Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

26 October 2016*

(Appeal — State aid — Production of aluminium — Preferential electricity tariff granted by a contract — Decision declaring the aid compatible with the internal market — Termination of the contract — Judicial suspension of the effects of termination of the contract — Decision declaring the aid unlawful — Article 108(3) TFEU — Concepts of 'existing aid' and 'new aid' — Distinction)

In Case C-590/14 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 18 December 2014,

Dimosia Epicheirisi Ilektrismou AE (DEI), established in Athens (Greece), represented by E. Bourtzalas, avocat, and by E. Salaka, C. Synodinos, C. Tagaras and A. Oikonomou, dikigoroi,

appellant,

the other party to the proceedings being:

Alouminion tis Ellados VEAE, previously Alouminion AE, established in Maroussi (Greece), represented by G. Dellis, N. Korogiannakis, E. Chrysafis, D. Diakopoulos and N. Keramidas, dikigoroi,

applicant at first instance

European Commission, represented by E. Gippini Fournier and A. Bouchagiar, acting as Agents,

defendant at first instance,

THE COURT (Tenth Chamber),

composed of A. Borg Barthet, acting as President of the Chamber, E. Levits and F. Biltgen (Rapporteur), Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Greek.

Judgment

1 By its appeal, Dimosia Epicheirisi Ilektrismou AE (DEI) seeks to have set aside the judgment of the General Court of the European Union of 8 October 2014, *Alouminion* v *Commission* (T-542/11, 'the judgment under appeal', EU:T:2014:859), by which that court annulled Commission Decision 2012/339/EU of 13 July 2011 on the State aid No SA.26117 — C 2/10 (ex NN 62/09) implemented by Greece in favour of Alouminion tis Ellados AE (OJ 2012 L 166, p. 83, 'the contested decision').

Background to the dispute

2 In 1960, Alouminion tis Ellados AE ('AtE'), to which Alouminion AE and Alouminion tis Ellados VEAE ('Alouminion') became the successors in July 2007 and May 2015, respectively, in the production of aluminium in Greece, entered into a contract ('the 1960 contract') with the public electricity company DEI, under which it was granted a preferential tariff for the supply of electricity.

3 Article 2(3) of the 1960 contract made provision for that contract to be renewed automatically every five years, unless terminated by one of the parties, giving two years' notice to the other party by registered letter with acknowledgement of receipt.

4 Under an agreement between AtE and the Greek State, formalised by a legislative decree of 1969, the 1960 contract was due to end on 31 March 2006, unless it was extended in accordance with its provisions.

5 By decision of 23 January 1992, the European Commission held that the preferential tariff granted to AtE constituted State aid compatible with the internal market.

6 In February 2004, DEI informed AtE of its intention to terminate the 1960 contract and, in accordance with the contractual provisions, ceased to charge it the preferential tariff as of 1 April 2006.

7 AtE challenged that termination before the competent national courts.

8 By order of 5 January 2007 ('the first order for interim measures'), the Monomeles Protodikeio Athinon (Single-member Court of First Instance, Athens, Greece), in interlocutory proceedings, suspended, as an interim measure and *ex nunc*, the effects of the termination. That court held that that termination was not consistent with the provisions of the 1960 contract and the applicable domestic legal framework.

9 DEI challenged the first order for interim measures before the Polymeles Protodikeio Athinon (Multi-member Court of First Instance, Athens), which, also in interlocutory proceedings, granted, *ex nunc*, DEI's application for the termination of the 1960 contract and the preferential tariff, by order of 6 of March 2008.

10 Thus, during the period from 5 January 2007 to 6 March 2008 ('the period at issue'), AtE and, subsequently, Alouminion, continued to benefit from the preferential tariff.

11 In July 2008, the Commission received complaints. By letter dated 27 January 2010, it notified the Hellenic Republic of its decision to initiate the procedure laid down in Article 108(2) TFEU and invited the interested parties to submit their comments within one month of the date of publication of that letter.

12 That decision was published in the *Official Journal of the European Union* on 16 April 2010 (OJ 2007 C 96, p. 7).

13 The Commission in particular expressed doubts in that decision as to whether the preferential tariff charged by DEI to AtE, and subsequently Alouminion, during the period at issue, was at the same rate as the tariff charged to other large industrial consumers of high voltage electricity, since the preferential tariff was due to end on 31 March 2006 but had been extended by the first order for interim measures.

14 The Hellenic Republic, Alouminion and DEI sent their respective observations to the Commission.

15 By the contested decision, the Commission considered that the Hellenic Republic had unlawfully granted AtE and Alouminion State aid of an amount of EUR 17.4 million by applying the preferential tariff during the period in question. Given that that aid had been granted in contravention of Article 108(3) TFEU and was, accordingly, incompatible with the internal market, the Commission ordered the Hellenic Republic to recover the aid from Alouminion.

