



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 15 October 2015¹

Case C-431/14 P

Hellenic Republic

v

European Commission

(Appeal — State aid — Compensation payments made by the Greek Agricultural Insurance Organisation (ELGA) in 2008 and 2009 — Decision declaring aid incompatible with the internal market and ordering its recovery — Concept of State aid — State aid that may be considered to be compatible with the internal market — Article 107(3)(b) TFEU — Temporary Community Framework for State aid designed to favour access to financing in the context of the economic and financial crisis)

1. By its appeal, the Hellenic Republic seeks to have set aside the judgment of the General Court in *Greece v Commission* ('the judgment under appeal')² dismissing its action for annulment of Commission Decision 2012/157/EU of 7 December 2011 concerning compensation payments made by the Greek Agricultural Insurance Organisation (ELGA) in 2008 and 2009 ('the contested decision').³

Legal framework

TFEU

2. Article 107(1) TFEU provides that, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market.

3. Pursuant to Article 107(3)(b) TFEU, aid, inter alia, to remedy a serious disturbance in the economy of a Member State may be considered to be compatible with the internal market.

1 — Original language: French.

2 — T-52/12, EU:T:2014:677.

3 — OJ 2012 L 78, p. 21.

Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis

4. On 22 January 2009, the European Commission published a Communication concerning the Temporary Community Framework for State aid measures to support access to finance in the current financial and economic crisis ('the Temporary Community Framework').⁴ The Commission there noted, inter alia, that the global crisis required exceptional policy responses, going beyond emergency support for the financial system.⁵ In the light of the seriousness of that crisis and its impact on the overall economy of the Member States, the Commission thus considered that certain categories of State aid were justified, for a limited period, to alleviate those difficulties and that they could therefore be declared compatible with the common market on the basis of what has since become Article 107(3)(b) TFEU.

5. While announcing that it would temporarily and under certain conditions authorise the grant of aid falling within the scope of Article 107(1) TFEU, the Commission made it clear that that authorisation did not cover aid schemes for undertakings active in the primary production of agricultural products.⁶

6. At point 7 of the Temporary Community Framework, the Commission stated inter alia:

'The Commission applies this Communication from 17 December 2008, the date on which it agreed in principle its content, having regard to the financial and economic context which required immediate action. This Communication is justified by the current exceptional and transitory financing problems related to the banking crisis and will not be applied after 31 December 2010. After consulting Member States, the Commission may review it before that date on the basis of important competition policy or economic considerations. ...

...

In accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid [⁷], the Commission applies the following in respect of non-notified aid:

(a) this Communication, if the aid was granted after 17 December 2008;

...'

7. The Commission amended the Temporary Community Framework by a communication published on 31 October 2009.⁸ According to point 1 of that communication:

'...

The possibility under point 4.2 [of the Temporary Community Framework] to grant a compatible limited amount of aid does not apply to undertakings active in the primary production of agricultural products. Farmers, however, encounter increased difficulties to obtain credit as a consequence of the financial crisis.

... [I]t is appropriate to introduce a separate compatible limited amount of aid for undertakings active in the primary production of agricultural products.'

4 — OJ 2009 C 16, p. 1.

5 — Third paragraph of Point 4.1 of the Temporary Community Framework.

6 — Subparagraph (h) of the third paragraph of point 4.2.2 of the Temporary Community Framework.

7 — OJ 2002 C 119, p. 22.

8 — OJ 2009 C 261, p. 2.

8. Subparagraph (h) of the third paragraph of point 4.2.2 of the Temporary Community Framework, as amended by that communication, provides as follows:

‘The Commission will consider such State aid compatible with the common market on the basis of Article [107(3)(b) TFEU], provided all the following conditions are met:

...

(h) the aid scheme applies as such to undertakings active in the processing and marketing of agricultural products ..., unless the aid is conditional on being partly or entirely passed on to primary producers. Where the aid is granted to undertakings active in the primary production of agricultural products ..., the cash grant (or gross grant equivalent) does not exceed EUR 15 000 per undertaking ...’

