Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

5 November 2014*

(State aid — Aid to support the deployment of next generation broadband networks in the Cornwall and Isles of Scilly region — Decision declaring the aid compatible with the internal market — Article 107(3)(c) TFEU — Action for annulment — No substantial effect on the competitive position — Locus standi — Procedural rights of the interested parties — Partial inadmissibility — No doubts which justify initiating the formal investigation procedure)

In Case T-362/10,

Vtesse Networks Ltd, established in Hertford (United Kingdom), represented by H. Mercer QC,

applicant,

v

European Commission, represented by B. Stromsky and L. Armati, acting as Agents,

defendant,

supported by

Republic of Poland, represented initially by M. Szpunar and B. Majczyna, and subsequently by B. Majczyna, acting as Agents,

by

United Kingdom of Great Britain and Northern Ireland, represented initially by S. Behzadi-Spencer and L. Seeboruth, and subsequently by L. Seeboruth, J. Beeko and L. Christie, acting as Agents, and initially by K. Bacon, and subsequently by S. Lee, Barristers,

and by

British Telecommunications plc, established in London (United Kingdom), represented initially by M. Nissen and J. Gutiérrez Gisbert, then by M. Nissen and G. van de Walle de Ghelcke and lastly by G. van de Walle de Ghelcke, J. Rivas Andrés, lawyers, and J. Holmes, Barrister,

interveners,

* Language of the case: English.

APPLICATION for the annulment of Commission Decision C(2010) 3204 of 12 May 2010 declaring the aid measure 'Cornwall & Isles of Scilly Next Generation Broadband', providing aid from the European Regional Development Fund to support the deployment of next generation broadband networks in the Cornwall and Isles of Scilly region, compatible with Article 107(3)(c) TFEU (State Aid No 461/2009 — United Kingdom),

THE GENERAL COURT (Ninth Chamber),

composed of G. Berardis, President, O. Czúcz and A. Popescu (Rapporteur), Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 3 July 2014,

gives the following

Judgment

Background to the dispute

1 The applicant, Vtesse Networks Ltd, is a telecommunications operator which offers the use of high capacity lines, principally to large businesses. Since it does not own any network of high capacity lines of its own, the applicant leases such lines from other telecommunications operators and supplements that supply with the construction of tailor-made connecting networks.

2 British Telecommunications plc ('BT'), the former incumbent telecommunications operator in the United Kingdom, was, until its privatisation, a state-owned business known as British Telecom. It provides a wide range of services in the telecommunications sector, including the leasing of high capacity lines.

The administrative procedure

3 The United Kingdom of Great Britain and Northern Ireland ('the United Kingdom') notified its intention to grant State aid to support the deployment of next generation broadband networks, known as NGA ('Next Generation Access') networks, in the Cornwall and Isles of Scilly region ('the notified measure'). On 29 July 2009, that notification was registered by the European Commission, which received supplementary information from the United Kingdom authorities on 28 September 2009.

4 On 21 October 2009, the Commission registered a complaint lodged by the applicant regarding the notified measure.

5 The following is clear from the file:

— the complaint was sent on 23 October 2009 to the United Kingdom authorities, which submitted their observations on it on 23 November 2009;

— additional information submitted by the applicant on 9 November 2009 was forwarded on 19 November 2009 to the United Kingdom authorities, which submitted their observations on 4 December 2009;

— by letter of 28 January 2010, the Commission requested clarification of information from the United Kingdom authorities, which replied by letter of 3 March 2010;

— a final document which the applicant lodged on 16 March 2010 was not forwarded to the United Kingdom authorities, the Commission considering that its content called for no observations because the information related to another complaint lodged by the applicant.

Contested decision

6 On 12 May 2010, without initiating the formal investigation procedure provided for in Article 108(2) TFEU, the Commission adopted Decision C(2010) 3204, declaring the notified measure compatible with the internal market ('the contested decision').

7 In the contested decision, the tender process initiated to designate the operator that would receive the public funding in order to deploy the NGA network in the Cornwall and Isles of Scilly region is set out in paragraphs 23 to 25. It is apparent from paragraph 23 that the State aid was to be allocated on the basis of a public tender following the competitive dialogue procedure in accordance with Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114).

8 It is apparent from paragraph 25 of the contested decision that, in accordance with the contract notice published on 17 March 2009, the interested parties had to complete a pre-qualification questionnaire enabling an initial evaluation of the applicant undertakings to be made. Further to the examination of the pre-qualification questionnaire, five tenderers were invited to participate in the call for tenders, of which two were eliminated and one withdrew its bid. On 28 August 2009, an invitation to submit a final bid was sent to the two remaining participants in the competitive dialogue procedure, namely BT and the Babcock consortium to which the applicant belonged. On 18 September 2009, the Babcock consortium stated that it would not be submitting a final bid. The final bid was received from BT on 16 October 2009. A formal evaluation of the bid was undertaken in accordance with the process and the objective criteria set out and BT was recommended as the preferred bidder to the project's Strategic Management Board.

