

Case C-362/09 P

Athinaiki Techniki AE

v

European Commission

(Appeal — State aid — Complaint — Decision to take no further action on the complaint — Withdrawal of the decision to take no further action — Conditions governing the lawfulness of withdrawal — Regulation (EC) No 659/1999)

Opinion of Advocate General Bot delivered on 2 September 2010 I - 13277

Judgment of the Court (Third Chamber), 16 December 2010 I - 13303

Summary of the Judgment

State aid — Examination of complaints — Commission's obligations — Preliminary examination stage — Obligation to close the preliminary examination stage with a decision — Withdrawal of a decision to take no further action on a complaint regarding alleged unlawful aid — Conditions

(Art. 88 EC; Council Regulation No 659/1999, Arts 4(2), (3) and (4), 13(1), and 20(2))

Article 13(1) of Regulation No 659/1999 on the application of Article 88 EC obliges the Commission, once any additional comments have been lodged by interested parties or the reasonable period has expired, to close the preliminary examination stage by adopting a decision pursuant to Article 4(2), (3) or (4) of that regulation, that is to say, a decision stating that aid does not exist, raising no objections, or initiating the formal investigation procedure.

If, following a decision to take no further action on a complaint regarding alleged unlawful State aid, the Commission were entitled to withdraw such an act it could perpetuate a state of inaction during the preliminary examination stage, contrary to its obligations under Articles 13(1) and 20(2) of Regulation No 659/1999 and avoid any judicial review.

To allow such a possibility would run counter to the legal certainty that Regulation No 659/1999 specifically seeks to enhance, as stated in recitals 3, 7 and 11 in the preamble to that regulation.

Consequently, having regard to the requirements of good administration and legal certainty and to the principle of effective legal protection, it must be considered, on the one hand, that the Commission may withdraw a decision to take no further action on a complaint regarding alleged unlawful aid only in order to remedy illegality affecting that decision, and on the other hand, that the Commission may not, after such withdrawal, take up the procedure again at a stage earlier than the exact point at which the illegality found had occurred.

(see paras 63, 68-70)