9. That amendment to the Temporary Community Framework took effect on 28 October 2009.

Greek law

10. Law No 1790/1988 established a body operating in the public interest called the ‘Greek Agricultural Insurance Organisation’ (ELGA). ELGA, which is a legal person governed by private law and is wholly owned by the State, has in particular the objective of insuring crop and animal production and crop and animal assets of agricultural holdings against damage due to natural risks.

11. Pursuant to Article 3a of Law No 1790/1988, in the version applicable to the dispute, insurance with ELGA is compulsory and covers natural risks such as floods and drought. To that end, Article 5a imposes a special insurance contribution to ELGA on agricultural producers who are beneficiaries of that insurance scheme. The rate of that contribution, the revenue from which is included in the State budget, varies according to whether the insurance covers a product of animal or plant origin.

Background to the dispute and contested decision

12. On 30 January 2009 the Minister for Economic Affairs and Finance and the Minister for Rural Development and Food adopted Inter-ministerial Decree No 262037 on exceptional compensation for damage to agricultural production (‘the Inter-ministerial Decree’). The Inter-ministerial Decree provided that compensation of EUR 425 million would be paid on an exceptional basis by ELGA because of the decrease in production of certain vegetable crops which occurred in the 2008 growing season owing to adverse weather conditions. The resulting expenditure, chargeable to ELGA’s budget, was financed by means of a loan contracted by ELGA with banks and guaranteed by the State.

13. By letter of 20 March 2009, sent in reply to a request for information from the Commission, the Hellenic Republic informed the Commission that ELGA had in addition paid compensation to farmers in 2008 for damage covered by insurance amounting to EUR 386 986 648. That amount came partly from insurance contributions paid by producers and partly from funds obtained as a result of a loan of EUR 444 million contracted by ELGA from a bank and guaranteed by the State.

14. By decision of 27 January 2010,⁹ the Commission opened the formal investigation procedure provided for by Article 108(2) TFEU in Case C 3/10 (ex NN 39/09), concerning compensation payments made by ELGA in 2008 and 2009.

⁹ — OJ 2010 C 72, p. 12.

15. On 7 December 2011 the Commission adopted the contested decision, which provides *inter alia* as follows:

‘Article 1

1. The compensation paid by [ELGA] to producers of agricultural products in 2008 and 2009 constitutes State aid.
2. The compensation aid granted in 2008 under the special compulsory insurance scheme is compatible with the internal market as regards the aid amounting to EUR 349493652.03 which ELGA granted to producers to make good their crop losses and as regards the aid relating to crop losses caused by bears amounting to EUR 91 500 and the corrective action taken within the framework of the abovementioned aid. The compensation aid represented by the remaining amount paid in 2008 under the special insurance scheme is incompatible with the internal market.
3. The compensation aid of EUR 27 614 905 granted in 2009 under [the Inter-ministerial Decree] is compatible with the internal market.

The compensation aid of EUR 387 404 547 granted to producers on dates before 28 October 2009 is incompatible with the internal market. This conclusion shall be without prejudice to aid which, at the time it was granted, met all the conditions laid down in [Commission] Regulation (EC) No 1535/2007 [of 20 December 2007 on the application of Articles [107 and 108 TFEU] to *de minimis* aid in the sector of agricultural production (OJ 2007 L 337, p. 35)].

Article 2

1. [The Hellenic Republic] shall take all measures necessary to recover from its beneficiaries the incompatible aid referred to in Article 1, which was granted unlawfully.

...’

Procedure before the General Court and judgment under appeal

16. In its application lodged at the Registry of the General Court on 8 February 2012, the Hellenic Republic brought an action for annulment of the contested decision. In a separate document lodged at the Registry of the General Court on the same date, the Hellenic Republic applied for interim measures under Articles 278 and 279 TFEU, seeking suspension of the contested decision. By order of the President of the General Court in *Greece v Commission*,¹⁰ the operation of the contested decision was suspended, in so far as that decision ordered the Hellenic Republic to recover from the recipients the incompatible aid referred to in Article 1 of the decision.

