



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

16 October 2014*

(State aid — Electricity — Preferential tariffs — Decision to initiate the procedure provided for in Article 108(2) TFEU — Action for annulment — Act not open to challenge — Aid measure fully implemented, in part, as at the date of the decision and, in part, when the action was brought — Inadmissibility)

In Case T-517/12,

Alro SA, established in Slatina (Romania), represented by C. Quigley QC, O. Bretz, Solicitor, and S. Verschuur, lawyer,

applicant,

v

European Commission, represented by É. Gippini Fournier and T. Maxian Rusche, acting as Agents,

defendant,

APPLICATION, principally, for annulment of Commission Decision C(2012) 2517 final of 25 April 2012 to initiate the formal investigation procedure under Article 108(2) TFEU into State aid SA 33624 (2012/C) (2011/NN) — Romania — Preferential electricity tariffs granted to Alro Slatina SA and, in the alternative, for annulment of Decision C(2012) 2517 final in so far as it applies to the period from 1 January 2007 to 31 December 2009,

THE GENERAL COURT (Fifth Chamber),

composed of A. Dittrich, President, J. Schwarcz (Rapporteur) and V. Tomljenović, Judges,

Registrar: S. Spyropoulos, Administrator,

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

gives the following

* Language of the case: English.

Judgment

Background to the dispute

- 1 The applicant, Alro SA, is a Romanian aluminium producer which on 8 September 2005 concluded a long-term contract with the public undertaking Hidroelectrica SA ('the supplier') for the supply of electricity in continuum band for the period 1 October 2005 to 31 January 2013. As from 1 January 2006, the applicant purchased electricity on the basis of this contract for the entire group to which it belongs in Romania.
- 2 The long-term contract for the supply of electricity in continuum band was subject, before 10 August 2012, to 17 addenda ('the alleged aid measure'), the fourth of which — signed on 6 June 2006 — laid down a new formula for calculating the electricity purchase price which applied between 1 January 2007 and 31 December 2009 ('the amended 2005 contract'). The seventeenth addendum was signed on 11 March 2010 and it laid down a new calculation formula, applicable from 1 January 2010 ('the 2010 contract').
- 3 The calculation formula set out in the amended 2005 contract provided that the price per megawatt hour (MWh) of electricity would be indexed to the supplier's costs, the main components of which were labour costs, operating costs and depreciation costs, and took account of inflation. The calculation formula introduced a price floor, an obligation to pay in Romanian lei (RON) and an obligation to pay for six months of electricity in advance.
- 4 The calculation formula set out in the 2010 contract, which replaced the earlier formula, was no longer based on the supplier's production costs, but on the aluminium price quotations on the London Metal Exchange. It withdrew the floor price, changed the payment currency to US dollars (USD) and set at one month the obligation to pay for the supply of electricity in advance.
- 5 In the light of information published in the Romanian press, in January 2011 the Commission opened an enquiry on its own initiative into the long-term contracts for the supply of electricity negotiated directly between the supplier and the applicant.
- 6 The Commission requested information from Romania on the above long-term electricity supply contracts by letters of 16 February, 4 March and 14 April 2011, to which Romania replied by letters of 24 March, 16 May and 6 June 2011. In addition, the Commission received comments from the applicant by letters of 30 September and 9 November 2011, and 29 February and 8 March 2012. Meetings were also held with representatives of Romania and of the applicant.
- 7 By Decision C(2012) 2517 final of 25 April 2012, the Commission initiated the formal investigation procedure laid down in Article 108(2) TFEU in respect of the new aid disbursed to the applicant and to other members of the group to which it belonged in Romania, first, during the period from 1 January 2007 to 31 December 2009 and, secondly, from 1 January 2010 onwards, in the context of the alleged aid measure ('the contested decision').
- 8 In paragraphs 61 and 152 of the contested decision, the Commission, first, issued its preliminary view that the alleged aid measure constituted State aid within the meaning of Article 107(1) TFEU, granted in the form of preferential tariffs for the supply of electricity, which might have benefited the applicant and other members of the group to which it belonged in Romania and, secondly, that it doubted whether, by reducing operating costs that should have been borne entirely by the beneficiaries, without pursuing any specific objective of common interest, such aid could be found compatible with the Treaty.