9 The Commission then set out the various points raised by the applicant in its complaint (paragraphs 38 to 43 of the contested decision) and the content of the observations on that complaint, submitted by the United Kingdom authorities (paragraphs 44 to 49 of the contested decision).

10 After establishing that the notified measure did in fact involve elements of State aid (paragraphs 50 to 57 of the contested decision), the Commission assessed its compatibility with the internal market under Article 107(3)(c) TFEU, as interpreted in light of the Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks (OJ 2009 C 235, p. 7) ('the Guidelines'). In accordance with the Guidelines, the Commission examined the objective of that measure (paragraphs 60 to 63 of the contested decision), its nature in relation to that objective and the distortions of competition or effect on trade that it might create (paragraphs 64 to 70 of the contested decision). It concluded that the criteria laid down in the Guidelines for broadband were met in this case and that the notified measure was therefore compatible with the internal market, within the meaning of Article 107(3)(c) TFEU (paragraphs 71 and 72 of the contested decision).

Procedure and forms of order sought

11 By application lodged at the Court Registry on 27 August 2010, the applicant brought the present action.

12 By applications lodged at the Court Registry, in the case of BT on 25 November 2010 and in the cases of the Republic of Poland and the United Kingdom on 13 December 2010, those parties applied for leave to intervene in support of the form of order sought by the Commission.

13 By orders of the President of the Second Chamber of the Court of 18 January 2011, in the cases of the Republic of Poland and the United Kingdom, and of 25 January 2011 in the case of BT, those parties were granted leave to intervene.

14 On 29 March 2011, BT lodged its statement in intervention, while the Republic of Poland and the United Kingdom lodged their statements on 31 March 2011.

15 By letter of 6 June 2011, the applicant applied to the Court for an extension of time for lodging a reply and/or the adoption of a measure of organisation of procedure, under Article 64(4) of the Rules of Procedure, so that it could lodge a reply. On 1 July 2011, the Court rejected the application for an extension of time for lodging the reply. As regards the application for a measure of organisation of procedure, the Court found, after considering the submissions of the parties on that question, that it should not be granted.

16 On 8 July 2011, the applicant submitted its observations on the statements in intervention of BT, the Republic of Poland and the United Kingdom.

17 After a change in the composition of the Chambers of the Court, the Judge-Rapporteur initially designated was attached to the Ninth Chamber, to which the present case was accordingly allocated.

18 By way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure, the General Court (Ninth Chamber) asked the parties to answer certain questions and requested the Commission to produce a number of documents. The parties acceded to those requests.

19 The applicant claims that the Court should:

— declare the action admissible;

— annul paragraph 72 of the contested decision;

— order the Commission to pay the costs.

20 The Commission contends that the Court should:

— dismiss the action as inadmissible in part and, in any event, unfounded;

— order the applicant to pay the costs.

21 In support of the form of order sought by the Commission, BT contends that the Court should:

— dismiss the action, of its own motion, as inadmissible;

— in the alternative, dismiss the action as inadmissible in part and, in any event, unfounded;

— in any event, order the applicant to pay the costs, including those of BT.

22 In support of the form of order sought by the Commission, the Republic of Poland contends that the Court should:

— dismiss the action in that it is devoid of purpose;

— order the applicant to pay the costs.

23 In support of the form of order sought by the Commission, the United Kingdom contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

24 In support of its action, the applicant advances three pleas in law, alleging, first, manifest errors in the assessment of the facts, secondly, failure to apply or infringement of Article 102 TFEU and, thirdly, breach of the rights of the defence.

Admissibility

25 In these proceedings issue is taken, on the one hand, with the admissibility of the application in light of the requirements laid down in Article 44(1)(c) of the Rules of Procedure and, on the other, with the applicant's standing to challenge the contested decision.

Whether the application is consistent with Article 44(1)(c) of the Rules of Procedure

26 The Commission argued, in its defence and at the hearing, that, in accordance with Article 44(1)(c) of the Rules of Procedure of the General Court, the second plea in law must be declared inadmissible. In its view, the applicant has failed to specify the scope of its application in respect of that plea. Moreover, neither the facts nor the legal particulars on which the applicant relies are clearly indicated.