17. The Hellenic Republic raised seven pleas in law in support of its action for annulment of the contested decision. By the judgment under appeal, the General Court dismissed the action in its entirety.

Procedure before the Court, grounds of appeal and forms of order sought by the parties

18. By its appeal, lodged at the Registry of the Court on 19 September 2014, the Hellenic Republic asks the Court to set aside the judgment under appeal, to annul the contested decision and to order the Commission to pay the costs.

¹⁰ — T-52/12 R, EU:T:2012:447.

19. The Hellenic Republic puts forward three grounds in support of its appeal. The first ground of appeal — which alleges, in essence, an infringement of Article 107(1) TFEU, failure to state reasons and distortion of the evidence — is divided into two parts. In the first part, the Hellenic Republic criticises the General Court for classifying as ‘State resources’ the compulsory contributions paid in 2008 and 2009 by the farmers who received compensation aid during those years. In the second part, it criticises the General Court for not taking the view that the amounts corresponding to those contributions should be deducted from the aid to be recovered, since those amounts could not have procured an economic advantage liable to distort competition for the farmers concerned. By its second ground of appeal, which alleges infringement of Article 107(1) TFEU and a failure to state reasons, the Hellenic Republic essentially takes issue with the General Court for holding that the compensation payments made by ELGA in 2009 had procured a selective economic advantage for the beneficiaries that was liable to distort competition and trade between Member States and therefore constituted State aid. The exceptional crisis situation affecting the Greek economy at that time precludes such a finding. The third ground of appeal alleges misinterpretation and misapplication of Article 107(3)(b) TFEU and failure to state reasons. In the first part, the Hellenic Republic criticises the General Court for ruling that the payments at issue made in 2009 could not be declared compatible with the internal market on the basis of that provision, since the scheme relaxing the rules on State aid provided for by the Temporary Community Framework did not apply to aid granted to undertakings active in the primary production of agricultural products. It submits that the General Court should have taken into account, in that respect, the crisis situation referred to above. In the second part, it complains that the General Court did not examine its argument that the contested decision was excessive in that it ordered, in December 2011, the recovery of compensation payments made by ELGA in 2008 and 2009 even though the crisis had worsened in the meantime.

20. The Commission asks the Court to dismiss the appeal as inadmissible or unfounded and to order the Hellenic Republic to pay the costs.

21. By application lodged at the Registry of the Court on 30 September 2014, the Hellenic Republic applied for interim measures under Articles 278 and 279 TFEU, seeking inter alia suspension of the judgment under appeal until the Court rules on the Hellenic Republic’s appeal. The Vice-President of the Court dismissed that application for interim measures on the ground that the Hellenic Republic failed to satisfy the condition relating to a *prima facie* case.¹¹

22. By letter lodged at the Registry of the Court on 2 March 2015, the Hellenic Republic requested the Court to sit as a Grand Chamber pursuant to the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union.

23. At its general meeting of 30 June 2015, the Court decided to refer the case to the Grand Chamber under that provision, with a view to the possible application of Article 181 of the Rules of Procedure. It also considered that the case did not require either the holding of a hearing or the delivery of an Opinion.

24. In the course of its initial deliberations, the Grand Chamber considered, however, that the treatment of the first part of the third ground of appeal justified the holding of a hearing and the delivery of an Opinion. At its general meeting of 2 September 2015, the Court therefore decided to open the oral procedure and invited the parties to focus their oral arguments on that part.

25. The Hellenic Republic and the Commission presented oral argument at the hearing held on 6 October 2015.

¹¹ — Order in *Greece v Commission*, C-431/14 P-R, EU:C:2014:2418.

