Reports of Cases

Case T-79/14

Secop GmbH
v
European Commission

(State aid — Rescuing firms in difficulty — Aid in the form of a State guarantee — Decision declaring the aid compatible with the internal market — Failure to initiate the formal investigation procedure — Serious difficulties — Procedural rights of the interested parties)

Summary — Judgment of the General Court (First Chamber), 1 March 2016

1. *State aid — Examination by the Commission — Preliminary review and main review — Compatibility of aid with the internal market — Difficulties of assessment — Commission's duty to initiate the main review procedure — Serious difficulties — Concept*

   (Art. 108(2) and (3) TFEU)

2. *State aid — Examination by the Commission — Discretion of the Commission — Possibility of adopting guidelines — Judicial review — Limits*

   (Art. 107(3) TFEU)

3. *State aid — Prohibition — Exceptions — Aid capable of being regarded as compatible with the internal market — Aid for rescuing a firm in difficulty — Guidelines on State aid for rescuing and restructuring firms in difficulty — Objectives*

   (Art. 107(3)(c) TFEU; Commission Notice 2004/C 244/02, point 12)

4. *State aid — Prohibition — Exceptions — Aid capable of being regarded as compatible with the internal market — Aid for rescuing a firm in difficulty — Limited effects in the internal market — Urgency — Commission examination under a simplified procedure*

   (Art. 107(3)(c) TFEU; Commission Notice 2004/C 244/02, point 23)

5. *State aid — Planned aid — Examination by the Commission — No right of competitors of the aid beneficiary to be associated with the procedure in the preliminary phase of the examination — Existence of such a right in merger matters — Decision of the Commission finding aid compatible with the internal market without opening the formal investigation procedure and without hearing a competitor associated with a merger concerning the aid beneficiary — Lawfulness — No breach of the principle of equal treatment*

   (Art. 108(3) TFEU; Council Regulation No 139/2004, Art. 18(1); Commission Regulation No 802/2004, Art. 11(b))

6. *State aid — Examination of complaints — Obligations of the Commission — Preliminary examination phase — Obligation of the Commission to conduct inquiries — Scope*

(Arts 107(1) TFEU and 108(3) TFEU)

7. *State aid — Planned aid — Notifying the Commission — Decision of the Commission not to raise an objection — Information gathered by the Commission pursuant to the Merger Regulation — Use as evidence — Scope — Account taken to justify the opening of a procedure on another legal basis*

(Council Regulation No 139/2004, Art. 17(1))

8. *State aid — Examination by the Commission — Compatibility of aid with the internal market — Discretion — Existence of a parallel merger procedure — Obligation of consistency between the provisions of the Treaty on State aid and other provisions of the Treaty*

(Arts 107 TFEU and 108 TFEU)

1. See the text of the decision.

(see paras 22-27)

2. See the text of the decision.

(see para. 29)

3. According to point 12 of the Community guidelines on State aid for rescuing and restructuring firms in difficulty ('the guidelines'), a newly created firm is not eligible for rescue or restructuring aid even if its initial financial position is insecure. That is the case, for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over that undertaking's assets. The objective of point 12 is to prevent the creation of unviable undertakings or loss-making activities which, from the moment they are created, are dependent on State support.

To that end, the clarification of the second sentence of that paragraph applies in particular to the situation of the disposal of the assets of an existing legal entity to another legal entity, newly created or pre-existing. Thus, it is the economic entity within which the assets acquired were newly incorporated that can, where relevant, be qualified as a new firm. As for the legal entity which disposes of the assets, the objective of such an operation could precisely be its rescue. In the situation in which the assets are transferred, it is not the entity formed of the economic activities retained by the transferor company that is relevant, for the purpose of the classification 'newly created firm' but the entity made up of the economic activities of the transferee company, within which the transferred assets were integrated. It is also normal and reasonable for a firm in difficulty to dispose of certain assets and focus its activity on its core business, whether from a geographical or sectoral perspective, in order to improve the chances of economic recovery.