The procedure before the General Court and the judgment under appeal

16 By application lodged at the Registry of the General Court on 6 October 2011, Alouminion brought an action for annulment of the contested decision and for the Commission to be ordered to pay the costs.

17 Alouminion relied on ten pleas in law in support of its action, by means of which it disputed, principally, the classification of the measure at issue as new aid or, in the alternative, the classification of the preferential tariff as State aid or, in the further alternative, the obligation to recover the new aid resulting from the measure at issue.

18 The General Court upheld the first plea in law in the action and annulled the contested decision without ruling on the other pleas in law in that action.

The appeal

Admissibility

Arguments of the parties

19 Alouminion considers that the present appeal is inadmissible.

20 DEI states that, at first instance, the General Court granted its request for leave to intervene in support of the forms of order sought by the Commission. The second paragraph of Article 56 of the Statute of the Court of Justice of the European Union provides that interveners in the proceedings at first instance may bring an appeal where the decision of the General Court directly affects them.

21 DEI claims that, in order to comply with the contested decision, it recovered the State aid at issue, with interest, namely, EUR 21276766.43. Inasmuch as the judgment under appeal annulled the contested decision, that recovery no longer has any legal basis.

22 DEI submits that it is thus liable to have to refund the sum recovered and that, in the light of the settled-case law of the Court, it must, therefore, be regarded as being directly affected by the judgment under appeal.

Findings of the Court

23 It must be stated that, according to Article 56 of the Statute of the Court of Justice of the European Union, interveners other than the Member States and institutions of the Union can bring an appeal against a decision of the General Court only if that decision directly affects them.

24 It follows from the settled case-law of the Court, in that respect, that an appellant who is likely to have to refund a sum pursuant to the judgment of the General Court must be considered to be directly affected by that judgment (see to that effect, in particular, judgments of 24 September 2002, *Falck and Acciaierie di Bolzano* v *Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraphs 46 to 58; and of 2 October 2003, *International Power and Others* v *NALOO*, C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P, EU:C:2003:534, paragraphs 52 and 53).

25 In the circumstances of this case, DEI would, in implementing the judgment under appeal, be bound to reimburse the sum it recovered in order to comply with the contested decision, that is to say EUR 21276766.43, which corresponds to the difference between the preferential tariff of electricity supply wrongly applied to Alouminion and the normal tariff.

26 It follows that the judgment under appeal is such as directly to affect the financial situation of DEI, in accordance with Article 56 of the Statute of the Court of Justice of the European Union. Consequently, the appeal is admissible.

Substance

27 DEI puts forward five pleas in law in support of its appeal.

28 By its first plea in law, divided into three parts, DEI, supported by the Commission, complains that the General Court infringed Article 108(3) TFEU and Article 1(b) and (c) 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).

First part of the first plea in law

– Arguments of the parties

29 By the first part of the first plea in law, DEI, supported by the Commission, complains that the General Court held that the extension of existing aid does not constitute, *ipso facto*, new aid.

30 DEI and the Commission argue that, after having recalled, in paragraph 53 of the judgment under appeal, the settled case-law of the Court according to which the extension of existing aid creates new aid distinct from the aid that was extended and the amendment of the duration of existing aid must also be regarded as new aid (judgment of 4 December 2013, *Commission* v *Council*, C-121/10, EU:C:2013:784, paragraph 59 and case-law cited, and judgment of 4 December 2013, *Commission* v *Council*, C-111/10, EU:C:2013:785, paragraph 58), the General Court attempted, in paragraph 54 of the judgment under appeal, to temper that case-law by interpreting the judgments of 9 August 1994, *Namur-Les assurances du crédit* (C-44/93, EU:C:1994:311); and of 20 May 2010, *Todaro Nunziatina & C.* (C-138/09, EU:C:2010:291), as meaning that it is only if the aid scheme is substantially amended that it must be considered to be new aid.

31 Nevertheless, it does not follow from the judgments of 9 August 1994, *Namur-Les assurances du crédit* (C-44/93, EU:C:1994:311); and of 20 May 2010, *Todaro Nunziatina & C.* (C-138/09, EU:C:2010:291), that the extension of the period of validity of an existing aid does not, in itself, lead to the grant of new aid, and, in any event, the judgment of 9 August 1994, *Namur-Les assurances du crédit* (C-44/93, EU:C:1994:311), is not capable of being applied to the present case.

32 DEI and the Commission submit that the fact that the extension of the period of validity of existing aid creates new aid is the obvious corollary to Articles 107 and 108 TFEU.

33 According to DEI and the Commission, the State aid control system introduced by those provisions lays down a different procedure depending on whether the aid in question is existing or new. If it were to be accepted that the extension of existing aid did not constitute, *ipso facto*, new aid, a Member State could circumvent that difference in procedure by extending indefinitely such an aid, or by extending it over a short period of time.