Assessment

Preliminary remarks

26. I shall confine myself to examining the first part of the third ground of appeal. As I pointed out above, it is in fact only that part of the Hellenic Republic's arguments which led the Grand Chamber to consider, despite the approach initially taken at the general meeting of 30 June 2015, that the present case required a hearing and an Opinion.

27. I emphasise from the outset that this Opinion examines only the admissibility and merits of that argument, which concerns, in essence, the question of whether Article 107(3)(b) TFEU may be applied directly, regardless of the conditions laid down by the Temporary Community Framework. This legal examination in no way involves examining the underlying economic issue. Accordingly, I shall refrain from confirming or refuting the difficulties experienced by the agricultural sector in Greece since 2008 and also from assessing their extent.¹²

Examination of the first part of the third ground of appeal

Arguments of the parties

28. According to the Hellenic Republic, the General Court wrongly failed to find that the payments at issue which ELGA made in 2009 were compatible with the internal market directly on the basis of Article 107(3)(b) TFEU. The crisis the Hellenic Republic experienced at that time caused a serious disturbance in its economy within the meaning of that provision, which justified it in granting aid to undertakings in the agricultural sector. It is irrelevant that such aid was excluded from the less strict scheme provided for by the Temporary Community Framework before the latter was amended in October 2009. The exceptional crisis circumstances which affected the Greek economy when that aid was granted were distinct from the global financial situation which had justified the adoption of that communication.

29. The Commission contends that this part of the Hellenic Republic's argument is inadmissible. On the one hand, the complaint seeks to call into question the General Court's assessment of the facts. On the other hand, the argument put forward in that respect is out of time, since the Hellenic Republic failed to establish at first instance the exceptional crisis circumstances on which it relies in its appeal. The Commission also disputes the merits of the first part of the third ground of appeal.

Assessment

30. I cannot agree with the Commission when it challenges the admissibility of the first part of the third ground of appeal.

31. It is true that, under Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal lies only on points of law. Accordingly, the General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence, since the appraisal of those facts and the assessment of that evidence do not, save where the facts or evidence are distorted, constitute points of law subject, as such, to review by the Court of Justice on appeal.¹³

¹² — A certain number of further explanations put forward at the hearing concerning those difficulties do not therefore appear to me to be relevant for dealing with the present appeal.

¹³ — See, inter alia, order in *Industrias Alen v The Clorox Company*, C-422/12 P, EU:C:2014:57, paragraph 37 and the case-law cited.

32. The purpose of the first part of the third ground of appeal is not, however, to invite the Court to carry out a fresh assessment of the facts examined by the General Court concerning the argument that the Hellenic Republic bases on the economic crisis it experienced in 2009. By this aspect of its appeal, the Hellenic Republic exclusively criticises the error of law which it alleges that the General Court committed when interpreting and applying Article 107(3)(b) TFEU, in considering that that provision could not be applied directly and independently of the Temporary Community Framework.

33. Nor am I convinced by the Commission's reasoning that that argument is tantamount to relying out of time on facts which have not been established before the General Court.

34. It appears from the file before the General Court that the Hellenic Republic, as pointed out by the General Court in paragraph 135 of the judgment under appeal, relied on the existence of a serious crisis affecting its economy since the end of 2008 in support of its action for annulment. That argument sought *inter alia* to establish that the payments which ELGA made in 2009 should have been declared compatible with the internal market on the basis of Article 107(3)(b) TFEU. However, in the judgment under appeal the General Court gave no ruling on the existence as such, at that time, of a serious disturbance in the Greek economy within the meaning of that provision. In response to the fourth plea of the action for annulment, the General Court considered, in essence, that the Commission was bound by the Temporary Community Framework and that it should therefore not declare the payments made by ELGA in 2009 compatible with the internal market directly on the basis of Article 107(3)(b) TFEU.¹⁴ As I stated above,¹⁵ the first part of the third ground of appeal concerns that legal reasoning alone.