- 9 In paragraphs 74 to 78 of the contested decision, the Commission took the view that the alleged aid measure constituted new aid as of the date of Romania's accession to the European Union, that is, 1 January 2007. It distinguished between two periods, namely, first, the period from 1 January 2007 to 1 January 2010, during which the amended 2005 contract applied, and, secondly, the period after 1 January 2010, when the 2010 contract entered into force.

Procedure and forms of order sought

- 10 The applicant brought the present action by application lodged at the Court Registry on 23 November 2012.
- 11 The applicant claims that the Court should:
- annul the contested decision;
 - alternatively, annul the contested decision in so far as it applies to the period from 1 January 2007 to 31 December 2009;
 - order the Commission to pay the costs.
- 12 The Commission contends that the Court should:
- dismiss the action;
 - order the applicant to pay the costs.
- 13 By letter lodged at the Court Registry on 21 March 2013, the applicant requested the Court, by way of measure of organisation of procedure, to ask the Commission to produce documents on which it relied in its defence.
- 14 By letter lodged at the Court Registry on 23 April 2013, the Commission submitted its observations on the measure of organisation of procedure requested by the applicant.

Law

Preliminary considerations

- 15 The applicant raises three pleas in law, by which it criticises the Commission's evaluation of the condition for the imputability of the alleged aid measure to the Romanian State. First, the applicant claims that the contested decision contains an error of law which infringes Article 107(1) TFEU, particularly by misinterpreting the conditions laid down in the case-law of the Court of Justice. Secondly, the applicant submits that the contested decision contains a manifest error of assessment in its application of the criteria set out in the case-law of the Court of Justice. Thirdly, the contested decision does not contain an adequate statement of reasons.
- 16 The Commission considers, principally, that the action is inadmissible and, in the alternative, unfounded.

- 17 As regards the admissibility of the action, the Commission contends that the action is inadmissible on the ground that the applicant lacks a vested and present interest in seeing the contested decision annulled, since, when the present action was brought, the alleged aid measure was no longer in the course of implementation. The Commission also contends that the applicant has not established that it has a personal, vested and present interest in having that decision annulled.
- 18 It is appropriate, in particular, to rule on the first ground of inadmissibility, which essentially denies that the contested decision is a challengeable act for the purposes of Article 263 TFEU, in view of the nature and scope of the legal questions entailed by that ground of inadmissibility.

Whether the contested decision is a challengeable act

- 19 According to the Commission, the action is inadmissible because the applicant lacks a vested and present interest in seeing the contested decision annulled, since the 2010 contract was no longer in the course of implementation when the action was brought, having been terminated and replaced, following the declaration of insolvency of the supplier, by the eighteenth addendum, signed on 10 August 2012, which contains new contractual terms, which constitute an alteration to aid within the meaning of Article 4 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 2004 L 140, p. 1). Such a conclusion also applies to the amended 2005 contract, which had ceased to produce effects at the date of entry into force of the 2010 contract, the aid stemming from the 2005 contract having already been granted and disbursed.
- 20 The applicant submits that the action is admissible, since a decision to initiate the formal investigation procedure is always open to challenge where there is a dispute between the Commission and the Member State or beneficiary of the alleged aid measure as to the correct status of the measure — new aid, existing aid or measure not constituting aid — regardless of whether the measure is still in the course of implementation.
- 21 In addition, the applicant submits that it follows from Article 4(4) 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) that the contested decision is, as such, open to review, and is, moreover, a formal decision that, pursuant to Article 263 TFEU, constitutes a challengeable act. Such a decision may have legal effects in the light of the possibility of proceedings before a national court seeking suspension and/or recovery of the alleged illegal aid, where the court may be called upon to draw all of the inferences arising from an infringement of Article 108(3) TFEU.
- 22 First, the Court notes that, according to consistent case-law, developed in the context of actions for annulment brought by Member States or institutions, any measures adopted by the institutions, whatever their form, which are intended to have binding legal effects are regarded as acts open to challenge, within the meaning of Article 263 TFEU (Case 22/70 *Commission v Council* ('ERTA') [1971] ECR 263, paragraph 42; Case C-316/91 *Parliament v Council* [1994] ECR I-625, paragraph 8; and Joined Cases C-463/10 P and C-475/10 P *Deutsche Post and Germany v Commission* [2011] ECR I-9639, paragraph 36). The case-law further shows that a Member State may bring an action for annulment of a measure producing binding legal effects without having to demonstrate that it has an interest in bringing proceedings (see *Deutsche Post and Germany v Commission*, paragraph 36 and the case-law cited).
- 23 In addition, it must be recalled that intermediate measures whose aim is to prepare the final decision do not, in principle, constitute acts which may form the subject-matter of an action for annulment (Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 10; Case C-521/06 P *Athinaïki Techniki v Commission* [2008] ECR I-5829, point 42; and *Deutsche Post and Germany v Commission*, cited in

