

Case T-301/02

AEM SpA

v

Commission of the European Communities

(State aid — Scheme of aid granted by the Italian authorities to certain public utilities in the form of tax exemptions and loans at preferential rates — Decision declaring the aid incompatible with the common market — Actions for annulment — Individual concern — Admissibility — Existing aid or new aid — Article 87(3)(c) EC)

Judgment of the Court of First Instance (Eighth Chamber, Extended Composition),
11 June 2009 II - 1761

Summary of the Judgment

- 1. Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Commission decision prohibiting a sectoral aid scheme
(Art. 230, fourth para., EC)*
- 2. State aid — Effect on trade between Member States — Adverse effect on competition — Criteria for assessment
(Art. 87(1) EC)*
- 3. State aid — Existing aid and new aid — Classification as new aid
(Art. 88 EC; Council Regulation No 659/1999, Art. 1(b) (i) and (v))*

4. *State aid — Commission decision declaring an aid scheme incompatible with the common market — Obligation to recover all sums received by the beneficiaries of the scheme — None (Art. 88(2) EC)*

1. Natural or legal persons other than the addressees may claim that a decision is of individual concern to them only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed.

aid scheme but also as an actual recipient of individual aid granted under that scheme, recovery of which has been ordered by the Commission, is individually concerned by the decision and the action which it brought against the latter is admissible.

(see paras 42-44)

An undertaking cannot, as a general rule, bring an action for the annulment of a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of the fact that it belongs to the sector in question and is a potential beneficiary of the scheme. Such a decision is, vis-à-vis the applicant undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner.

2. The Commission is required, when assessing whether aid affects trade between Member States and distorts or threatens to distort competition, not to establish that the aid has a real effect on trade between Member States and that competition is actually distorted, but only to examine whether that aid is liable to affect such trade and to distort competition.

However, an undertaking which is concerned by the decision at issue not only as an undertaking in the sector in question and a potential beneficiary of the

In the case of an aid scheme, the Commission may confine itself to examining the characteristics of the scheme in question in order to determine, in the grounds of its decision, whether, by reason of the terms of that scheme, it is likely to benefit in

particular undertakings engaged in trade between Member States.

Furthermore, any grant of aid to an undertaking pursuing its activities in the Community market is liable to cause distortion of competition and affect trade between Member States. There is no threshold or percentage below which trade between Member States can be said not to be affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected.

As regards the condition relating to the effect on inter-State trade, the fact that an undertaking that is a beneficiary of a State measure operates only on its national market or in its territory of origin is not decisive. Inter-State trade is affected by the measure in question when undertakings established in other Member States have less chance of providing their services in the market of the Member State concerned.

(see paras 88-91, 103)

3. It is clear from both the terms and purposes of Article 88 EC that aid which

existed before the entry into force of the EC Treaty and aid which could be properly put into effect in accordance with the conditions laid down in Article 88(3) EC is to be regarded as existing aid within the meaning of Article 88(1) EC while, on the other hand, measures to grant or alter aid, where the alterations may relate to existing aid or initial plans notified to the Commission, must be regarded as new aid subject to the obligation of notification laid down by Article 88(3) EC. When the alteration affects the actual substance of the original scheme, the latter is transformed into a new aid scheme. However, there can be no question of such a substantive alteration where the new element is clearly severable from the original scheme.

(see paras 117, 121)

4. Abolishing unlawful aid by means of recovery, together with the payment, where appropriate, of interest accruing thereon, is the logical consequence of its being found to be incompatible with the common market. That applies to both individual aid and to aid paid as part of an aid scheme.

However, where an aid scheme has been analysed in a general and abstract manner, the possibility cannot be ruled out that, in

an individual case, the amount granted under the scheme escapes the prohibition laid down in Article 87(1) EC, for example, because the grant of individual aid is covered by the *de minimis* rules.

compatible with the common market under a block exemption regulation or the *de minimis* rules or another Commission decision.

Although, when the Commission takes a decision declaring aid incompatible with the common market, the role of the national authorities is confined to implementing that decision and they do not enjoy any discretion in that regard, those authorities may, when implementing that decision, take such reservations into account. The Commission therefore orders only recovery of aid within the meaning of Article 87 EC and not of amounts which, while paid under the scheme in question, do not constitute aid or constitute existing aid or aid that is

The national court has jurisdiction to interpret the concepts of aid and existing aid and can adjudicate on any particular circumstances in which they may apply, where necessary by referring a question to the Court of Justice for a preliminary ruling.

(see paras 162-166)