking the annulment of the contested decision was without prejudice to the possibility for the applicants in the main proceedings to bring proceedings against that decision.

42 The applicants in the main proceedings did not, however, bring fresh proceedings before the General Court.

43 In the light of the foregoing considerations, it must be held that, in so far as the applicants in the main proceedings were undoubtedly entitled to bring an action for annulment under the fourth paragraph of Article 263 TFEU against the contested decision, but did not exercise that right, they cannot rely on the invalidity of that decision in support of their actions before the national court against the national measures implementing that decision.

44 In those circumstances, since the validity of the contested decision was not properly challenged before the national court, the present request for a preliminary ruling is inadmissible."

II.2. Reference of questions for preliminary ruling concerning the compatibility assessment of a Commission decision

Order of 10 October 2017, *Greenpeace Energy v Commission*, C-640/16 P, EU:C:2017:752

Relevance: Obligation of a national court to refer questions for preliminary ruling concerning the compatibility assessment of the Commission (in case it has doubts concerning the legality of that compatibility assessment)

Facts

In the proceedings at first instance (*Greenpeace Energy and Others v Commission*, T-382/15), the applicants brought an action for annulment of the Commission's decision declaring the planned measures of the United Kingdom in support of the new nuclear power station *Hinkley Point C* ('HPC') to be State aid compatible with the internal market. The General Court rejected the action by order because the applicants did not have legal standing before it (i.e. were not individually concerned by the contested decision). One of the applicants, *Greenpeace Energy*, brought an appeal against that order. One of its grounds of appeal was an alleged breach of its right to effective judicial protection (as provided for by Article 47 of the EU Charter of Fundamental Rights). The applicant argued that the assessment of compatibility of State aid fell within the exclusive competence of the Commission, so that national courts were not allowed to review such an assessment and consequently it was unable to challenge the validity of the Commission decision before national courts. According to the applicant the current narrow interpretation of individual concern (i.e. practically and even theoretically the complete lack of legal standing for all competitors of the beneficiary nuclear power plant) completely excludes judicial review of similar Commission decisions.

Held

The Court rejected the argument of *Greenpeace Energy* according to which the fact that it could not challenge the legality of the Commission's decision before the Court would breach its rights to effective judicial protection. The Court recalled its case-law laying down that in case a company cannot prove its direct and individual concern relating to a Commission's decision and therefore lacks legal standing to bring an action for annulment before the Court, the national system shall allow the company to call into question the legality of the abovementioned decision before a national court. If the national court has doubts concerning the legality of the Commission's decision – notwithstanding the fact that the examination of the compatibility of aid measures is the exclusive competence of the Commission – it shall refer questions to the Court for preliminary ruling. So as the Court laid down, even in the case of a positive decision (a Commission decision declaring State aid to be compatible) the national court shall refer questions for preliminary ruling if it has doubts concerning the legality of the Commission's decision, that is to say, even in case its doubts relate to the lawfulness of the Commission's assessment concerning compatibility of the aid.

The order is not available in English so we had to include citations in French.

Findings of the Cour

" 52 Greenpeace Energy reproche au Tribunal de ne pas avoir suffisamment apprécié l'importance de l'article 47 de la Charte pour l'interprétation de l'article 263, quatrième alinéa, deuxième branche, TFUE et d'avoir, ainsi, exagéré les conditions nécessaires pour la démonstration de la qualité pour agir d'un requérant. Selon Greenpeace Energy, l'interprétation de l'article 263, quatrième alinéa, deuxième branche, TFUE, retenue par le Tribunal, fait obstacle à ce que les particuliers puissent se prévaloir de manière effective des droits et des libertés consacrés par le droit de l'Union.