34 DEI and the Commission consider that the concept of 'existing aid' must therefore be interpreted restrictively in order not to prejudice the obligation to notify and suspend laid down in Article 108(3) TFEU, which the Court has moreover already acknowledged in the judgments of 5 October 1994, *Italy* v *Commission* (C-47/91, EU:C:1994:358, paragraphs 24 to 26); and of 21 March 2002, *Spain* v *Commission* (C-36/00, EU:C:2002:196, paragraph 24).

35 By contrast, the concept of 'new aid' must be interpreted widely since, in accordance with Article 1(c) of Regulation No 659/1999, it includes 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

36 DEI and the Commission emphasise, moreover, that Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 (OJ 2004 L 140, p. 1, and corrigendum OJ 2005 L 25, p. 74) provides that, 'For the purposes of Article 1(c) of Regulation (EC) No 659/1999, an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the [internal] market'.

37 Given those elements and the fact that the assessment, by the Commission, of the compatibility of aid with the internal market is based on the examination of economic data and the circumstances in the market at issue at the date of adoption of its decision and for the duration of the period over which it is envisaged the aid will be granted, DEI and the Commission claim that the extension of the period of validity of an aid cannot be regarded as a modification 'of a purely formal or administrative nature', within the meaning of Article 4(1) of Regulation No 794/2004, but constitutes the alteration of existing aid.

38 According to DEI, the settled case-law of the Court, referred to in paragraph 53 of the judgment under appeal, follows the same logic.

39 Alouminion considers that the first part of the first plea must be rejected.

40 In its opinion, in paragraph 54 of the judgment under appeal, the General Court explained the interpretation method to be adopted in order to establish whether there is in actual fact an alteration to an existing aid scheme and did not therefore attempt to qualify the settled case-law referred to in paragraph 53 of that judgment.

41 Alouminion argues that the judgment of 9 August 1994, *Namur-Les assurances du crédit* (C-44/93, EU:C:1994:311), is relevant here, for in that judgment the Court found that the measure at issue had not amended the legislation introducing the contested privileges, as regards both their nature and the activities of the public institution to which they applied, and concluded that that measure was not

capable of being considered the grant or alteration of existing aid. The same conclusion ought to be reached in the present case since, according to Alouminion, the first order for interim measures neither amended nor replaced the legal and contractual basis of the existing aid.

42 Alouminion submits that the General Court was fully entitled to refer to the judgment of 20 May 2010, *Todaro Nunziatina & C.* (C-138/09, EU:C:2010:291), for, even if the Court held, in paragraphs 46 and 47 of that judgment, that situations in which amendment of the legislative framework leads to an increase in the budget allocated to the aid scheme and to the extension of its duration constitute unlawful aid, it found, by contrast, that this is not true of situations amending the legislative framework, but not affecting the amount of the aid.

43 Alouminion concludes that, taking into account those judgments, the General Court has not erred in law by ruling, in paragraph 55 of the judgment under appeal, that the first order for interim measures could not be considered the grant or alteration of existing aid.

44 As for the argument according to which the extension of existing aid constitutes, *ipso facto*, new aid, Alouminion argues that the case-law relied on by DEI and the Commission in that respect is not relevant in the present case, because it concerns the strict assessment of the concept of 'existing aid', and not the assessment of the concept of 'extension'.

– Findings of the Court

45 As a preliminary point, it must be stressed that, in the context of the State aid control system, introduced by Articles 107 and 108 TFEU, the procedure differs according to whether the aid is existing or new. Whereas existing aid may, in accordance with Article 108(1) TFEU, be lawfully implemented so long as the Commission has made no finding of incompatibility, Article 108(3) TFEU provides that plans to grant or alter existing aid must be notified, in due time, to the Commission and may not be implemented until the procedure has led to a final decision (see, to that effect, judgments of 18 July 2013, P, C-6/12, EU:C:2013:525, paragraph 36 and case-law cited; and of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 35).

46 It must also be recalled, on the one hand, that, under Article 1(c) of Regulation (EC) No 659/1999, new aid is defined as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

47 On the other hand, Article 4(1) of Regulation No 794/2004 provides that 'For the purposes of Article 1(c) of Regulation (EC) No 659/1999, an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the [internal] market'.

48 Furthermore, it follows from settled case-law that the concept of 'State aid' must be applied to an objective situation, which falls to be appraised on the date on which the Commission takes its decision (see, to that effect, judgments of 10 July 1986, *Belgium* v *Commission*, 234/84, EU:C:1986:302, paragraph 16, of 11 September 2003, *Belgium* v *Commission*, C-197/99 P, EU:C:2003:444, paragraph 86, as well as of 1 July 2008, *Chronopost and La Poste* v *UFEX and Others*, C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 144).