(see paras 31, 32, 36)

4. Aids for rescuing firms in difficulty have very limited effects on the internal market, both by the restriction of eligible measures (loan guarantees or loans) and by their temporary and reversible nature (end of guarantee and loan repayment after a maximum of six months, subject to the submission, after this time, of a restructuring or liquidation plan) and their restriction to only those measures necessary for the temporary survival of the firm involved. It is those limited effects, together with the urgency of rescue aid, that justify the Commission normally examining them under a simplified procedure, in accordance with point 30 of the guidelines, striving to take a decision within a period of one month, if

the aid meets certain criteria. The consideration of the cumulative effect of any allegedly illegal possible earlier aid would make it impossible to meet that deadline and, therefore, would not be compatible with the urgency of that review and the limited impact of that aid on competition.

Furthermore, a consideration of earlier aid other than that defined in point 23 of the guidelines — which is already the subject of a final negative decision by the Commission — would require the Commission to carry out, indirectly, a review of that earlier aid, the classification of which as aid and unlawful aid can be disputed between the Commission and the Member State concerned and must, where appropriate, be the object of a separate procedure and decision. That could lead, in the end, either to the refusal of rescue aid, on the basis of a cursory review of earlier aid, whereas the latter could later be proved lawful or not to constitute aid, or to undue delay of the decision on rescue aid. Therefore, such a way of proceeding appears also to be incompatible with the requirements arising from the principle of legal certainty.

(see paras 52, 53)

5. In State aid matters, the persons whose interests are likely to be affected by the granting of aid, namely competitors, have no right to be automatically associated with the procedure in the preliminary phase of the examination. By contrast, in merger matters, the other interested parties within the meaning of Article 11(b) of Regulation No 802/2004 on the implementation of Regulation No 139/2004 on the control of concentrations between undertakings have the right to express their view at all stages of the procedure, including the preliminary phase.

In the case of a sale of all the assets of a subsidiary, its parent company must be assimilated to the vendor of those assets and thus has the status of party to the proposed merger. Unlike competitors, in accordance with Article 18(1), *in fine*, of Regulation No 139/2004, interested parties have the right to express their view at all stages of the procedure, including the preliminary phase. Therefore, the situation of an interested party, in the context of the preliminary examination phase in State aid matters, and that of another interested party, within the meaning of Article 11(1)(b) of Regulation No 802/2004, in the context of the procedure in merger matters, cannot be regarded as identical. It follows that the fact that the Commission did not, before adopting a decision finding a State aid compatible with the internal market, give the undertaking acquiring those assets, which at the same time has the status of competitor of the said parent company receiving the aid, and thus the status of a party interested by the aid, the opportunity to state its point of view does not infringe the principle of equal treatment.

(see paras 63, 64, 67)

6. In the context of the preliminary examination procedure, the Commission may in principle confine itself to taking into account the information provided by a Member State and is not required to conduct on its own initiative preparatory inquiries into all the circumstances if the information provided by the notifying Member State enables it to satisfy itself, after an initial examination, that the measure in question either does not constitute aid within the meaning of Article 107(1) TFEU or, if it is classified as aid, is compatible with the internal market.

(see para. 76)

7. The fact that information gathered under Regulation No 139/2004 may not be directly used as evidence in a procedure not governed by that regulation does not prevent it nevertheless amounting to factors that may, where appropriate, be taken into account to justify the opening of a procedure on another legal basis.

In that regard, the Commission is at least entitled, in the State aid procedure, to request the production of information or documents that have come to its knowledge in the merger procedure, if that information or those documents are relevant for the assessment of the aid in question.

(see paras 82, 83)

8. The Commission must, as a matter of principle, avoid the inconsistencies that can arise in the implementation of the various provisions of EU law. That obligation for the Commission to maintain the consistency between the provisions of the Treaty relating to State aid and other provisions of the Treaty is all the more necessary where those other provisions also have undistorted competition in the internal market as their aim. Therefore, when adopting a decision on the compatibility of aid with the internal market, the Commission is not to ignore the risk of individual traders undermining competition in the internal market.

Thus, when adopting a decision on the compatibility of State aid, the Commission must take into account the consequences of a merger that it is assessing under another procedure, insofar as the conditions of that merger are of such a kind as to influence the assessment of the effect on competition the aid at issue may have.

(see paras 85, 86)