paragraph 22 above, paragraph 50). The intermediate acts thus referred to are, first of all, acts which express a provisional opinion of the institution (*Deutsche Post and Germany v Commission*, cited in paragraph 22 above, paragraph 50; see, to that effect, *IBM v Commission*, paragraph 20).

- 24 Where an action for annulment of an act adopted by an institution is brought by a natural or legal person, the Court of Justice has repeatedly held that the action lies only if the binding legal effects of that act are capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (*IBM v Commission*, cited in paragraph 23 above, paragraph 9, and *Deutsche Post and Germany v Commission*, cited in paragraph 22 above, paragraph 37).
- 25 It must, however, be emphasised that the case-law cited in paragraph 24 above was developed in the context of actions brought before the EU judiciary by natural or legal persons against measures of which they were the addressees. Where an action for annulment is brought by a non-privileged applicant against a measure that has not been addressed to it, the requirement that the binding legal effects of the measure being challenged must be capable of affecting the interests of the applicant by bringing about a distinct change in his legal position overlaps with the conditions laid down in the fourth paragraph of Article 263 TFEU (*Deutsche Post and Germany v Commission*, cited in paragraph 22 above, paragraph 38).
- 26 Consequently, in order to assess whether the contested decision is open to review, the Court must, in the light of the case-law cited in paragraph 22 above, examine whether that decision constitutes an act which is intended to have binding legal effects (see, to that effect, *Deutsche Post and Germany v Commission*, cited in paragraph 22 above, paragraph 40).
- 27 Secondly, as regards a decision to initiate the formal investigation procedure into State aid, it is clear from the case-law that, where the Commission classifies a measure in the course of implementation as new aid, such a decision entails independent legal effects, particularly in so far as concerns the suspension of that measure (Case C-400/99 *Italy v Commission* [2001] ECR I-7303, paragraph 62; Joined Cases T-346/99 to T-348/99 *Diputación Foral de Álava and Others v Commission* [2002] ECR II-4259, paragraph 33, and the judgment of 25 March 2009 in Case T-332/06 *Alcoa Trasformazioni v Commission*, not published in the ECR, paragraph 35). That is plainly the case not only where the authorities of the Member State concerned regard a measure in the course of implementation as existing aid, but also where they take the view that the measure covered by the decision to initiate the procedure does not fall within the scope of Article 107(1) TFEU (*Diputación Foral de Álava and Others v Commission*, paragraph 33, and *Alcoa Trasformazioni v Commission*, paragraph 35).
- 28 A decision to initiate the formal investigation procedure in relation to a measure in the course of implementation and classified by the Commission as new aid necessarily alters the legal implications of the measure under consideration and the legal position of the beneficiary undertakings, particularly as regards the continued implementation of the measure. Until the adoption of such a decision, the Member State, the beneficiary undertakings and other economic operators may think that the measure is being lawfully implemented as a general measure not falling within the scope of Article 107(1) EC or as existing aid. On the other hand, after its adoption there is at the very least a significant element of doubt as to the legality of the measure, which, without prejudice to the possibility of seeking interim relief from the Court, must lead the Member State to suspend its application, since the initiation of the formal investigation procedure excludes the possibility of an immediate decision that the measure is compatible with the internal market, which would enable it to continue to be lawfully implemented. Such a decision might also be invoked before a national court called upon to draw all the consequences arising from infringement of the last sentence of Article 108(3) TFEU. Finally, it may lead the beneficiary undertakings of the measure to refuse in any event new payments or new advantages or to hold the necessary sums as provision for possible subsequent financial compensations. Businesses will also take account, in their relations with those beneficiaries, of the uncertainty of their legal and financial situation (*Italy v Commission*, cited in

paragraph 27 above, paragraph 59; *Diputación Foral de Álava and Others v Commission*, cited in paragraph 27 above, paragraph 34; and *Alcoa Trasformazioni v Commission*, cited in paragraph 27 above, paragraph 36).