49 It follows that the evaluation, by the Commission, of the compatibility of aid with the internal market is based on the assessment of the economic data and of the circumstances on the market at issue at the date on which the Commission makes its decision and takes into account, in particular, the period over which the grant of that aid is provided for. Consequently, the period of validity of existing aid is a factor likely to influence the evaluation, by the Commission, of the compatibility of that aid with the internal market.

50 In those circumstances, and as held by the Court in the judgments of 4 December 2013, *Commission* v *Council* (C-121/10, EU:C:2013:784, paragraph 59) and of 4 December 2013, *Commission* v *Council* (C-111/10, EU:C:2013:785, paragraph 58), extension of the duration of existing aid must be considered to be an alteration of existing aid and therefore, in accordance with Article 1(c) of Regulation No 659/1999, constitutes new aid.

51 It is in the light of those considerations as a whole that the merits of the first part of the first plea in law should be examined.

52 In the context of that first part, DEI, supported by the Commission, complains, in essence, that the General Court held that the extension of an existing aid does not constitute, *ipso facto*, new aid.

53 DEI and the Commission submit that, in paragraph 54 of the judgment under appeal, the General Court misinterpreted the judgments of 9 August 1994, *Namur-Les assurances du crédit* (C-44/93, EU:C:1994:311), and of 20 May 2010, *Todaro Nunziatina & C.* (C-138/09, EU:C:2010:291), in order to qualify the case-law cited in paragraph 53 of the judgment under appeal, namely, the judgments of 4 December 2013, *Commission* v *Council* (C-121/10, EU:C:2013:784, paragraph 59), and *Commission* v *Council* (C-111/10, EU:C:2013:785, paragraph 58).

54 In that respect, it must be noted that, in paragraph 54 of the judgment under appeal, the General Court relied, on the one hand, upon the judgment of 9 August 1994, *Namur-Les assurances du crédit* (C-44/93, EU:C:1994:311), to hold that for Article 108(1) and (3) TFEU to apply, 'the emergence of new aid or the alteration of existing aid must be determined by reference to the provisions providing for it', its detailed rules and its limits.

55 On the other hand, in that paragraph, the Court referred to paragraphs 46 and 47 of the judgment of 20 May 2010, *Todaro Nunziatina & C.* (C-138/09, EU:C:2010:291), to add that 'it is … only where the alteration affects the actual substance of the original scheme that the latter is transformed into a new aid scheme'.

56 That interpretation is based on an erroneous reading of that last judgment. Indeed, paragraphs 46 and 47 merely show that the Court held that, by planning both an increase to the budget allocated to the aid scheme at issue and an extension of two years to the period of application of that scheme, the Member State concerned had created new aid, distinct from the aid authorised by the Commission.

57 It follows that, as DEI argues, the case-law settled by the judgments of 4 December 2013, *Commission* v *Council* (C-121/10, EU:C:2013:784, paragraph 59); and of 4 December 2013, *Commission* v *Council* (C-111/10, EU:C:2013:785, paragraph 58), according to which extension of the existing aid scheme creates new aid, follows the same logic as the judgments of 9 August 1994, *Namur-Les assurances du crédit* (C-44/93, EU:C:1994:311); and of 20 May 2010, *Todaro Nunziatina & C.* (C-138/09, EU:C:2010:291). It must, moreover, be emphasised that, in those judgments of 4 December 2013, the Court expressly referred to paragraphs 46 and 47 of the latter judgment.

58 It must, furthermore, be noted that, in this case, it follows from the facts as established by the Court and described in paragraphs 2 to 10 of the present judgment that the 1960 contract was to end on 31 March 2006, unless it was extended in accordance with its provisions. In February 2004, DEI informed AtE of its intention of terminating that contract and ceased, as of 1 April 2006, to apply the preferential tariff to AtE. Nevertheless, the first order for interim measures suspended, provisionally, the effects of that termination so that, during the period at issue, AtE and, subsequently, Alouminion continued to take advantage of the preferential tariff.

59 Therefore, contrary to the General Court's findings in paragraphs 55 to 57 of the judgment under appeal, by reinstating the application of the preferential tariff during the period at issue, the first order for interim measures had the effect of altering the time limits of application of that tariff, as agreed in

the 1960 contract, and therefore the time limits of the aid scheme, as authorised by the Commission in its decision of 23 January 1992. The first order for interim measures must, consequently, be regarded as constituting alteration of existing aid.

60 In the light of the aforementioned developments as a whole, it must be noted that, in paragraphs 54 to 56 of the judgment under appeal, the General Court misinterpreted and misapplied the case-law of the Court established by the judgments of 9 August 1994, *Namur-Les assurances du crédit* (C-44/93, EU:C:1994:311), of 20 May 2010, *Todaro Nunziatina & C.* (C-138/09, EU:C:2010:291), and confirmed by the judgments of 4 December 2013, *Commission* v *Council* (C-121/10, EU:C:2013:784, paragraph 59), and of 4 December 2013, *Commission* v *Council* (C-111/10, EU:C:2013:785, paragraph 58), and that, by ruling, in paragraph 57 of the judgment under appeal, that the first order for interim measures was not to be regarded as the grant or alteration of aid, as provided for in Article 108(3) TFEU, the General Court erred in law.