27 BT submits that the Commission's objection that the second plea is inadmissible should be extended by the Court, of its own motion, to the entire application. It observes that, in its defence, the Commission addressed most of the points raised in the application, but that that was largely due to the Commission's prior knowledge of the facts of the case in the administrative procedure and to its 'speculative' interpretation of the applicant's pleas. Nevertheless, the Court is not, in BT's view, in a position to carry out its judicial review solely on the basis of the information given in the application.

28 In that regard, it must be noted that under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union — applicable to the procedure before the General Court by virtue of the first paragraph of Article 53 of that Statute and Article 44(1)(c) of the Rules of Procedure of the General Court — all applications must contain the subject-matter of the dispute and a brief statement of the pleas in law on which the application is based.

29 Those elements must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and sound administration of justice it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (order in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20; Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 29; and order in Case T-294/04 *Internationaler Hilfsfonds* v *Commission* [2005] ECR II-2719, paragraph 23).

30 In the present case, the present action should not be declared inadmissible for failure to meet the requirements of Article 21 of the Statute of the Court of Justice and of Article 44(1)(c) of the Rules of Procedure of the General Court. While it is true that the Commission had in certain passages of its defence to interpret the applicant's arguments, some of those interpretations being endorsed by the applicant in its observations of 8 July 2011, the detailed line of argument developed by the Commission and by the interveners concerning the merits of the action confirms that the application is sufficiently clear and precise to enable the parties properly to defend themselves.

31 In any event, in so far as the complaints concerning Article 44(1)(c) of the Rules of Procedure relate to the admissibility of the various pleas in law, the Court will, where necessary, examine those complaints when dealing with the various pleas.

Whether the applicant has standing to challenge the contested decision

32 The Commission and the Republic of Poland do not claim, in the context of the written procedure, that the action is inadmissible on the ground of lack of standing. On the other hand, BT alleges that the first and second pleas in law, challenging the merits of the contested decision, are inadmissible in that the applicant does not meet the criteria laid down in the case-law of the Court of Justice and that those pleas are, at all events, unfounded. As regards the third plea in law, concerning the safeguarding of the applicant's procedural rights, BT submits that it too should be declared inadmissible, since the applicant has produced no evidence to support its assertion that it is an interested party for the purposes of Article 108(2) TFEU. The United Kingdom expresses doubts, in its statement in intervention, only as to whether the first and second pleas are admissible, for the same reasons as those put forward by BT.

33 As a preliminary observation, it should be noted that even if, according to the fourth paragraph of Article 40 of the Statute of the Court of Justice, applicable to the General Court pursuant to Article 53 of that Statute, interveners may not raise pleas that do not support those raised by the party they are supporting, in the case of an absolute bar to proceeding with an action the admissibility of the action must be examined by the Court of its own motion, pursuant to Article 113 of the Rules of Procedure (see, to that effect, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 21 to 24).

34 In any event, it must be noted in that regard that, at the hearing, the Commission and the United Kingdom stated that they shared BT's point of view that, as regards the first and second pleas in law, the applicant did not meet the criteria set out in the Court's case-law, a statement of which was noted in the minutes of the hearing.

35 According to the fourth paragraph of Article 263 TFEU, '[a]ny natural or legal person may … institute proceedings against an act addressed to that person or which is of direct and individual concern to them'.

36 It is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned by a decision within the meaning of the second paragraph of Article 263 TFEU only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, p. 107; Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 20, and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 14).

37 That applies in particular where the applicant's market position would be substantially affected by the aid to which the decision at issue relates (see Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 30 and the case-law cited). It is therefore for the applicant to adduce pertinent

reasons to show that the Commission's decision may adversely affect its legitimate interests by substantially affecting its position on the market in question (see, to that effect, Case C-525/04 P *Spain* v *Lenzing* [2007] ECR I-9947, paragraph 41 and the case-law cited).

38 With regard to the determination of a substantial adverse effect on an undertaking's position on the market in question, it is apparent from the case-law that the mere fact that a measure may have an influence on the competitive relationships existing on the relevant market and that the undertaking concerned was in a competitive relationship with the addressee of that measure cannot in any event suffice for that undertaking to be regarded as being individually concerned by that measure (see *British Aggregates* v *Commission*, cited in paragraph 37 above, paragraph 47 and the case-law cited; order of 4 May 2012 in Case T-344/10 *UPS Europe and United Parcel Service Deutschland* v *Commission*, not published in the ECR, paragraph 47).

39 An undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid (see *British Aggregates* v *Commission*, cited in paragraph 37 above, paragraph 48 and the case-law cited; order in *UPS Europe and United Parcel Service Deutschland* v *Commission*, cited in paragraph 38 above, paragraph 48).