35. As to the substance, it should first be recalled that the General Court held, in paragraphs 185 to 188 of the judgment under appeal, that:

'185 With regard to the arguments raised in the fourth plea, it is clear that, contrary to what the Hellenic Republic claims, the Commission had to base its decision on the Temporary Community Framework and not directly apply Article 107(3)(b) TFEU in order to assess the compatibility of the payments made by ELGA in 2009 on account of the economic crisis experienced in Greece.

186 It is clear from the case-law that, in adopting rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its aforementioned discretion and cannot depart from those rules without being found, where appropriate, to be in breach of general principles of law such as equal treatment or the protection of legitimate expectations (see [judgments in] *Germany and Others v Kronofrance*, [C-75/05 P and C-80/05 P, EU:C:2008:482], paragraph 60 and the case-law cited, and ... *Holland Malt v Commission*, [C-464/09 P, EU:C:2010:733], paragraph 46).

187 Accordingly, in the specific area of State aid, the Commission is bound by the guidelines and notices that it issues, to the extent that they do not depart from the rules in the Treaty (see [judgment in] *Holland Malt v Commission*, [C-464/09 P, EU:C:2010:733], paragraph 47 and the case-law cited).

188 Therefore, it is necessary to reject the arguments of the Hellenic Republic to the effect that, on account of the serious disturbance in the Greek economy due to the economic crisis experienced in Greece since the end of 2008 and in 2009, the Commission should have declared the payments made by ELGA in 2009 compatible directly on the basis of Article 107(3)(b) TFEU.'

¹⁴ — Paragraphs 185 to 188 of the judgment under appeal, which I also cite in the following point of this Opinion.

¹⁵ — Point 32 above.

36. Next, it is necessary to recall the settled case-law that Article 107(3)(b) TFEU must be interpreted narrowly, since it lays down a derogation from the general principle that State aid is incompatible with the common market.¹⁶

37. Thus, aid which is covered by that provision is not *ex lege* compatible with the internal market, but rather may be considered by the Commission to be compatible with that internal market. That assessment falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union.¹⁷

38. In accordance with the settled case-law recalled by the General Court in paragraph 161 of the judgment under appeal, the Commission enjoys in that regard a wide discretion, the exercise of which involves complex assessments of an economic and social nature which must be made within a Community context. The Court, in reviewing whether that freedom was lawfully exercised, cannot substitute its own assessment for that of the Commission but must restrict itself to examining whether the Commission's assessment is vitiated by a manifest error or misuse of powers.¹⁸

39. In the present case, as regards the assessment in the light of Article 107(3)(b) TFEU of the aid which ELGA granted in 2009 to undertakings active in the primary production of agricultural products, the Commission limited the exercise of that discretion by adopting the Temporary Community Framework. In its original version, that communication excluded such aid from the scheme relaxing the rules on State aid which it introduced.¹⁹ At the hearing, the Commission submitted in essence that that exclusion was justified by the particular features of the primary agricultural production sector, which benefits from support measures at EU level. It was also in the exercise of the Commission's broad discretion that it later decided to amend the Temporary Community Framework in that regard for the purpose of bringing within it, under certain conditions, aid to undertakings active in the primary production of agricultural products granted as from 28 October 2009. That change was, according to the Commission, prompted by the growing difficulties of farmers in accessing credit.

40. As the General Court rightly recalled in paragraph 187 of the judgment under appeal, in the area of State aid, the Commission is bound by the guidelines and notices that it issues, to the extent that they do not depart from the rules in the Treaty or from any other rule of primary law.²⁰

41. Furthermore, the Hellenic Republic does not seek, by the first part of the third ground of appeal, to call into question that part of the judgment under appeal in which the General Court examined the plea of illegality which the Hellenic Republic had raised concerning subparagraph (h) of the third paragraph of point 4.2.2 of the Temporary Community Framework, alleging that the Temporary Community Framework excluded from its less strict scheme aid granted to undertakings active in the primary agricultural sector without stating the reasons for doing so. Nor does it seek to criticise the part of the judgment in which the General Court rejected its argument that the Commission was required to apply the amendment to the Temporary Community Framework made in October 2009 with retroactive effect from 17 December 2008.