- 29 Lastly, the independent legal effects referred to in paragraphs 27 and 28 above have to be understood as binding legal effects produced by preparatory or intermediate measures, such as, in the present case, the contested decision, against which the beneficiaries of the alleged State aid measure cannot be ensured sufficient legal protection by the bringing of an action against the decision terminating the procedure concerning the alleged State aid (see, to that effect, *Deutsche Post and Germany v Commission*, cited in paragraph 22 above, paragraphs 54 to 56).
- 30 Whether the contested decision constitutes an act which is intended to have binding legal effects and is, therefore, an act open to review, for the purposes of Article 263 TFEU, must be determined in the light of the abovementioned considerations.
- 31 The Commission's argument is based on the assumption that, as a rule, a decision to initiate the formal investigation procedure is merely a preparatory act, which does not produce binding legal effects and is not capable of affecting the interests of the beneficiary of the alleged aid by bringing about a distinct change in its legal position. None the less, the Commission acknowledges that, by way of exception, such a decision is a challengeable act if the measure at which it is directed is in the course of implementation. The Commission takes the view that, in that case, a decision to initiate the formal investigation procedure produces independent legal effects because of its suspensive effect, since the Member State to which the decision is addressed is required to suspend the aid.
- 32 In the first place, it must be noted that the Commission took the view, in paragraphs 74 to 79 of the contested decision, that the alleged aid measure constituted new aid, in so far as it stemmed both from the amended 2005 contract and the 2010 contract (see paragraph 9 above) and, in paragraph 145 of that decision, that that measure had been granted in breach of the notification and stand-still obligations established by Article 108(3) TFEU, applicable to aid characterised as new. In the operative part of the contested decision, the Commission reminded Romania that Article 108(3) TFEU had suspensory effect and that Article 14 of Regulation No 659/1999 provided that all unlawful aid could be recovered from the beneficiary.
- 33 The Court notes that the applicant states that it does not challenge here the Commission's finding in the contested decision that there were two separate contracts, the amended 2005 contract and the 2010 contract.
- 34 In the second place, it must be noted that, to date, neither the Court of Justice nor the General Court has had occasion to rule on the admissibility of an action for the annulment of a decision to initiate the formal investigation procedure in respect of a measure which was no longer in the course of implementation as at the date of the decision at issue or the date on which the action was brought. Although the applicant takes the view that any decision to initiate the formal investigation procedure may be challenged before the EU judicature, the possibility of bringing an action for annulment depends in fact on whether such a decision entails independent legal effects within the meaning of paragraph 29 above (*Italy v Commission*, cited in paragraph 27 above, paragraph 62; *Diputación Foral de Álava and Others v Commission*, cited in paragraph 27 above, paragraph 33; and *Alcoa Trasformazioni v Commission*, cited in paragraph 27 above, paragraph 35).
- 35 In that regard, it must be found that a decision to initiate the formal investigation procedure entails independent legal effects, when, in the light of its conclusions, it produces an immediate, certain and sufficiently binding effect on the Member State to which it is addressed and the beneficiary or beneficiaries of the aid measure under examination. It is therefore a decision which, by its effect alone and without the need for other measures by the Commission or another authority, obliges the Member State to which it is addressed to adopt one or more measures in order to comply with it.