61 Accordingly, the first part of the first plea must be upheld.

Second part of the first plea in law

– Arguments of the parties

62 By the second part of the first plea in law, DEI, supported by the Commission, submits that the arguments formulated by the General Court in paragraphs 61 to 68 of the judgment under appeal are erroneous.

63 In the first place, DEI and the Commission argue that, by referring, in paragraphs 53 and 61 to 63 of the judgment under appeal, to the judgments of 6 March 2002, *Diputación Foral de Álava and Others* v *Commission* (T-127/99, T-129/99 and T-148/99, EU:T:2002:59); and of 1 July 2010, *Italy* v *Commission* (T-53/08, EU:T:2010:267), to assert that only the extension of the duration of existing aid by a legislative intervention can result in the grant of new aid, the General Court misinterpreted those judgments.

64 In that respect, DEI and the Commission state that, if, according to the settled case-law of the Court, an omission attributed to a Member State may result in the emergence of State aid (judgment of 19 mars 2013, *Bouygues and Bouygues Télécom* v *Commission and Others* and *Commission* v *France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraphs 100 to 103), such would, *a fortiori*, be the case of a measure taken by an organ of the State, even when it is not a legislative measure.

65 In the second place, DEI and the Commission submit that the General Court was wrong to draw a distinction, in paragraph 63 of the judgment under appeal, between the judgments of 6 March 2002, *Diputación Foral de Álava and Others* v *Commission* (T-127/99, T-129/99 and T-148/99, EU:T:2002:59); and of 1 July 2010, *Italy* v *Commission* (T-53/08, EU:T:2010:267), and the present case on the ground that, in the cases giving rise to those judgments, the extension of the period of validity of the aid at issue was not automatic. It is, indeed, common ground that, in the present case, the extension of the application of the preferential tariff did not flow automatically from the 1960 contract, but stemmed from the first order for interim measures.

66 In the third place, DEI and the Commission note that, contrary to the General Court's findings in paragraphs 65 to 67 of the judgment under appeal, it does not follow from the judgment of 20 September 2011, *Regione autonoma della Sardegna and Others* v *Commission* (T-394/08, T-408/08, T-453/08 and T-454/08, EU:T:2011:493), that a measure, such as the first order for interim measures, must, to constitute new aid, amend the legal framework of the existing aid and consequently alter the substance of that aid. It follows, in fact, from that judgment that the consequence of even a non-material alteration of existing aid is the grant of new aid.

67 Furthermore, the Commission argues that the legal basis of the aid during the period at issue was the first order for interim measures and that the General Court therefore wrongly held, in paragraphs 64, 67 and 68 of the judgment under appeal, that the first order for interim measures did not amend the legal framework of the 1960 contract, but merely provisionally interpreted its contents.

68 In doing so, the General Court found that that contract alone produced legal effects. According to the Commission, orders for interim measures do not interpret or decide the case provisionally, but produce independent legal effects, by recognising existing rights and obligations and constituting new rights and new obligations as well. The national court may, in particular, order interim measures when, a right must be protected or a situation resolved and, second, an imminent risk urgently or of necessity must be prevented. Thus, those measures could provide for the protection of a right that is connected to the main proceedings but is not necessarily the same right as that for which the main proceedings seek permanent judicial protection.

69 Alouminion argues that the first order for interim measures amended neither the original national legal framework nor the preferential tariff's legal framework and that, therefore, the second part of the first plea in law must be rejected.

70 First of all, Alouminion submits that DEI was wrong to refer to the judgment of 20 September 2011, *Regione autonoma della Sardegna and Others* v *Commission* (T-394/08, T-408/08, T-453/08 and T-454/08, EU:T:2011:493), to argue that even a non-substantial alteration of existing aid results in the grant of new aid. Indeed, it is apparent from the Italian version of that judgment that such an alteration is merely 'liable' to lead to new aid.

71 Next, Alouminion submits that it follows from the judgments of 6 mars 2002, *Diputación Foral de Álava* v *Commission* (T-127/99, T-129/99 and T-148/99, EU:T:2002:59); and of 1 July 2010, *Italy* v *Commission* (T-53/08, EU:T:2010:267), that, if the General Court found that the aid at issue in the cases giving rise to those judgments constituted new aid, that was because there had been intervention by the legislature.

72 Finally, Alouminion submits that the case-law cited by DEI, according to which even an omission attributed to a Member State may result in the grant of aid is not relevant in the present case.