53 Greenpeace Energy estime que la thèse exposée au point 138 de l'ordonnance attaquée, selon laquelle une protection juridictionnelle lui serait garantie devant les juridictions du Royaume-Uni, est entachée d'une erreur de droit. Elle soutient que, lorsqu'il octroie une aide d'État autorisée par la Commission, un État membre applique exclusivement son droit national. Dès lors, renvoyer un concurrent affecté par l'octroi de l'aide à une protection juridictionnelle devant les juridictions de cet État membre n'aurait pas de sens. Cette hypothèse se distinguerait de celle dans laquelle l'État membre met en œuvre le droit dérivé de l'Union, par l'adoption d'actes individuels.

54 Greenpeace Energy ajoute que, en tout état de cause, il serait impossible, dans la présente affaire, d'apprécier en quoi une éventuelle procédure devant les juridictions du Royaume-Uni pourrait respecter les exigences d'une protection juridictionnelle effective et constituer une alternative plus efficace à un recours en annulation au titre de l'article 263, quatrième alinéa, deuxième branche, TFUE. Eu égard à la jurisprudence de la Cour selon laquelle les juridictions nationales ne sont pas compétentes pour statuer sur la compatibilité de mesures d'aides ou d'un régime d'aides d'État avec le marché intérieur (arrêt du 15 septembre 2016, PGE, C-574/14, EU:C:2016:686, point 32) et doivent s'abstenir de prendre des décisions allant à l'encontre d'une décision de la Commission relative à une aide d'État (voir, en ce sens, arrêts du 21 novembre 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, point 41, ainsi que du 26 octobre 2016, *DEI et Commission/Alouminion tis Ellados*, C-590/14 P, EU:C:2016:797, point 105), il serait quasiment exclu que les concurrents d'une entreprise bénéficiaire d'une décision de la Commission autorisant l'octroi d'une aide à son profit soumettent cette décision au contrôle des juridictions nationales et, par ce biais, au contrôle incident du juge de l'Union.

55 La Commission relève que Greenpeace Energy bénéficie d'une protection juridictionnelle adéquate devant les juridictions du Royaume-Uni, devant lesquelles elle pourrait, en sa qualité de concurrente du bénéficiaire des aides visées par la décision litigieuse, contester la validité de cette décision. Certes, le juge national ne serait pas compétent pour déclarer lui-même une aide incompatible avec le marché intérieur, mais il serait compétent pour examiner s'il existe des doutes sur la légalité d'une décision de la Commission et, éventuellement, soumettre la question de la validité de cette décision à l'appréciation de la Cour, dans le cadre d'un renvoi préjudiciel.

2) Appréciation de la Cour

56 Il y a lieu de relever que, aux points 133 à 145 de l'ordonnance attaquée, le Tribunal a examiné et rejeté l'argument avancé devant lui par Greenpeace Energy et les autres requérantes en première instance, selon lequel, en substance, faute de pouvoir former un recours en annulation contre la décision litigieuse devant les juridictions de l'Union, elles seraient privées d'une protection juridictionnelle effective, dès lors qu'il leur serait impossible d'introduire un recours contre les mesures d'aide concernées par ladite décision devant les juridictions du Royaume-Uni.

57 En particulier, le Tribunal a indiqué, au point 144 de l'ordonnance attaquée, que

Greenpeace Energy et les autres requérantes en première instance n'avaient pas établi que les composantes de l'aide concernée par la décision litigieuse constituaient des mesures qui ne pouvaient pas être attaquées en tant que telles devant le juge national, ni n'avaient démontré que le fait qu'elles ne possédaient pas d'établissement au Royaume-Uni les empêchaient d'introduire un recours devant les juridictions de cet État membre pour contester de telles mesures.

58 Force est de constater que l'argumentation avancée par Greenpeace Energy dans le cadre de la présente branche n'est pas susceptible de remettre en cause ces considérations du Tribunal et de démontrer qu'elles seraient entachées d'une erreur de droit.

59 À cet égard, il y a lieu de relever que Greenpeace Energy se livre à une lecture sélective et séparée de son contexte de la jurisprudence de la Cour, mentionnée au point 54 de la présente ordonnance.