- 36 That is the case when the Commission decides to initiate the formal investigation procedure in respect of an aid measure which has been implemented without having been notified and is still in the course of implementation when the decision is adopted. In that case, the scope of the measure under examination is necessarily altered, in the light of the Commission's preliminary conclusion that it is unlawful State aid, because it was implemented without having been notified. In the light of such an assessment, which gives rise to a significant element of doubt as to the legality of the measure under examination, the Member State to which the decision is addressed must suspend the application of that measure (see, to that effect, *Italy v Commission*, cited in paragraph 27 above, paragraph 59; *Diputación Foral de Álava and Others v Commission*, cited in paragraph 27 above, paragraph 34; and *Alcoa Trasformazioni v Commission*, cited in paragraph 27 above, paragraph 36). That is an immediate, certain and sufficiently binding effect of the decision to initiate the formal investigation procedure, the Member State being required to suspend the application of the measure under examination by reason solely of that decision and in order to draw the necessary inferences from the preliminary conclusions as to the unlawfulness of that measure.
- 37 In addition, the EU judicature considers that, where the Commission has initiated the formal examination procedure with regard to a measure which is being implemented, national courts are required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure (Case C-284/12 *Deutsche Lufthansa* [2013] ECR, paragraph 42).
- 38 To that end, national courts may decide to suspend the implementation of the measure in question and order the recovery of payments already made. They may also decide to order provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's decision to initiate the formal examination procedure (*Deutsche Lufthansa*, cited in paragraph 37 above, paragraph 43).
- 39 Unlike a decision to initiate the formal investigation procedure in respect of a measure in the course of implementation, a decision of that nature in respect of a measure which is no longer in the course of implementation does not entail independent legal effects, since its scope is not immediate, certain and sufficiently binding in relation to the Member State to which it is addressed and the beneficiary or beneficiaries of the measure under examination.
- 40 Thus, the Member State is not required to commence recovery of the aid paid to the beneficiary because such a decision has been adopted. In that regard, the Court notes that Regulation No 659/1999 itself imposes very strict conditions on the Commission when it envisages ordering the Member State to recover the aid provisionally. Article 11(2) of Regulation No 659/1999 requires that there be no doubts about the aid character of the measure concerned, there be an urgency to act and there be a serious risk of substantial and irreparable damage to a competitor. Such conditions, while prescribed for the adoption of a separate decision different in scope from the decision to initiate the formal investigation procedure, are evidence that there is no general obligation on the Member State to which that decision is addressed to recover the aid unlawfully paid, purely on the basis of that decision. In addition, Article 14(1) of Regulation No 659/1999 provides expressly that, after the adoption of a final decision finding that aid is incompatible with the internal market, the Commission must not require recovery of the aid if this would be contrary to a general principle of EU law.
- 41 In addition, it has been held, first, that the national court was not required to order the recovery of aid implemented contrary to Article 108(3) TFEU where the Commission had adopted a final decision declaring that aid to be compatible with the internal market, within the meaning of Article 107 TFEU, but that it had to order the beneficiary of the aid to pay interest in respect of the period of unlawfulness (Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraph 55). Secondly, during proceedings before a national court for the recovery of aid, there is an obligation on the national court to adopt safeguard measures only if the conditions justifying such measures are satisfied, namely that there is no doubt regarding the classification as State

aid, that the aid is about to be, or has been, implemented, and that no exceptional circumstances have been found which would make recovery inappropriate. If those conditions are not satisfied, the national court must dismiss the application (Case C-1/09 *CELF and Ministre de la Culture et de la Communication* [2010] ECR I-2099, paragraph 36).