16 — Judgments in *Germany v Commission* (C-301/96, EU:C:2003:509, paragraph 106) and *Freistaat Sachsen and Others v Commission* (C-57/00 P and C-61/00 P, EU:C:2003:510, paragraph 98).

17 — Judgment in *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraph 66 and the case-law cited).

18 — Judgments in *Italy v Commission* (C-66/02, EU:C:2005:768, paragraph 135), *Portugal v Commission* (C-88/03, EU:C:2006:511, paragraph 99), and *Unicredito Italiano* (C-148/04, EU:C:2005:774, paragraph 71).

19 — Subparagraph (h) of the third paragraph of point 4.2.2 of the Temporary Community Framework. Such aid remained fully subject to Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles [107 TFEU and 108 TFEU] to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ 2001 L 358, p. 3), to which footnotes 17 and 18 of the Temporary Community Framework refer.

20 — See, in particular, judgments in *Germany v Commission* (C-288/96, EU:C:2000:537, paragraph 62), *Netherlands v Commission* (C-382/99, EU:C:2002:363, paragraph 24), and *Holland Malt v Commission* (C-464/09 P, EU:C:2010:733, paragraph 47).

42. I am therefore of the view that the Court should give a ruling on the first part of the third ground of appeal to the effect that the General Court was right to find that the Commission could not depart from the Temporary Community Framework, and in particular from the exclusion that it laid down in subparagraph (h) of the third paragraph of point 4.2.2, as regards the aid at issue granted by ELGA in 2009, without being found, in such a case, to be in breach of general principles of law such as equal treatment or the protection of legitimate expectations.²¹

43. The fact that the Temporary Community Framework was adopted without obtaining the Hellenic Republic's approval is irrelevant in that respect, as was rightly pointed out by the Commission at the hearing in response to a question put to the parties. Admittedly, the guidelines proposed by the Commission to Member States under *Article 108(1) TFEU* are, according to settled case-law, an element of regular, periodic cooperation in the context of which the Commission is, in conjunction with the Member States, to keep under constant review all systems of existing aid and to propose to them any appropriate measures required by the progressive development or by the functioning of the common market.²² Insofar as those proposals for appropriate measures are accepted by a Member State, they are binding on it.²³ Clearly, however, those principles do not apply to a communication such as the Temporary Community Framework, by which the Commission limits the exercise of the broad discretion it enjoys under *Article 107(3)(b) TFEU* and which applies to it provided that that communication does not depart from the rules in the Treaty.

Conclusion

44. I therefore suggest that the Court reject the first part of the third ground of appeal as manifestly unfounded.

21 — See, to that effect, judgment in *Banco Privado Português and Massa Insolvente do Banco Privado Português* (C-667/13, EU:C:2015:151, paragraph 69 and the case-law cited). The Court essentially confirmed in that judgment that the Commission could, without infringing Article 107(3) TFEU, declare aid incompatible with the internal market on the sole ground that the aid did not fulfil the conditions laid down in its Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (OJ 2008 C 270, p. 8) (see paragraphs 66 to 75 of the judgment).

22 — See, in particular, judgments in *IJssel-Vliet* (C-311/94, EU:C:1996:383, paragraphs 36 and 37), and *Germany v Commission* (C-242/00, EU:C:2002:380, paragraph 28 and the case-law cited).

23 — Judgments in *IJssel-Vliet* (C-311/94, EU:C:1996:383, paragraphs 42 and 43), *Commission v Council* (C-111/10, EU:C:2013:785, paragraph 51), *Commission v Council* (C-117/10, EU:C:2013:786, paragraph 63), *Commission v Council* (C-118/10, EU:C:2013:787, paragraph 55), and *Commission v Council* (C-121/10, EU:C:2013:784, paragraph 52). See also, to that effect, judgment in *CIRFS and Others v Commission* (C-313/90, EU:C:1993:111, paragraph 35).