60 En effet, si, selon la jurisprudence constante de la Cour, l'appréciation de la compatibilité de mesures d'aides ou d'un régime d'aides d'État avec le marché intérieur relève de la compétence exclusive de la Commission, agissant sous le contrôle des juridictions de l'Union (arrêt du 15 septembre 2016, PGE, C-574/14, EU:C:2016:686, point 32 et jurisprudence citée), il n'en reste pas moins que, comme le Tribunal l'a à juste titre rappelé au point 140 de l'ordonnance attaquée, il résulte également de cette jurisprudence que, lorsqu'une juridiction nationale estime qu'un ou plusieurs moyens d'invalidité d'un acte de l'Union, y compris une décision de la Commission autorisant l'octroi d'une aide d'État, sont fondés, elle doit surseoir à statuer et saisir la Cour d'une procédure de renvoi préjudiciel en appréciation de validité.

61 Partant, un particulier qui n'est pas directement et individuellement concerné, au sens de l'article 263, quatrième alinéa, deuxième branche, TFUE, par une décision de la Commission autorisant l'octroi d'une aide d'État n'est pas privé de protection juridictionnelle effective, dès lors qu'il peut contester cette aide devant les juridictions nationales et, dans ce contexte, soulever des moyens mettant en cause la validité de ladite décision.

62 L'argument de Greenpeace Energy selon lequel les État membres appliquent leurs propres droits nationaux lorsqu'ils octroient des aides d'État n'est pas susceptible de conduire à une conclusion différente, dans la mesure où les États membres sont tenus de n'accorder des aides d'État dont l'octroi est autorisé par leur droit national que dans le respect des articles 107 et 108 TFUE.

63 C'est, en outre, à juste titre que le Tribunal a rappelé, aux points 141 et 142 de l'ordonnance attaquée, la jurisprudence constante de la Cour selon laquelle, à l'égard des personnes qui ne satisfont pas aux conditions de l'article 263, quatrième alinéa, TFUE, pour porter un recours devant la juridiction de l'Union, il incombe aux États membres de prévoir un système de voies de recours et de procédures permettant d'assurer le respect du droit fondamental à une protection juridictionnelle effective. Cette obligation des États membres, réaffirmée à l'article 19, paragraphe 1, second alinéa, TUE, résulte également de l'article 47 de la Charte s'agissant des mesures prises par les États membres mettant en œuvre le droit de l'Union au sens de l'article 51, paragraphe 1, de la Charte (arrêt du 28 avril 2015, T & L Sugars et Sidul Açúcares/Commission, C-456/13 P, EU:C:2015:284, points 49 et 50 ainsi que jurisprudence citée).

64 Eu égard aux considérations qui précèdent, il convient de rejeter la seconde branche du second moyen comme étant manifestement non fondée et, par voie de conséquence, de rejeter le second moyen dans son intégralité."

II.3. PRIOR NOTIFICATION OBLIGATION IN CASE A NATIONAL COURT'S INTERIM MEASURE CONSTITUTES STATE AID

Judgement of 13 March 2018, *Alouminion tis Ellados* v Commission, T-542/11 RENV, EU:T:2018:132

Relevance: Interim measures of the national courts

Facts

In 1960, the predecessor of *Alouminion AE* which was an aluminium producer company, concluded a contract with the public electricity company, *DEI*, under which the latter applied a preferential electricity tariff ('preferential tariff'). In accordance with its provisions, the contract was renewed every five years unless terminated by one of the parties. Under an agreement between the predecessor and the Greek State, the contract, as amended, was due to end on 31 March 2006 unless it was extended in accordance with its provisions. In 1992, the Commission held that the preferential tariff did not constitute State aid. However, in 2002, the Commission adopted a decision in which it qualified the preferential tariff as State aid compatible with the internal market.

In 2004 DEI terminated the contract and ceased to charge *Alouminion* the preferential tariff with effect from the end of March 2006. *Alouminion* contested the termination before the national court and requested the continuance of the preferential tariff as an interim measure. The national court in its first order suspended, as an interim measure and *ex nunc*, the effects of the termination, pending a judgement on the substance. Between January 2007 and March 2008 ('the period at issue'), DEI applied the preferential tariff, in accordance with the interim measure. DEI contested the abovementioned interim measure before the Greek court of appeal, which court granted DEI's application, *ex nunc*, by its order of March 2008.