- 42 In the light of the foregoing, it cannot be found that a decision to initiate the formal investigation procedure in respect of a measure which is no longer in the course of implementation produces an immediate, certain and sufficiently binding effect on the Member State that places it under an obligation to recover the aid unlawfully paid.
- 43 As regards the certainty of the independent legal effects produced by the decision to initiate the formal investigation procedure, it must be found that, unlike the obligation to suspend the measure under examination because such a decision is taken regarding a measure in the course of implementation, the recovery of unlawful aid is, as a general rule, likely to occur only in proceedings before a national court and the outcome of those proceedings is, by nature, uncertain, having regard to the different parameters which that court must take into consideration before it can order the beneficiary of unlawful aid to repay it (see paragraph 41 above).
- 44 Accordingly, it follows from all those considerations that a decision to initiate the formal investigation procedure in respect of a measure which is no longer in the course of implementation, as in the present case the amended 2005 contract, does not entail independent legal effects and, consequently, does not produce binding legal effects. It does not therefore constitute a challengeable act for the purposes of Article 263 TFEU.
- 45 In the third place, it must be found that the conclusion reached by the Court in paragraph 44 above cannot apply to the 2010 contract, which was in the course of implementation at the date of the contested decision. However, it is established that the 2010 contract was terminated and replaced by the eighteenth addendum, signed on 10 August 2012, which entered into force retroactively on 1 January 2012. Since the application in the present action was lodged at the Court Registry on 23 November 2012, it must be found that the alleged aid measure was no longer in the course of implementation at the date on which the action was brought.
- 46 In that regard, it is apparent from the case-law that the admissibility of an action must be assessed by reference to the situation prevailing at the time when the application was lodged (Case 50/84 *Bensider and Others v Commission* [1984] ECR 3991, paragraph 8, and Joined Cases C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 and C-22/01 *Spain v Council* [2002] ECR I-3439, paragraph 23).
- 47 Consequently, inasmuch as it is directed at the 2010 contract, the contested decision no longer entails independent legal effects and, therefore, no longer has binding legal effects. To that extent, the contested decision no longer constituted a challengeable act when the action was brought.
- 48 In the fourth place, it must be found that the various arguments put forward by the applicant cannot call in question the conclusions in paragraphs 44 and 47 above.
- 49 First, the applicant relies on the terms of Article 4(4) of Regulation No 659/1999 in arguing that the contested decision may, as such, be reviewed, since it is a formal decision which, under the wording of Article 263 TFEU, constitutes a challengeable act, as confirmed by the case-law of the Court of Justice.
- 50 Although Regulation No 659/1999 uses the term ‘decision’ in order to designate several of the measures that the Commission may take during the procedure for examining State aid, it is apparent from the case-law that, in order to ascertain whether an act amounts to a challengeable act for the purposes of Article 263 TFEU, in particular in order to distinguish a preparatory measure from a final decision, it is necessary to look at the substance of the measure the annulment of which is sought, as its form is, in principle, immaterial (see, to that effect, *ERTA*, cited in paragraph 22 above,

paragraph 42; *IBM v Commission*, cited in paragraph 23 above, paragraph 9; Case T-3/93 *Air France v Commission* [1994] ECR II-121, paragraphs 43 and 57; and Case T-260/04 *Cestas v Commission* [2008] ECR II-701, paragraph 68).

- 51 In the present case, it is quite apparent from paragraphs 39 to 44 above that a decision to initiate the formal investigation procedure in respect of a measure which is no longer in the course of implementation as at the date of that decision does not entail independent legal effects, thereby not producing the binding legal effects indicative of a challengeable act. In other words, such an act, while formally constituting a decision, is not, because of its substance, decisional in nature.
- 52 At the hearing, the applicant relied on the judgment in *Deutsche Post and Germany v Commission*, cited in paragraph 22 above (paragraphs 43 to 45), in order to substantiate its argument that the form in which the contested decision was adopted is decisive in determining whether that decision could form the subject-matter of an action for annulment. Admittedly, in that judgment, the Court of Justice held that, by providing that ‘the information injunction’ under Article 10(3) of Regulation No 659/1999 should take the form of a decision, the EU legislature intended to confer a binding character on such a measure, and that, consequently, such an injunction was intended to produce binding legal effects and therefore constituted an act open to challenge for the purposes of Article 263 TFEU. None the less, it must be noted that the Court did not simply rely on that analysis in order to hold that the measure contested in the case in point could be the subject-matter of an action for annulment. In the remainder of the judgment in *Deutsche Post and Germany v Commission*, cited in paragraph 22 above, the Court of Justice examined whether, as the General Court had found in the order which was the subject-matter of the appeal before the Court of Justice, the contested measure constituted an intermediate measure preparatory in nature and whether it entailed independent legal effects against which the applicants in that case could be ensured sufficient legal protection by the bringing of an action against the decision terminating the procedure concerning the alleged State aid (paragraphs 48 to 63). The Court of Justice found that this was not the case since, although the contested measure constituted an intermediate measure, the effects of the possible illegality of that measure were not capable of being removed by an action brought against the final decision terminating the State aid procedure (*Deutsche Post and Germany v Commission*, cited in paragraph 22 above, paragraphs 56 to 60). Consequently, although the Court took into account the form in which the contested measure had been adopted, namely a decision within the meaning of Article 288 TFEU, in order to hold that it was a measure which could form the subject-matter of an action for annulment, that assessment was only one factor in its reasoning in order to reach that conclusion.
- 53 Secondly, the applicant stressed at the hearing the importance of the judgment in *Deutsche Lufthansa*, cited in paragraph 37 above, in determining whether the contested decision constituted a challengeable act for the purposes of Article 263 TFEU. It submitted that the Court has held that a decision to initiate the formal investigation procedure produced independent legal effects because it created binding links for the national courts, in particular in that the latter could decide to suspend the measure at issue, order the recovery of sums already paid to the beneficiary of that measure or order interim measures in order to safeguard the parties’ interests. The applicant takes the view that it risks being faced, during the formal investigation procedure, with court proceedings even if the alleged aid measure is no longer in the course of implementation, because the national courts must apply the findings of the contested decision.
- 54 First of all, the General Court notes that the main proceedings before the German court in *Deutsche Lufthansa* had given rise to the request for a preliminary ruling to which the Court of Justice replied concerned an aid measure in the course of implementation as the date of the Commission’s decision initiating the formal investigation procedure (see paragraph 37 above).
- 55 Next, although it cannot be denied that, where such an application has been made to it, the national court may order the recovery of the aid paid, regardless of whether or not it is still in the course of implementation at the date of the decision to initiate the formal investigation procedure, such a