– Findings of the Court

73 As regards, in the first place, paragraphs 61 to 64 of the judgment under appeal, it must be noted, first, that, in paragraph 63 of that judgment, the General Court stated that, in the cases giving rise to the judgments of 6 March 2002, *Diputación Foral de Álava and Others* v *Commission* (T-127/99, T-129/99 and T-148/99, EU:T:2002:59); and of 1 July 2010, *Italy* v *Commission* (T-53/08, EU:T:2010:267), the extensions at issue were regarded as not constituting new aid 'only because those extensions, far from being automatic, had required legislative intervention in order to adjust the privilege initially fixed'.

74 Even if it appears from the facts in paragraphs 1 to 9 of the judgment of 6 March 2002, *Diputación Foral de Álava and Others* v *Commission* (T-127/99, T-129/99 and T-148/99, EU:T:2002:59), and in paragraphs 1 to 11 of the judgment of 1 July 2010, *Italy* v *Commission* (T-53/08, EU:T:2010:267), that the extensions at issue stemmed from a legislative intervention, the fact remains that there is nothing factor to indicate that it is because of that situation that, in those judgments, the General Court held that those extensions constituted new aid.

75 It follows, in particular, from paragraphs 174 and 175 of the judgment of 6 March 2002, *Diputación Foral de Álava and Others* v *Commission* (T-127/99, T-129/99 and T-148/99, EU:T:2002:59), that the aid at issue had been granted on the basis of a legal instrument, namely, a legislative intervention,

adopted when the Kingdom of Spain was already a Member State and that, even if the privilege provided in that legal instrument constituted only the extension of an earlier measure, the fact remained that, because of the alteration of the duration of the aid at issue, it had to be regarded as new aid. It follows that the extensions at issue were considered to be new aid, not because they stemmed from a legislative intervention, but because of their effects.

76 Second, in paragraphs 63 and 64 of the judgment under appeal, the General Court distinguished the judgments of 6 March 2002, *Diputación Foral de Álava and Others* v *Commission* (T-127/99, T-129/99 and T-148/99, EU:T:2002:59), and of 1 July 2010, *Italy* v *Commission* (T-53/08, EU:T:2010:267), from the present case on the grounds that, in the cases giving rise to those judgments, the extension of the period of validity of the aid at issue had not been automatic.

77 It should be noted that it is clear from the facts as determined by the General Court and described in paragraphs 8 to 10 of the present judgment that, here, the extension of the application of the preferential tariff did not automatically stem from the 1960 contract, but resulted from the first order for interim measures.

78 Consequently, the arguments in paragraphs 61 to 64 of the judgment under appeal are based on an erroneous interpretation and application of the judgments of 6 March 2002, *Diputación Foral de Álava and Others* v *Commission* (T-127/99, T-129/99 and T-148/99, EU:T:2002:59); and of 1 July 2010, *Italy* v *Commission* (T-53/08, EU:T:2010:267).

79 As regards, in the second place, paragraphs 65 to 68 of the judgment under appeal, it must be noted that, in paragraphs 65 and 66 of that judgment, the General Court stated that if, in the judgment of 20 September 2011, *Regione autonoma della Sardegna and Others* v *Commission* (T-394/08, T-408/08, T-453/08 and T-454/08, EU:T:2011:493), it was indeed held that the aid granted on a legal basis substantively different from that of the scheme approved by the approval decision had to be considered new aid, the original aid, in the case which gave rise to that judgment, had nevertheless been approved by the Commission and the new aid had been granted by a new legislative measure conflicting with the Commission's approval decision.

80 Then, after noting, in paragraph 67 of the judgment under appeal, that, in the present case, it was not the purpose of the first order for interim measures to amend the legal framework of the preferential tariff in relation to that approved by the Commission, the General Court concluded therefrom, in paragraph 68 of that judgment, that the legal basis of the aid at issue was not the first order for interim measures, but the 1960 contract and the relevant national law, as interpreted, provisionally, by the first order for interim measures.

81 It must be observed, in that respect, that, in so far as it follows from paragraph 59 of the present judgment that, by extending the application of the preferential tariff during the period at issue, the first order for interim measures had the effect of altering the time limits of the 1960 contract, and accordingly the time limits of the preferential tariff as described in paragraph 4 of the present judgment, the legal basis of the aid during the period at issue was the first order for interim measures.

82 Consequently, paragraphs 67 and 68 of the judgment under appeal are vitiated by an error of law.

83 The second part of the first plea in law too must therefore be upheld in part.

Third part of the first plea in law

– Arguments of the parties

84 By the third part of its first plea in law, DEI claims that the General Court erred in law by ruling, in paragraph 58 of the judgment under appeal, that a national court's decision on interim measures of a national court cannot result in the grant of aid.

85 DEI states, in that respect, that it follows from the Court's settled case-law that national courts are competent to adopt interim measures in order to prevent the distortion of competition stemming from the grant of aid in infringement of the standstill obligation provided for in Article 108(3) TFEU and that the national courts' decisions adopting such measures are, therefore, part of the State aid preventive control system.