40 First of all, in that regard, it must be noted that demonstrating a substantial adverse effect on a competitor's position on the market cannot simply be a matter of the existence of certain factors indicating a decline in its commercial or financial performance (see *British Aggregates* v *Commission*, cited in paragraph 37 above, paragraph 53 and the case-law cited; order in *UPS Europe and United Parcel Service Deutschland* v *Commission*, cited in paragraph 38 above, paragraph 49).

41 Next, the existence of a substantial effect on the applicant's position on the market does not depend directly on the amount of the aid, but on the significance of the adverse effect which that aid may have on that position. Such an adverse effect may vary, in respect of aid of a similar amount, in the light of criteria such as the size of the market concerned, the specific nature of the aid, the length of the period for which it was granted, whether the activity affected is the applicant's main or ancillary activity, and the possibilities which the applicant has to circumvent the negative effects of the aid (see, to that effect, order in *UPS Europe and United Parcel Service Deutschland* v *Commission*, cited in paragraph 38 above, paragraph 58).

42 Lastly, without prejudice to the foregoing, it must be noted that when the Commission adopts a decision under Article 4(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), finding that aid is compatible with the internal market, it refuses by implication to initiate the formal investigation procedure laid down in Article 108(2) TFEU and Article 6(1) of Regulation No 659/1999 (judgment of 24 January 2013 in Case C-646/11 P *3F* v *Commission*, not published in the ECR, paragraph 26). The interested parties, which, in accordance with Article 1(h) of Regulation No 659/1999, are any persons, undertakings or associations whose interests might be affected by the granting of aid, in particular undertakings that are in competition with the recipients of that aid and who are intended to benefit from the procedural guarantees of the formal investigation procedure, may secure compliance therewith only if they are able to challenge the aforementioned decision before the European Union judicature. In those circumstances, their action can then only be one which is intended to safeguard the procedural rights available to them under Article 108(2) TFUE and Article 6(1) of Regulation No 659/1999 (*British Aggregates* v *Commission*, cited in paragraph 37 above, paragraph 28).

43 In the light of all the provisions and the case-law set out in paragraphs 35 to 42 above, the Court considers that it is appropriate, first, to examine whether the applicant is an interested party within the meaning of Article 1(h) of Regulation No 659/1999 so that it has the standing to bring

proceedings to safeguard its procedural rights, and then to examine whether the applicant's competitive position has been substantially affected by the notified measure so that it has standing to challenge the merits of the contested decision.

44 In the first place, as regards the question of whether the applicant is an interested party for the purposes of Article 108(2) TFEU and Article 1(h) of Regulation No 659/1999, BT submits that the applicant cannot be considered an interested party since it has not provided any evidence to that effect.

45 It is indeed true that the applicant does not actually provide evidence regarding its status as an interested party in the part of its application relating to the admissibility of the action under Article 263 TFEU.

46 However, the fact remains that the applicant has stated — without being challenged by the other parties — (i) that it is a specialist telecommunications service provider mainly offering high capacity retail leased lines using optical fibres for large businesses wishing to link their business premises and (ii) that BT provides services in a wide range of telecoms markets and competes directly with it in relation to the provision of high capacity leased lines to customers.

47 Consequently, it must be found that BT and the applicant are competing telecommunications operators on the market for the provision of specialist telecommunications services and that the applicant must be considered an interested party for the purposes of Article 108(2) TFEU. In those circumstances, it must be held that the applicant has standing to bring proceedings against the contested decision in so far as, by its action, it seeks to safeguard its procedural rights.

48 In the second place, as regards the question whether, quite apart from its standing to bring proceedings to safeguard its procedural rights, the applicant may, by its action, challenge the merits of the contested decision, the Court finds that the applicant has not shown that its market position is substantially affected within the meaning of the case-law set out in paragraph 37 above.

49 The arguments raised by the applicant in that regard cannot invalidate the finding set out in paragraph 48 above.

50 In the application, the applicant submits in essence:

— that it is a competitor of BT, the beneficiary of the aid;

— that it was the only surviving telecoms company in the tender process apart from BT when it was obliged to withdraw;

— that it was the only telecoms company other than the actual recipient of the aid which would have been eligible to receive the aid;

— that, in any event, its competitive position on the market has been substantially adversely affected by the grant of the aid, on the ground that the tender process was a very substantial project for it;

— that, moreover, the only recorded complaint in respect of the aid in this case was that of the applicant. By analogy with Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, this is a further ground for admissibility.

51 In that regard, first, it must be noted that an undertaking cannot rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that, having regard to the extent of its participation in the procedure and to the extent of the detriment to its market position, its circumstances distinguish it in a similar way to the undertaking in receipt of the aid (see paragraph 39 above).