In July 2008 the Commission received complaints concerning State aid measures in favour of the applicant, inter alia the preferential tariff, and in January 2010 the Commission opened the formal investigation procedure. In the opening decision, the Commission expressed doubts as to whether the preferential tariff charged by DEI to *Alouminion* during the period at issue was at the same rate as the tariffs charged to other large industrial consumers of high voltage electricity, since the preferential tariff was due to end in March 2006 but had been extended by the first court order granting the interim measure. After all, in its decision of 13 July 2011, the Commission concluded that the Hellenic Republic had unlawfully granted *Alouminion* State aid amounting to EUR 17.4 million by charging the preferential electricity tariff during the period at issue. The Commission also held that that aid was incompatible with the internal market and called on the Hellenic Republic to recover it from the applicant.

The applicant brought an action against the contested decision. In the judgement delivered at first instance[3] the General Court concluded that the Commission wrongly classified the national court's abovementioned interim measure as new State aid. Ruling on DEI's appeal against this

[3] Judgment of 8 October 2014, *Alouminion* v Commission, T-542/11, EU:T:2014:859

judgement, the Court held that the interim measure constituted new State aid, so it set aside the first judgement and referred the case back to the General Court. [4]

Held

The applicant submitted that the Commission exceeded its competence in qualifying the interim measure (which suspended *ex nunc* the effects of the termination of the contract between DEI and *Alouminion)* as new State aid. The applicant argued that in case of a dispute settled exclusively within the framework of national law, the Commission cannot decide on the purely national content of the dispute. In connection with the aforesaid, the Court recalled that there are cases in which the national courts shall interpret and apply the notion of State aid to determine whether a state measure introduced without observance of the preliminary examination procedure under Article 108(3) TFEU is State aid or not. According to the case law, the intervention of national courts is due to the recognised direct effect of the last sentence of Article 108(3) TFEU. In that regard, the Court refined, that the immediate applicability of the prohibition on implementation in that article extends to all aid which has been implemented without being notified and, in the event of notification, operates during the preliminary period and, if the Commission initiates the formal investigation procedure, until the final decision. The Court emphasized that on the basis of the relevant case law, there is a difference between the Commission's key role to assess the compatibility of State aid and the national courts' role to safeguard the individuals' rights arising from the prohibition of implementation. The assessment of the compatibility belongs to the exclusive competence of the Commission even if the Member State did not comply with that prohibition. Meanwhile, the national courts shall safeguard the individuals' rights without deciding on the compatibility with the internal market. Furthermore, the Court emphasized that except for the assessment of the compatibility, the Commission does not have exclusive competence to assess compliance with the State aid rules. On the other hand, even though it is not an exclusive competence, the Commission is definitely empowered to decide whether a state measure, like the interim measure in the main proceedings, constitutes new State aid or not. The Commission can assess every kind of new State aid measures, like new projects and also the substantial modifications of an existing aid, so that those projects and modifications shall be notified to the Commission. In view of the foregoing, the Court laid down that the Commission was absolutely competent to declare that the interim measure applied by the Greek court constituted new State aid, and was also entitled to interpret the contract and the applicable national legal framework in order to ascertain the existence of such aid.

The applicant also submitted that the Commission's decision qualifying an interim measure of the national court as State aid was contrary to its right to an effective judicial protection (as laid down also in Article 47 of the EU Charter of Fundamental Rights). The applicant argued that new aid should always be notified before putting into effect, while an effective judicial protection should include right to appropriate provisional measures to be applied immediately if necessary. The General Court rejected those arguments with a short reference to the fact that the applicant could not reasonably rely on a breach of its right to an effective judicial protection (and right to appropriate provisional measures) in the situation at issue where the national court actually did grant its application for interim relief, and where it has been withdrawn on appeal at a date earlier than when the Commission closed its State aid investigation. So on the whole, although it is not expressly stated in the judgment (and the judgment is currently subject of

[4] Judgment of 26 October 2016, DEI and Commission v *Alouminion tis Ellados*, C-590/14 P, EU:C:2016:797

appeal before the CJEU)[5], the General Court's interpretation is that even in such a case when the granting of an interim measure would constitute State aid, the measure must be notified to the Commission (and approved before grant of the interim measure) and that this obligation shall not be regarded as compromising individuals' right to an effective judicial protection.