86 According to DEI, it follows that any national court, including a national court ruling in interlocutory proceedings, must assess whether a measure it has itself prescribed can have consequences that could render it incompatible with the internal market because it generates the grant of an illegal competitive advantage for the future.

87 In this case, that would mean that the national court's provisional assessment in the first order for interim measures regarding the termination of the 1960 contract could not permanently dispel the uncertainty concerning the legal nature and the effects of the application of the preferential tariff after the expiry of its initial period of validity and that that order ought to have been subject to the preliminary examination provided for in Article 108(3) TFEU.

88 The Commission states, like DEI, that the circumstance that a new aid was created by an order for interim measures of the national court is not relevant for the purpose of the assessment of compatibility of that aid with the internal market.

89 According to the Commission, the opposite conclusion would amount to interpreting the concept of aid subjectively, depending on the body that adopts the measure introducing the aid, and would therefore be contrary to the Court's case-law and, in particular, the judgment of 8 December 2011, *France Télécom* v *Commission* (C-81/10 P, EU:C:2011:811, paragraph 17 and case-law cited), in which it was held that the concept of State aid has a legal character and must be interpreted on the basis of objective factors and according to the effects of that aid.

90 The Commission adds that DEI's argument that it is for the national court, in the context of interlocutory proceedings, to notify the Commission and to subject to its preventive review any new measure granting new aid or altering existing aid is borne out by the judgment of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraphs 59 to 63), from which it is apparent that exclusive competence of the Commission and the primacy of EU law preclude the national court from applying a national measure where its application would be an obstacle to the recovery of the State aid.

91 The Commission notes also that, in accordance with paragraph 58 of its Notice on the enforcement of State aid law by national courts (OJ 2009 C 85, p. 1), where there is a risk that the payment of unlawful aid will be made during the course of national court proceedings, the national court's duty to prevent infringements of Article 108(3) of the Treaty can require it to issue an interim order preventing the illegal disbursement until it has ruled on the substance of the matter. It concludes that, logically, such aid cannot originate from a national court itself.

92 Alouminion submits that the third branch of the first plea in law is based on an erroneous reading of the judgment under appeal and must, therefore, be rejected.

93 Alouminion argues that, in actual fact, in paragraph 58 of the judgment under appeal, the General Court held that the first order for interim measures does not have the effect of granting a new privilege, distinct from the existing aid. The General Court has not, therefore, excluded the situation in which a State aid is granted by means of a national court's decision granting a new privilege distinct from existing aid, but merely found that such was not the case here.

94 In any event, Alouminion claims, first, that paragraph 58 of the judgment under appeal is superfluous in that it confirms, by converse inference, the reasoning developed in paragraphs 55 to 57 of that judgment and, second, that the assessment, by the Tribunal, of the contents of the first order for interim measures amounts to a factual assessment, which falls outside the review by the Court in the context of the appeal.

– Findings of the Court

95 It should be noted, first of all, that, in accordance with settled case-law, implementation of the State aid control system is a matter, first, for the Commission and, second, for the national courts, each of which fulfil complementary and separate roles (judgments of 9 August 1994, *Namur-Les assurances du crédit*, C-44/93, EU:C:1994:311, paragraph 14; and of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 27 and case-law cited, as well as of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 36).

96 National courts do not have jurisdiction to rule on a State aid's compatibility with the internal market, that supervision falling within the exclusive competence of the Commission (see, to that effect, judgments of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 27, of 18 July 2013, P, C-6/12, EU:C:2013:525, paragraph 38 and case-law cited, and of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 37).

97 By contrast, it is for the national courts to ensure the safeguarding, until the final decision of the Commission, of the rights of individuals when the obligation to give prior notice to the Commission under Article 108(3) TFEU has been infringed (judgments of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 27 and case-law cited, of 18 July 2013, P, C-6/12, EU:C:2013:525, paragraph 39, as well as 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 28).

98 For this purpose, proceedings concerning State aid may be brought before national courts, requiring them to interpret and apply the concept of 'State aid' in Article 107(1) TFEU, in particular in order to determine whether a measure introduced without observance of the preliminary examination procedure provided for in Article 108(3) EC ought to have been subject to this procedure (judgments of 18 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraph 50 and case-law cited, as well as of 18 July 2013, *P*, C-6/12, EU:C:2013:525, paragraph 38).

99 If the national courts reach the conclusion that the measure at issue should have in fact been notified to the Commission, they must ascertain whether the Member State concerned has fulfilled that obligation and, if that is not the case, declare that measure unlawful (judgment of 19 March 2015, *OTP Bank*, C-672/13, EU:C:2015:185, paragraph 68).

100 It is for those courts to draw all the necessary inferences from the infringement of Article 108(3) TFEU, in accordance with domestic law, with regard both to the validity of the acts giving effect to the aid and the recovery of financial support granted in disregard of that provision (judgment of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 29 and case-law cited).