52 In the present case, the applicant lodged a complaint with the Commission, which was registered on 21 October 2009. In addition, as is apparent from the contested decision as a whole, that decision takes into account the information set out in the complaint as well as the information provided by the United Kingdom authorities at the Commission's request after the applicant lodged its complaint. It must therefore be found that the applicant did in fact play a role in the administrative procedure.

53 It is, however, clear from the case-law that it cannot be inferred solely from the applicant's participation in the administrative procedure that it has standing to bring proceedings. The applicant must, in any event, demonstrate that the notified measure was likely to substantially affect its position on the market (see, to that effect, Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraph 60, and order of 21 January 2011 in Case T-54/07 *Vtesse Networks* v *Commission*, not published in the ECR, paragraph 92).

54 Secondly, as has already been held, it is not apparent from the judgment in *Cofaz and Others* v *Commission*, cited in paragraph 50 above, contrary to what the applicant essentially claims, that the lodging of a complaint by the applicant and its participation in the administrative procedure are sufficient to establish that the notified measure is of individual concern to it (see, to that effect, the order in *Vtesse Networks* v *Commission*, cited in paragraph 53 above, paragraph 93).

55 Thirdly, the Court must reject the applicant's assertion that (i) it was the only surviving telecoms company in the tender process and (ii) the only telecoms company which would have been eligible to receive the aid. In the first place, as argued in particular by BT, the United Kingdom and the Commission at the hearing, the two surviving participants in the tender process were BT and the Babcock consortium, to which the applicant does indeed belong, and not BT and the applicant. In the second place, it is apparent from the file and from the submissions made in that regard during the hearing that the applicant was not the only surviving telecoms company in the tender process, since the other members of the Babcock consortium included, inter alia, the telecommunications companies Surf Telecoms and Motorola Inc. Even assuming that those companies were not tasked with constructing the physical infrastructure and were not the most directly concerned by the main part of the tender as the applicant claims, the fact remains that both companies were concerned by the contested decision. It is apparent, as the applicant indeed acknowledges in particular in its observations of 8 July 2011, that, in the context of the Babcock consortium's bid, Motorola was involved in the 'wireless' part of the bid and Surf Telecoms rented fibre to the applicant. Consequently, it must be found that the applicant is not concerned in a manner which distinguishes it individually from the other companies.

56 Fourthly, it must be recalled that the mere fact that the contested decision may have a certain influence on the competitive relationships existing on the relevant market and that the applicant is in a competitive relationship with BT cannot amount to a substantial effect on the applicant's competitive position. The applicant must demonstrate also that the adverse effect on its position on the market was significant (see paragraph 41 above).

57 The applicant has not proved such an adverse effect. It simply alleges that the call for tenders was a very substantial project for it, whereas the onus was on it to state the reasons for which the contested decision was likely adversely to affect its interests by seriously jeopardising its position on the market in question.

58 It is apparent from the foregoing considerations that the applicant has not proved that its competitive position was substantially affected by the contested decision.

59 In those circumstances, it must be found first, that, inasmuch as the applicant is an interested party for the purposes of Article 108(2) TFEU and Article 1(h) of Regulation No 659/1999, it has standing to bring proceedings against the contested decision in order to safeguard its procedural rights and, secondly, that it does not, by contrast, have standing to bring proceedings against the contested decision in order to challenge the merits of that decision.

60 However, the fact that the applicant has not proved that its market position is substantially affected by the aid in question does not mean that, in order to show that the Commission ought to have had doubts concerning the compatibility of the aid in question with the internal market which justified initiating the formal investigation procedure under Article 108(2) TFEU, the applicant is precluded from submitting arguments concerning the merits of the Commission's assessment, provided, however, that at least one of the pleas in its action alleges that the Commission infringed its obligation to initiate the formal investigation procedure.

61 First of all, under the case-law, where an applicant alleges that its procedural rights have been infringed on the ground that Commission did not initiate the formal investigation procedure, it may invoke any plea such as to show that the assessment of the information and evidence which the Commission had during the preliminary examination phase of the measure notified should have raised doubts concerning the characterisation of the notified measure as State aid and its compatibility with the Treaty. The use of such arguments cannot, however, change the subject-matter of the action or alter the conditions of its admissibility. On the contrary, proof of the existence of doubts concerning that characterisation or compatibility with the internal market is precisely what must be adduced in order to show that the Commission was required to initiate the formal investigation procedure (see Case T-304/08 *Smurfit Kappa Group* v *Commission* [2012] ECR, paragraph 52 and the case-law cited; judgment of 16 September 2013 in Case T-79/10 *Colt Télécommunications France* v *Commission*, not published in the ECR, paragraph 84).