The judgment is not available in English so we had to include citations in French.

Findings of the Court

"52 En ce qui concerne le rôle de la Commission, la Cour relève, dans l'arrêt du 22 mars 1977, *Steinike et Weinlig* (78/76, EU:C:1977:52, point 9), que le traité, en organisant par l'article 108 TFUE l'examen permanent et le contrôle des aides par la Commission, entend que la reconnaissance de l'incompatibilité éventuelle d'une aide avec le marché intérieur résulte, sous le contrôle des juridictions de l'Union, d'une procédure appropriée dont la mise en œuvre relève de la responsabilité de la Commission.

53 Pour ce qui est des juridictions nationales, la Cour déclare, dans l'arrêt du 22 mars 1977, *Steinike et Weinlig* (78/76, EU:C:1977:52), qu'elles peuvent être saisies de litiges les obligeant à interpréter et à appliquer la notion d'aide, visée à l'article 107 TFUE, en vue de déterminer si une mesure étatique instaurée sans tenir compte de la procédure de contrôle préalable de l'article 108], paragraphe 3, TFUE devrait ou non y être soumise.

54 L'intervention des juridictions nationales est due à l'effet direct reconnu à l'article 108, paragraphe 3, dernière phrase, TFUE. À cet égard, la Cour précise, dans l'arrêt du 11 décembre 1973, *Lorenz* (120/73, EU:C:1973:152, point 8), que le caractère immédiatement applicable de l'interdiction de mise à exécution visée par cet article s'étend à toute aide qui aurait été mise à exécution sans être notifiée et, en cas de notification, se produit pendant la phase préliminaire et, si la Commission engage la procédure contradictoire, jusqu'à la décision finale.

55 La Cour juge ainsi que le rôle central et exclusif réservé par les articles 107 et 108 TFUE à la Commission pour la reconnaissance de l'incompatibilité éventuelle d'une aide avec le marché intérieur est fondamentalement différent de celui qui incombe aux juridictions nationales quant à la sauvegarde des droits que les justiciables tiennent de l'effet direct de l'interdiction édictée à l'article 108, paragraphe 3, dernière phrase, TFUE. Alors que la Commission est tenue d'examiner la compatibilité de l'aide projetée avec le marché intérieur, même dans les cas où l'État membre méconnaît l'interdiction de mise à exécution des mesures d'aides, les juridictions nationales, elles, ne font que sauvegarder, jusqu'à la décision finale de la Commission, les droits des justiciables face à une méconnaissance éventuelle, par les autorités étatiques, de l'interdiction visée à l'article 108, paragraphe 3, dernière phrase, TFUE. Lorsque lesdites juridictions prennent une décision à cet égard, elles ne se prononcent pas pour autant sur la compatibilité des mesures d'aides avec le marché intérieur, cette appréciation finale étant de la compétence exclusive de la Commission, sous le contrôle des juridictions de l'Union (arrêt du 21 novembre 1991, *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de s*aumon, C-354/90, EU:C:1991:440, point 14).

56 Il ressort ainsi clairement de la jurisprudence de la Cour que, certes, la Commission ne jouit pas, sauf pour ce qui est de l'appréciation de la compatibilité d'une

[5] C-332/18 P - *Mytilinaios Anonymos Etairia – Omilos Epicheiriseon*

aide, d'une compétence exclusive en matière de contrôle du respect des dispositions du traité en matière d'aides d'État.