possibility cannot be regarded as being an immediate, certain and sufficiently binding effect of that decision. In that regard, the decision to initiate the formal investigation procedure entails such an effect with regard to the Member State only if the measure concerned is in the course of implementation, since, in that case, the Member State is required, by the decision itself, to suspend the aid measure without the need to bring an action before the national court (see paragraphs 36 to 38 above). In addition, it is apparent from the principles set out above that, contrary to the applicant's claims, the national court is under no obligation to order the recovery of the aid paid (see paragraphs 40 and 41 above), which may occur, as a rule, only in the case of court proceedings, the outcome of which is, by nature, uncertain (see paragraph 43 above).

- 56 In that regard, it must be noted, as the Commission has done, that, in accordance with the principle of sincere cooperation between the national courts, on the one hand, and the Commission and the Courts of the European Union, on the other, the national court is only required to take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under EU law and to refrain from those which may jeopardise the attainment of the objectives of the Treaty, in particular, from taking decisions which conflict with a decision of the Commission, even if it is provisional (*Deutsche Lufthansa*, cited in paragraph 37 above, paragraph 41).
- 57 Accordingly, the interpretation of the judgment in *Deutsche Lufthansa*, cited in paragraph 37 above, does not give grounds for finding that a decision to initiate the formal investigation procedure in respect of a measure which is no longer in the course of implementation has a scope which is immediate, certain and sufficiently binding on the Member State to which it is addressed.
- 58 Thirdly, the applicant argued, at the hearing, that the mere possibility of bringing an action for the annulment of the decision closing the formal investigation procedure or of raising the unlawfulness of the contested decision as a defence would not ensure that it had sufficient protection.
- 59 The applicant's argument may be construed as meaning that the possibility of challenging the lawfulness of the final decision or raising, as a defence, the unlawfulness of the contested decision is not sufficient to ensure that it has effective judicial protection, since it could face actions for the recovery of aid paid before the adoption of such a final decision. However, in a situation such as that in the present case, the judicial protection of the applicant in the light of the Treaty is ensured by the possibility for the national court, hearing a case on the recovery of unlawful aid paid, to make a request to the Court of Justice for a preliminary ruling on the validity of the decision to initiate the formal investigation procedure, pursuant to Article 267 TFEU, since the only persons precluded from that means of obtaining redress are those that could bring an action for annulment of such a decision on the basis of Article 263 TFEU (see, to that effect, Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraph 26).
- 60 Fourthly, according to the applicant, it is apparent from the contested decision that the Commission finds that the amended 2005 contract and the 2010 contract constitute an unlawful State aid measure and, in particular in the operative part, does not express any doubt that State aid was involved, since the alleged aid measure is not described as 'possible' or 'suspected' State aid.
- 61 It is quite apparent from the contested decision that the Commission's conclusions as to the unlawful nature of the alleged aid measure were provisional, at the end of a preliminary assessment pursuant to Article 6(1) of Regulation No 659/1999. Thus, in paragraph 61 of the contested decision, the Commission stated that '[h]aving examined the information and arguments provided so far by [Romania] and [the applicant], [it] t[ook] the preliminary view that [the alleged aid measure] involve[d] state aid within the meaning of Article 107(1) TFEU', and that it doubted that it could be found compatible with the Treaty. In paragraph 62 of the contested decision, the Commission mentioned the indications regarding the existence of State aid and the doubts regarding the compatibility of such alleged aid with the internal market. On reading those passages of the contested decision, it cannot be claimed that the Commission carried out a final assessment of whether the