62 That proof may be furnished by reference to a body of consistent evidence: the question whether or not a doubt existed requires investigation of both the circumstances in which the decision not to raise objections was adopted and its content, comparing the assessments upon which the Commission relied in that decision with the information available to it when it ruled on the characterisation of the aid in question and whether the aid was compatible with the common market (see *3F* v *Commission*, cited in paragraph 42 above, paragraph 31, and the case-law cited). The applicant has the burden of proving the existence of such doubt (Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 49; Case T-36/06 *Bundsverband deutscher Banken* v *Commission* [2010] ECR II-537, paragraph 127, and *Colt Télécommunications France* v *Commission*, cited in paragraph 61 above, paragraph 37).

63 Next, it is apparent from the case-law that, provided that an applicant raises a plea by which it seeks to defend its procedural rights, the Court may take into account the arguments raised in other pleas of the application in which the applicant seeks to show that the Commission should have had doubts concerning the characterisation of the contested measures as State aid or their compatibility with the internal market (see, to that effect, Case C-83/09 P *Commission* v *Kronoply and Kronotex* [2011] ECR I-4441, paragraphs 56 to 58, and Case C-148/09 P *Belgium* v *Deutsche Post and DHL International* [2011] ECR I-8573, paragraphs 64 to 66).

64 The admissibility of the pleas in law must be examined in the light of the case-law referred to in paragraphs 61 to 63 above.

Admissibility of the pleas in law raised by the applicant, having regard to its standing to bring proceedings

65 At the outset, it must be noted that the applicant is entitled to put forward the third plea in law in its capacity as an interested party, since, by that plea, it seeks expressly to safeguard its procedural rights

66 As regards the first plea in law, the applicant submits that the Commission made manifest errors in its assessment of the facts in that it found that there had been an open, non-discriminatory and competitive tendering procedure, whereas it ought to have found that competition had been eliminated in relation to the call for tenders (first part of the plea), the proposal made to BT concerning the use of existing infrastructure was also available to other tenderers that requested it (second part of the plea) and the overall effect on competition was positive (third part of the plea).

67 As regards the second plea in law, the applicant submits that the facts described in its application establish an abuse of a dominant position through the bundling of infrastructure or services, failure to give access to essential facilities and margin squeeze in so far as any access to BT fibre services was offered. It claims in substance that, although that point was clearly raised by the Commission, as is apparent from paragraph 41 of the contested decision, the Commission gave no consideration to the question whether BT had abused its dominant position in breach of Article 102 TFEU. According to the applicant, the contested decision thus infringes Article 102 TFEU, the assessment of the effect of the notified measure on competition set out in paragraphs 69 and 70 of the contested decision is invalidated and, consequently, the contested decision is unlawful and does not fall within the scope of Article 107(3)(c) TFEU.

68 In response to the inadmissibility of the first and second pleas in law alleged by BT, during the written procedure and the hearing, and by the Commission and the United Kingdom, at the hearing, the applicant stated in its observations of 8 July 2011 that that allegation was unfounded since it did not take account of the judgment in *Commission* v *Kronoply and Kronotex*, cited in paragraph 63 above. When questioned on that point by the Court in the context of a measure of organisation of procedure (see paragraph 18 above), the parties, with the exception of the Republic of Poland and the applicant, took the view that the judgment in *Commission* v *Kronoply and Kronotex*, cited in paragraph 63 above, confirmed that the first and second pleas in law were inadmissible.

69 In that regard, although *Commission* v *Kronoply and Kronotex*, cited in paragraph 63 above, allows arguments concerning the merits of the contested decision to be taken into account in order to determine whether any doubt has been established which supports the procedural plea alleging the failure to initiate the formal investigation procedure, the inference which the applicant draws from this, as regards the admissibility of the first and second pleas in law, is invalid: in essence the applicant argues that, since it raises a procedural plea, it may rely on any other argument or plea aimed at challenging the merits of the contested decision, without thereby giving rise to any admissibility issues.

70 However, *Commission* v *Kronoply and Kronotex*, cited in paragraph 63 above, as reproduced in the subsequent case-law of the General Court and the Court of Justice, does not provide any basis for such a view. That judgment merely states that it is possible to take into account substantive arguments only in so far as they can substantiate a plea in law alleging the existence of doubts which justified initiating the formal investigation procedure. However, the arguments must be defined in terms that are connected with the fact to be proved, namely the existence of doubts concerning the compatibility of the measure in question with the internal market.

