

Defendant: European Commission

Form of order sought

1. Annulment of the European Commission's decision of 14 October 2009, notified to the Portuguese Government by letter No 11656, refusing to reimburse the amount of the contribution originally approved for the purchase of two Ocean Patrol Vessels (OPV) for surveillance of fishing activities, in the sum of EUR 11 025 000;
2. an order that the defendant should adopt a favourable decision with regard to the requests for reimbursement made by the Portuguese Government in connection with European Commission Decision 2002/978/EC of 10 December 2002;
3. an order that the European Commission should pay the costs.

Pleas in law and main arguments

- (a) Error as regards the legal requirements, given that the Portuguese State has complied in full with all the rules in the sphere of public procurement;
- (b) error as to the facts;
- (c) breach of the obligation to state reasons: the contested decision does not contain any grounds whatsoever, however slight, justifying the decision adopted. Inasmuch as it is contrary to and profoundly affects duly consolidated legal situations in a Member State, so causing the latter serious damage, such a decision ought, more than any other, to contain solid and persuasive reasoning, of which there is absolutely none in this case.

Action brought on 21 December 2009 — Niki Luftfahrt v European Commission

(Case T-511/09)

(2010/C 80/48)

Language of the case: German

Parties

Applicant: Niki Luftfahrt GmbH (Vienna, Austria) (represented by: H. Asenbauer, lawyer)

Defendant: European Commission

Form of order sought

- Annul the European Commission's decision of 28 August 2009 'State Aid C 6/2009 (ex N 663/2008) — Austria Austrian Airlines — Restructuring Plan' in accordance with the first paragraph of Article 264 TFEU (formerly the first paragraph of Article 231 EC); and
- Order the European Commission to pay the applicant's costs in accordance with Article 87(2) of the Rules of Procedure.

Pleas in law and main arguments

The applicant challenges Commission Decision C (2009) 6686 final of 28 August 2009 concerning State aid in the course of the Austrian State's sale of its shares in the Austrian Airlines group to Deutsche Lufthansa AG (C 6/2009 (ex 663/2008)). In that decision the Commission takes the view that, subject to certain conditions, the restructuring aid granted by the Republic of Austria to Austrian Airlines is compatible with the common market, provided that the restructuring plan notified to the Commission is implemented in full.

In support of its action for annulment the applicant, which operates a privately financed airline and lodged a complaint with the Commission regarding the restructuring aid at issue, submits, first, that the Commission has infringed Article 87(1) and (3)(c) EC, Article 88(2) EC and the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2). In particular it claims that the Commission failed to appreciate that:

- the beneficiary of the aid at issue was not Austrian Airlines but Lufthansa, which is not a firm in difficulty and is therefore not a firm which merits aid,
- neither Austrian Airlines nor Lufthansa has provided an appropriate contribution of its own to the restructuring of Austrian Airlines,
- the notified restructuring measures are not in accordance with the guidelines, and
- the compensatory measures offered by the Republic of Austria are insufficient to reduce as far as possible negative effects of the aid on trading conditions.

Moreover, the applicant also submits that the aid at issue is inseparable from conditions which infringe the Community rules on freedom of establishment and thus Article 43 EC.

It also alleges infringement of Article 253 EC, inasmuch as the Commission has not stated proper reasons for the contested decision, in that:

- it did not ascertain and examine the situation on the relevant markets, in particular the position of the undertaking benefiting from the aid and the position of competitors on the markets, and
- it failed it to take account of the fact that in the past Austrian Airlines has received a large amount of aid that was contrary to Community law.

Lastly, the applicant complains that the Commission has abused its discretion.

Action brought on 21 December 2009 — Rusal Armenal v Council

(Case T-512/09)

(2010/C 80/49)

Language of the case: English

Parties

Applicant: Rusal Armenal ZAO (represented by: B. Evtimov, lawyer)

Defendant: Council of the European Union

Form of order sought

- annul Council Regulation (EC) No 925/2009 of 24 September 2009 imposing an definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain aluminium foil originating in Armenia, Brazil and the People's Republic of China, insofar as it affects the applicant;
- order the Council to pay the costs of and occasioned by these proceedings.

Pleas in law and main arguments

By means of its application, the applicant seeks the annulment of Council Regulation (EC) No 925/2009 of 24 September

2009 imposing an definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain aluminium foil originating in Armenia, Brazil and the People's Republic of China ('the contested regulation'), insofar as it affects the applicant (OJ 2009 L 262, p. 1).

In support of its application, the applicant puts forward the following five legal grounds for annulment, one of which is based on an incidental plea of illegality.

On the basis of its first ground for annulment, the applicant claims that the Commission and the Council breached Article 2, paragraphs 1 to 6, of the Basic Regulation⁽¹⁾ and Article 2.1 and 2.2 of the Agreement on Implementation of Article VI GATT 1994 (hereinafter 'Anti-dumping agreement' or 'ADA'), by establishing normal value for the applicant, based on data from a third analogue country, thereby reaching fundamentally flawed findings of dumping and of cumulation, injury and causality regarding imports from Armenia. According to the applicant, the Council and the Commission should have established normal value for the applicant based on its own Armenian data, and not pursuant to Article 2(7)(a) of the Basic Regulation.

Further, the applicant claims that, for the purpose of reviewing the merits of the first ground for annulment, the Court should declare, in an incidental manner pursuant to Article 277 TFEU (ex Article 241 EC), the inapplicability of Article 2(7) of the Basic Regulation towards the applicant, to the extent that it served as a legal basis for the analogue country methodology, used to establish the applicant's normal value in the contested regulation. The applicant invokes this incidental plea of illegality, since it claims to be entitled to benefit from a judicial review of the application of Article 2(7) to itself and since it claims to have been affected by findings on normal value in the contested regulation which are legally based on Article 2(7) of the Basic Regulation. The latter should be declared inapplicable, according to the applicant, on the ground that its application with respect to the applicant infringes provisions 2.1 and 2.2 of the Anti-dumping agreement, which the EU intended to implement as multilateral obligations into EU law and which are part of the Treaties on which the EU is based and are binding on the Council and the Commission pursuant to well-settled case law of the Court of Justice.

On the basis of its second ground for annulment, the applicant submits that, even if it is assumed that the institutions did not act in breach of Article 2, paragraphs 1 to 6 of the Basic Regulation and the Anti-dumping agreement, they committed a breach of Article 2(7)(c) of the Basic Regulation and wrongly denied market economy treatment ('MET') to the applicant and made a series of manifest errors of assessments of the facts in the context of application of Article 2(7)(c).