alleged aid measure constituted State aid. As regards paragraph 152 of the contested decision, the Commission concluded therein, on a preliminary basis, that the amended 2005 contract and the 2010 contract constituted unlawful State aid, which did not seem to fulfil any of the conditions for being declared compatible with the internal market.

- 62 Fifthly, the applicant submits that by virtue of its application to contracts concluded with the supplier, the contested decision created significant uncertainty in the business community and in the applicant's relations with banks, its customers and its competitors, particularly as to whether it may ultimately be required to pay further amounts to the supplier in respect of past supplies.
- 63 It must be noted, as the Commission has done, that the commercial uncertainty and the perceptions of the other operators as regards the situation of the beneficiary of an aid measure, such as the applicant in the present case, cannot be regarded as binding legal effects, since they are mere consequences of fact and not legal effects that the decision to initiate the formal investigation procedure is intended to have (see, to that effect, and by analogy, *IBM v Commission*, cited in paragraph 23 above, paragraph 19; Case C-301/03 *Italy v Commission* [2005] ECR I-10217, paragraph 30; and Case T-258/06 *Germany v Commission* [2010] ECR II-2027, paragraph 151). Admittedly, the European Union judicature has taken into consideration the fact that businesses will take account, in their relations with the beneficiary of an unlawful aid measure, of the uncertainty of its legal and financial situation (*Italy v Commission*, cited in paragraph 27 above, paragraph 59; *Diputación Foral de Álava and Others v Commission*, cited in paragraph 27 above, paragraph 34; and *Alcoa Trasformazioni v Commission*, cited in paragraph 27 above, paragraph 36). None the less, by means of such considerations, it is clear that the European Union judicature simply highlighted the factual consequences of the binding legal effects which led it to find, in those judgments, that the decisions to initiate the formal investigation procedure contesting a measure in the course of implementation constituted challengeable acts.
- 64 Accordingly, the applicant's argument cannot affect whether the contested decision is characterised as an act which may form the subject-matter of an action for annulment.
- 65 Sixthly, the applicant refers to a circumstance which it attributes to the contested decision, namely that the applicant's parent company, V., had put on hold its plan to build its own cogeneration gas power plant in Romania due to the reluctance of banks to fund the project.
- 66 Such a circumstance cannot be regarded as a binding legal effect of the contested decision, being at most a possible factual consequence of that decision (see paragraph 63 above). In any event, it must be found that the applicant adduces no evidence in support of its argument, since there is no document on the file proving the initial intention of V. to undertake the project in question, its decision to suspend that project, or the link between that alleged decision and a refusal by the banks to fund because of the contested decision.
- 67 It follows from all the foregoing that the contested decision does not constitute a challengeable act for the purposes of Article 263 TFEU and that, consequently, the action is inadmissible and there is no need to grant the measure of organisation of procedure applied for by the applicant.

Costs

- 68 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present case, since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those of the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

- 1. Dismisses the action as inadmissible;**
- 2. Orders Alro SA to pay the costs.**

Dittrich

Schwarcz

Tomljenović

Delivered in open court in Luxembourg on 16 October 2014.

[Signatures]