71 In the circumstances of the present case, the Court can therefore take into account the first and second pleas in law only to the extent that they are based on arguments intended to show that the Commission did not overcome doubts encountered during the preliminary investigation phase.

72 It must be found in that regard that there is no argument in the first and second pleas in law raised by the applicant that is intended to show that the Commission encountered doubts which justified initiating a formal investigation procedure. As noted by BT, the United Kingdom and the Commission in their replies to a written question from the Court, those pleas are intended only to challenge the merits of the Commission's assessment.

73 In the first plea in law, the applicant simply argues that certain statements in the contested decision constitute manifest errors of assessment of the facts. The applicant fails to explain how the arguments relied on in that plea show the existence of doubts, still less how the manifest errors on which it relies affected its procedural rights. The first plea in law does not therefore show that the circumstances were such that the Commission was required to initiate the formal investigation procedure.

74 As regards the second plea in law, alleging a breach of Article 102 TFEU, the applicant concludes, in the application that 'the [c]ontested [d]ecision infringes Article 102 TFEU, … the assessment in the [c]ontested [d]ecision of the impact of the measure on competition ([paragraphs 69 to 70]) is invalidated and … therefore the [c]ontested [d]ecision is unlawful and not within Article 107(3)(c) [TFEU]'. As BT correctly argues in its reply to a written question from the Court, the applicant alleges an infringement of primary law rather than a breach of its procedural rights, which clearly concerns the substance and goes beyond the protection of procedural rights.

75 It must be concluded from this — as the Commission, BT and the United Kingdom have done — that, by the first and second pleas in law, the applicant requests the Court to assess the merits of the contested decision in so far as it declares the aid at issue compatible with the internal market, but does not, by the arguments relied on, seek to defend its procedural rights under Article 108(2) TFEU. Consequently, it is not for the Court to interpret those pleas in law which challenge exclusively the merits of the contested decision, as essentially seeking to safeguard the applicant's procedural rights, since, by such an interpretation, it would re-define the subject-matter of the action (see, to that effect, the judgment of 29 November 2007 in Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others* v *Commission*, not published in the ECR, paragraph 25, and *Commission* v *Kronoply and Kronotex*, cited in paragraph 63 above, paragraph 55).

76 Moreover, that conclusion is not called into question by the applicant's observations of 8 July 2011 by which it seeks, on several occasions, to reformulate the first two pleas in law as procedural pleas, arguing that they reveal doubts which should have led to the formal investigation procedure being initiated.

77 In the course of those observations, the applicant cannot properly re-categorise its first and second pleas in law by claiming that they reveal the existence of doubts when the applicant did not put forward in those pleas, at the application stage, any argument alleging the existence of doubts which would have precluded the contested decision being adopted without initiation of the formal investigation procedure.

78 It must be found that such arguments, submitted for the first time by the applicant in its observations of 8 July 2011, are inadmissible. It follows from Article 44(1)(c) in conjunction with Article 48(2) of the Rules of Procedure that the original application must contain the subject-matter of the proceedings and a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure, which is not the case here.

79 In the light of the foregoing considerations, the plea of inadmissibility concerning the first and second pleas in law must be upheld and those pleas must be rejected as inadmissible.

Substance

80 As regards the third plea in law, which the applicant is entitled to put forward in its capacity as an interested party, the Court notes that it covers two separate complaints. First, the applicant disputes the lawfulness of the decision not to initiate the formal investigation procedure. Secondly, the applicant alleges a breach of the rights of the defence in so far as it was not invited to reply to the observations which the United Kingdom authorities made on its complaint.

The first part of the third plea in law

81 The applicant submits, in essence, that the Commission infringed its procedural rights in not initiating the formal investigation procedure provided for in Article 108(2) TFEU.

82 As has been noted in paragraph 62 above, the applicant has the burden of proving the existence of doubts, and it may furnish such proof from a body of consistent evidence concerning (i) the circumstances and the duration of the preliminary investigation phase and (ii) the contents of the contested decision.

– The evidence relating to the preliminary investigation procedure

83 It must be noted that, although the first part of the third plea alleges the breach of the applicant's procedural rights on account of the failure to initiate the formal investigation procedure, the applicant makes no reference, in the application, to any evidence in that regard. It was not until its observations of 8 July 2011 that the applicant refers, for the first time, to circumstances relating to the preliminary investigation procedure. It argues, essentially, that the duration of the preliminary investigation phase and the exchanges between the Commission and the United Kingdom authorities are evidence of the existence of doubts which justified initiating the formal investigation procedure.

84 Thus, those arguments relating to the circumstances and the duration of the proceedings cannot be regarded as amplifying a plea made, even implicitly, in the application.