57 Elle n'en demeure pas moins manifestement compétente en cette matière, de sorte que, en l'espèce, il ne saurait être sérieusement reproché à la Commission de s'être reconnue compétente pour décider qu'une mesure nationale donnée avait constitué une aide nouvelle.

58 En effet, il appartient à la Commission de procéder à l'examen de toute aide nouvelle, en ce compris non seulement tout projet d'aide, mais également toute modification substantielle d'une aide existante, de sorte que lesdits projets ou modifications doivent lui être notifiés en application de l'article 108, paragraphe 3, TFUE.

59 Aussi, même dans les circonstances de l'espèce, la Commission était-elle compétente pour apprécier l'existence d'une aide nouvelle.

60 La Commission pouvait ainsi, à bon droit, procéder à l'interprétation du contrat et du cadre juridique national applicable, tant matériel que procédural, aux fins d'apprécier l'existence d'une aide nouvelle, sans préjudice du contrôle, par le Tribunal, du bien-fondé de cette appréciation."

[...]

« 62 Par le troisième moyen du recours, la requérante soutient que la décision attaquée est entachée d'illégalité en ce que la Commission a enfreint le principe de protection juridictionnelle effective.

63 Selon la requérante, en qualifiant la mesure en cause, c'est-à-dire la première ordonnance de référé, d'aide nouvelle, la Commission a enfreint le principe de protection juridictionnelle effective.

64 En effet, en considérant que la résiliation était valide, nonobstant un litige encore pendant devant les juridictions nationales et la première ordonnance de référé portant précisément sur cette question, la Commission aurait enfreint le principe de protection juridictionnelle effective, lequel comprend la protection juridictionnelle au provisoire.

65 Au surplus, en qualifiant la mesure en cause, c'est-à-dire la première ordonnance de référé, d'aide nouvelle, l'approche de la Commission impliquerait qu'une décision judiciaire nationale prononcée en référé dût lui être notifiée et que les effets de ladite décision doivent être suspendus, conformément à l'article 108, paragraphe 3, TFUE, ce qui affecterait le principe de protection juridictionnelle effective au provisoire.

66 Selon la Commission, soutenue par DEI, le troisième moyen du recours doit être rejeté, en particulier à la suite de l'arrêt sur pourvoi.

67 À cet égard, il convient de rappeler, à titre liminaire, que, en vertu d'une jurisprudence constante, le principe de protection juridictionnelle effective constitue un principe général du droit de l'Union, qui découle des traditions constitutionnelles communes aux États membres, qui a été consacré par les articles 6 et 13 de la convention de sauvegarde des droits de l'homme et des libertés fondamentales, signée à Rome le 4 novembre 1950 (ci-après la « CEDH ») (arrêt du 15 mai 1986, Johnston, 222/84, EU:C:1986:206, points 18 et 19), qui a également été réaffirmé à l'article 47 de la charte des droits fondamentaux de l'Union européenne et qui trouve tout autant application dans des procédures au provisoire (voir, en ce sens, arrêt du 13 mars 2007, Unibet, C-432/05, EU:C:2007:163, point 67 et jurisprudence citée).

68 En l'espèce, force est de constater que, dans le cadre du troisième moyen du recours, la requérante se contente de soulever les arguments qu'elle invoque par ailleurs dans le cadre du deuxième moyen, lequel a été rejeté par le Tribunal dans le présent arrêt.

69 En tout état de cause, le troisième moyen du recours ne saurait prospérer.

70 En effet, d'une part, il ne saurait être reproché à la Commission d'avoir, par la décision attaquée, enfreint le droit de la requérante d'agir devant les juridictions nationales aux fins d'obtenir une protection

de ses droits au provisoire, ne serait-ce que par l'existence même de la première ordonnance de référé.

71 Le même constat s'impose pour ce qui est, d'autre part, de la seconde ordonnance de référé, laquelle a révoqué la première

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ordonnance de référé avant que ne fût adoptée la décision attaquée.

72 Partant et indépendamment de l'incidence de l'arrêt sur pourvoi, le troisième moyen, tiré d'une violation du principe de protection juridictionnelle effective, doit être rejeté