101 National courts are, in particular, competent to adopt interim measures in order to prevent the distortion of competition stemming from the grant of an aid in contravention of the standstill obligation provided for in Article 108(3) TFEU (see judgments of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires et Syndicat national des négociants et transformateurs de saumon*, C-354/90, EU:C:1991:440, paragraph 11, of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraphs 39, 40 and 53, and of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 34). Thus, in accordance with paragraph 58 of the Commission's Notice on the enforcement of State aid law by national courts (OJ 2009 C 85, p. 1), where there is a risk that the payment of unlawful aid will be made during the course of national court proceedings, the court may find it necessary to issue an interim order preventing the illegal disbursement until the substance of the matter is resolved.

102 It is in the light of all these considerations that the merits of the third part of the first plea in law, by which DEI complains that the General Court ruled, in paragraph 58 of the judgment under appeal, that a national court's decision on interim measures cannot have as a consequence the grant of a State aid, must be assessed.

103 It should be noted in this regard that, in paragraph 58 of the judgment under appeal, the General Court held that the act of accepting that the first order for interim measures constitutes the grant or alteration of aid, in accordance with Article 108(3) TFEU, 'would ... be tantamount to requiring, in law and in fact, the national court hearing the application for interim measures in a dispute relating to a contract, as in the present case, to notify to the Commission and submit for its preventive review not only new aid or alterations of aid properly so-called granted to an undertaking in receipt of existing aid but also all measures which affect the interpretation and implementation of that contract that may have an impact on the functioning of the internal market, on competition or simply on the actual duration, over a specific period, of aid which continues to exist in principle although the Commission has not taken any decision with regard to approval or incompatibility'.

104 Thus, in paragraph 58 of the judgment under appeal, the General Court differentiated between 'new aid or alterations of aid properly so-called' and measures that affect the interpretation and implementation of a contract approved by the Commission as a State aid compatible with the internal market, in other words, measures such as the first order for interim measures, and concluded that the national court hearing the application for interim measures is not subject to the obligations falling upon, in general, the national court in accordance with Articles 107 and 108 TFEU.

105 It must be borne in mind that the application of the EU State aid rules is based on a duty of sincere cooperation between the national courts, on the one hand, and the Commission and the European Union courts, on the other, in the context of which each acts on the basis of the role assigned to it by the FEU Treaty. In the context of that cooperation, national courts must take all the measures, whether general or specific, necessary to ensure fulfilment of the obligations under EU law and must refrain from those that may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU. Accordingly, national courts must, in particular, refrain from taking decisions that conflict with a decision of the Commission (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 41).

106 Furthermore, the Court held, in paragraphs 46 and 47 of the judgment of 18 July 2013, *P* (C-6/12, EU:C:2013:525), that it is for the national courts to verify whether the detailed arrangements for the implementation of an aid regime have been amended and, if it were to transpire that any amendments had had the effect of extending the scope of the regime, it could be necessary to consider that the aid was new, with the consequence that the notification procedure set out in Article 108(3) TFEU would be applicable.

107 Accordingly, it is important to declare that the General Court erred in law by holding, in paragraph 58 of the judgment under appeal, that, because it is ruling in interlocutory proceedings, a national court seised of a dispute relating to a contract does not have to notify to the Commission, in accordance with Article 108(3) TFEU, 'all measures which affect the interpretation and implementation of that contract that may have an impact on the functioning of the internal market, on competition or simply on the actual duration, over a specific period, of aid which continues to exist'.

108 Indeed, to make it possible for national courts hearing an application for interim measures to escape the obligations incumbent upon them in the context of the control of State aids introduced by Articles 107 and 108 TFEU would lead those courts to disregard the limits of their own jurisdiction, intended to guarantee the observance of EU State aid law, and also to infringe their duty of sincere cooperation with the institutions of the Union, referred to in paragraph 105 of the present judgment, and would, therefore, undeniably prejudice the effectiveness of those articles.

109 Accordingly, the third part of the first plea must be [upheld].

110 In these circumstances, the first plea must be upheld in its entirety and, without there being any need to examine the other grounds of appeal, the judgment under appeal must be set aside.

Referral of the case back to the General Court

111 According to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the latter may, where the decision of the General Court has been annulled, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

112 In the present case, since the General Court examined only one of the pleas in law put forward by the parties, the Court considers that the state of the proceedings does not permit it to give final judgment. Accordingly, the case must be referred back to the General Court.

Costs

113 Since the case has been referred back to the General Court, the costs relating to the present appeal proceedings must be reserved.

On those grounds, the Court (Tenth Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 8 October 2014 in** *Alouminion* **v** *Commission* **(T-542/11, EU:T:2014:859);**

2. **Refers Case T-542/11 back to the General Court of the European Union;**

3. **Reserves the costs.**

[Signatures]