85 Consequently, it must be held that since those arguments are new, they must be declared inadmissible under Article 48(2) of the Rules of Procedure, which provides that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure, which is not the case here.

– The evidence relating to the contents of the contested decision

86 In the application, the applicant argues as follows:

'At the very least the … factual summary [in the application] and the first two submissions indicate that the aid is, at least *prima facie*, not compatible with the internal market. In those circumstances, the Contested Decision is unlawful in failing to open the full investigation procedure under Article l08(2) [TFEU] and/or in terminating its enquiry under Article 108(3) [TFEU]'.

87 It must be therefore be noted that the applicant simply refers to the facts set out in its action and to the arguments concerning the first and second pleas in law in asserting that the Commission ought to have initiated the formal investigation procedure, and does not state how those facts or arguments reveal doubts which justified initiating the formal investigation procedure.

88 Admittedly, as noted in paragraph 61 above, where an applicant alleges that its procedural rights have been infringed because the Commission did not initiate the formal investigation procedure, it may invoke any plea in law to show that the assessment of the information and evidence which the Commission had during the preliminary examination phase of the notified measure should have raised doubts as to the measure's compatibility with the Treaty.

89 It is apparent, however, from the case-law referred to above that it is for the applicant to identify the evidence relating to the contents of the contested decision in order to prove the existence of doubts (see, to that effect, *Prayon-Rupel* v *Commission*, cited in paragraph 62 above, paragraph 49). In addition, when the applicant simply refers, as in the present case, to the arguments raised in respect of another plea, it must identify precisely which of the arguments raised in that respect are, in its view, capable of proving the existence of such doubts.

90 In the present case, in support of the first complaint of the third plea in law, the applicant simply refers to the factual summary in the application and the arguments relating to the first two pleas in law. However, that vague and wholly unsubstantiated reference does not enable the Court to identify the precise factors raised in the first and second pleas which, in the applicant's view, prove the existence of doubts and substantiate the third plea in law.

91 Accordingly, the first part of the third plea in law must be rejected.

The second part of the third plea in law

92 In support of the second part of that plea, the applicant argues that the contested decision terminates the Commission's investigation on the ground that sufficient reassurance was received from the United Kingdom authorities that the complaint was unfounded. The applicant submits that, in such circumstances, the minimum procedural requirement was to relay to it, as complainant, the answers of the United Kingdom authorities.

93 It must be found that, by that argument, the applicant essentially submits that, irrespective of the safeguarding of the procedural rights which it derives from Article 108(2) TFEU, it ought to have been in a position to submit its observations on the information sent by the United Kingdom authorities. Such an argument must be rejected.

94 First of all, it must be emphasised that the obligation on the Commission to give the parties concerned notice to submit their comments comes into being upon the adoption of a decision to initiate the formal investigation procedure, the object of which is to enable the Commission to be fully informed of all the facts of the case.

95 Next, as the Commission correctly contends, the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in the light of its EU law obligations, for granting the aid. Under that procedure, interested parties other than the Member State concerned have essentially the role of sources of information for the Commission and, in that regard, they cannot themselves lay claim to an exchange of arguments with the Commission such as that initiated in regard to that Member State. Interested parties other than the Member State concerned have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (see, to that effect, Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161, paragraph 222, and Case T-62/08 *ThyssenKrupp Acciai Speciali Terni* v *Commission* [2010] ECR II-3229, paragraphs 161 and 162).

96 Lastly, it must also be pointed out that the Court cannot, on the basis of general principles of EU law, such as the right to be heard or sound administration, extend the procedural rights which the Treaty and secondary legislation confer on interested parties in procedures for reviewing State aid. Nor does

the fact that the applicant has legal standing to bring an action against the contested decision permit the Court to do so (see, to that effect, *ThyssenKrupp Acciai Speciali Terni* v *Commission*, cited in paragraph 95 above, paragraph 167).

97 The second part of the third plea in law must therefore be rejected.

98 Since none of the arguments relied upon in the context of the third plea in law are such as to establish the existence of doubts requiring the Commission to initiate the formal investigation procedure, that plea must be rejected and the action dismissed in its entirety.

Costs

99 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those of the Commission and BT, in accordance with the form of order sought by them. However, in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States which intervened in the proceedings are to bear their own costs. It follows that the Republic of Poland and the United Kingdom must bear their own costs.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Vtesse Networks Ltd to bear its own costs and to pay those of the European Commission and British Telecommunications plc;**

3. **Orders the Republic of Poland and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

Berardis Czúcz Popescu

Delivered in open court in Luxembourg on 5 November 2014.

[Signatures]

Table of contents