

Action brought on 14 April 2015 — Buonotourist v Commission**(Case T-185/15)**

(2015/C 190/31)

*Language of the case: Italian***Parties**

Applicant: Buonotourist Srl (Castel San Giorgio, Italy) (represented by: G. Capo, lawyer, L. Visone, lawyer)

Defendant: European Commission

Form of order sought

- Annul the decision of the European Commission of 19 January 2015 on State aid Sa.35843 (2014/c) (ex 2012/NN), notified to the applicant on 20 February 2015 and implemented by Italy;

- declare, in accordance with Articles 263 TFEU and 264 TFEU, the decision of the European Commission of 19 January 2015 in the procedure relating to State aid Sa.35843 (2014/c) (ex 2012/NN) (in the sum of EUR 1 111 572,00) totally null and void, in so far as it finds that the sums granted by way of compensation for public service obligations under Regulation (EEC) No 1191/69 — compensation granted pursuant to Article 11 for a tariff obligation in the Local Public Transport sector — are to be regarded as a measure that has not been notified, constituting State aid within the meaning of Article 107(1) TFEU, which is incompatible with the internal market;

- declare, in accordance with Articles 263 TFEU and 264 TFEU, the decision of the European Commission of 19 January 2015 in the procedure relating to State aid Sa.35843 (2014/c) (ex 2012/NN) (in the sum of EUR 1 111 572,00) totally null and void, in so far as it imposes operational measures for the recovery of the aid by the Italian State;

- order the Commission to pay the costs incurred by Buonotourist s.r.l.

Pleas in law and main arguments

By the contested decision in the present case, the Commission declared that the payments made to Buonotourist, either by way of compensation or reparation for damage, for the unlawful unilateral imposition of public service obligations (PSO) for the period 1996-2002, in so far as they constitute a measure that has not been notified, constitute State aid within the meaning of Article 107(1) of the Treaty, which is incompatible with the internal market. As a consequence, the decision imposed operational measures for the recovery of the aid.

In support of the action, the applicant relies on 8 pleas in law.

1. First plea in law, alleging infringement of Articles 93, 107, 108 and 263 TFEU in relation to Article 17 of Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (O), English Special Edition, 1969(1), p. 276).
 - It is submitted in this regard that the question whether the compensation payments made in respect of PSO tariffs pursuant to Regulation No 1191/69 are compatible with Community law should have been considered in the light of the provisions of that regulation, not by reference to the Treaty provisions on State aid. The Commission therefore erred in law by acting on the basis of the Treaty provisions.

2. Second plea in law, alleging infringement of Article 4 of 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 1999 L 83, p. 1) in relation to Articles 107 and 108 TFEU.

— It is submitted in this regard that the Commission treated the payments made to Buonotourist for the PSO imposed on it as a measure that had not been notified. On the contrary, those payments were made after the measure had been notified to the Commission. As a consequence, the Commission erred in law and made a procedural error by adopting the decision to open the procedure 14 months after receipt of the notification.

3. Third plea in law, alleging infringement of Articles 93, 107 and 108 TFEU in relation to Article 17 of Regulation No 1191/69 and to Article 9 of Regulation (EEC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1).

— It is submitted in this regard that the Commission erred in law in that it infringed the principles of legal certainty and of the protection of legitimate expectations as the case is governed by Regulation No 1191/69.

4. Fourth plea in law, alleging infringement of Article 1(f) in relation to Article 1(g) and to Articles 4, 7 and 15 of Regulation No 659/1999, for the purposes of Article 17 of Regulation No 1191/69.

— It is submitted in this regard that compensation paid pursuant to that regulation is exempt from any preliminary information procedure and that the sums received by Buonotourist may therefore be classified as existing aid. The Commission erred in law by infringing Article 108(2) TFEU as it cannot order the recovery of sums paid on the basis that the aid granted is classified as unlawful.

5. Fifth plea in law, alleging infringement of Article 267 TFEU, Articles 6 and 13 ECHR and Articles 93, 107 and 108 TFEU.

— It is submitted in this regard that the Consiglio di Stato has already carried out an assessment in relation to what is covered by the provisions laid down in Articles 11 and 17 of Regulation No 1191/69, thereby adopting a position to the effect that the sums granted are covered as existing aid. The Commission exceeded its power as it cannot annul decisions of judicial bodies, including national judicial bodies, when they apply Community law.

6. Sixth plea in law, alleging infringement of Articles 6, 7 and 13 ECHR; Articles 93 — 107 and 108 in relation to Article 258 et seq. TFEU, in relation to Article 101 of the Constitution of the Italian Republic; and Article 2909 of the Italian Civil Code.

— It is submitted in this regard that the contested decision has an impact on the status of *res judicata* of the judgment of the Consiglio di Stato interpreting and applying Community rules. The Commission has therefore once again exceeded its powers as it cannot set aside the judgment having the status of *res judicata* but must institute proceedings pursuant to Article 258 TFEU.

7. Seventh plea in law, alleging infringement of Articles 11 and 17 of Regulation No 1191/69, Articles 93, 107 and 108 TFEU, and misuse of power in the present case.

— It is submitted in this regard that a measure may be classified as State aid if it actually and specifically affects trade and free competition, in so far as it must be demonstrated that there is in fact such an effect. The Commission has absolutely failed to demonstrate that this is the case, especially in view of the fact that in the Regione Campania the internal local public transport (LPT) market has never been open to competition.

8. Eighth plea in law, alleging infringement of Articles 1, 11 and 17 of Regulation No 1191/69 and Articles 93, 107 and 108 TFEU.

— It is submitted in this regard that the Commission made a factual error as it maintained that the compensation granted was calculated by a method established *ex post*. It is apparent from the documents annexed to the application that the opposite is in fact the case.