Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

6 April 2017*

(State aid — Maritime transport — Public service compensation — Capital increase — Decision declaring aid incompatible with the internal market and ordering that it be recovered — Bankruptcy of the applicant — Capacity to be a party to legal proceedings — Continued interest in bringing proceedings — Failure to find that there was no need to adjudicate — Concept of aid — Service of general economic interest — Private investor test — Manifest error of assessment — Error of law — Plea of illegality — Obligation to state reasons — Rights of the defence — Decision 2011/21/EU — Guidelines on State aid for rescuing and restructuring firms in difficulty — Union framework applicable to State aid in the form of public service compensation — *Altmark* judgment)

In Case T-220/14,

Saremar — Sardegna Regionale Marittima SpA, established in Cagliari (Italy), represented by G.M. Roberti, G. Bellitti and I. Perego, lawyers,

applicant,

v

European Commission, represented by G. Conte, D. Grespan, and A. Bouchagiar, acting as Agents,

defendant,

supported by

Compagnia Italiana di Navigazione SpA, established in Naples (Italy), represented initially by F. Sciaudone, R. Sciaudone, D. Fioretti and A. Neri, and subsequently by M. Merola, B. Carnevale and M. Toniolo, lawyers,

intervener,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2013) 9101 final of 22 January 2014 concerning aid measures SA.32014 (2011/C), SA.32015 (2011/C), SA.32016 (2011/C) granted by the Autonomous Region of Sardinia (Italy) to Saremar in the form of public service compensation and a capital increase, in so far as that decision found those measures to be State aid incompatible with the internal market and ordered that it be recovered,

THE GENERAL COURT (Eighth Chamber),

composed of D. Gratsias (Rapporteur), President, M. Kancheva and N. Półtorak, Judges,

* Language of the case: Italian.

Registrar: J. Palacio González, Principal Administrator,

having regard to the written part of the procedure and further to the hearing on 20 July 2016,

gives the following

Judgment [1]

[omissis]

Law

1. Saremar's capacity to be a party to legal proceedings

43 As a preliminary point, it is apparent from the explanations and documents provided by the parties to the Court on 11 and 29 July 2016 that, given the impossibility of repaying that part of the aid in dispute that had already been paid out, Saremar requested to be admitted to a procedure for an arrangement with creditors with a view to its liquidation, which request was homologated by the Tribunale di Cagliari (Cagliari Court, Italy) on 22 July 2015. Saremar ceased all activity on 31 March 2016 and is at an advanced stage of the liquidation phase, inasmuch as all privileged creditors have had their claims satisfied and the plan is to proceed in the coming months with an initial substantial distribution amongst the unsecured creditors.

44 Under the applicable national law and procedural rules, a company placed under liquidation may lose its capacity to be a party to legal proceedings, at least in its own name. Moreover, the applicant itself states that that may be the case under Italian law. At the hearing and in its correspondence of 29 July 2016, the Commission submitted only that the applicant's bankruptcy calls its interest in bringing proceedings into question, but not that that liquidation calls into question its capacity to be a party to legal proceedings. However, since the applicant's loss of capacity to be a party to legal proceedings would make the question of its interest in bringing proceedings pointless, it must be ascertained whether it has retained that capacity in the course of the present proceedings.

45 In that regard, although, as the Court of Justice has held, the concept of 'legal person' in the fourth paragraph of Article 263 TFEU does not necessarily coincide with the corresponding concepts specific to the different legal orders of the Member States, it nevertheless follows from the case-law that the concept implies, in principle, the existence of a legal personality constituted under the law of a Member State or third country and capacity to be a party to legal proceedings recognised under that law (see, to that effect, judgments of 20 March 1959, *Nold* v *High Authority*, 18/57, EU:C:1959:6; 28 October 1982, *Groupement des Agences de voyages* v *Commission*, 135/81, EU:C:1982:371, paragraph 10; 18 January 2007, *PKK and KNK* v *Council*, C-229/05 P, EU:C:2007:32, paragraph 114; and order of 24 November 2009, *Landtag Schleswig-Holstein* v *Commission*, C-281/08 P, not published, EU:C:2009:728, paragraph 22). Thus, it is only in exceptional circumstances, including when imperatives of ensuring effective judicial protection so require, that the admissibility of an action brought by an entity that does not have capacity to be a party to legal proceedings may be allowed (see, to that effect, judgment of 18 January 2007, *PKK and KNK* v *Council*, C-229/05 P, EU:C:2007:32, paragraphs 109 to 114). That capacity to be a party to legal proceedings must be retained throughout the proceedings (see, to that effect, judgments of 20 September 2007, *Salvat père & fils and Others* v *Commission*, T-136/05, EU:T:2007:295, paragraphs 25 to 27, and 21 March 2012, *Marine Harvest Norway and Alsaker Fjordbruk* v *Council*, T-113/06, not published, EU:T:2012:135,

1 — Only the paragraphs of this judgment which the Court considers it appropriate to publish are reproduced here.

paragraphs 27 to 29). The existence of legal personality and the capacity to be a party to legal proceedings must be examined in the light of relevant national law (judgment of 27 November 1984, *Bensider and Others* v *Commission*, 50/84, EU:C:1984:365, paragraph 7, and order of 3 April 2008, *Landtag Schleswig-Holstein* v *Commission*, T-236/06, EU:T:2008:91, paragraph 22).

46 In the present case, it is apparent from Saremar's correspondence of 29 July 2016 that, in accordance with the case-law of the Corte suprema di cassazione (Court of Cassation, Italy), a company that is the subject of an arrangement with creditors retains the right to bring legal proceedings in its own name and to be a party to legal proceedings in order to protect its assets. Moreover, the applicant attached to that correspondence a letter from its judicial liquidators dated 26 July 2016 confirming that the terms of reference in the present proceedings remain valid. Consequently, the conclusion is that, despite being placed under liquidation, Saremar has not lost its capacity to be a party to legal proceedings in the course of the present proceedings.

2. The Commission's plea that there is no need to adjudicate

47 The Commission submits that, due to Saremar's ongoing liquidation, it has lost its interest in bringing proceedings in the course of the present proceedings. It observes that Saremar's bankruptcy proceedings are at an advanced stage and could be completed before judgment is given in the present proceedings. Moreover, as the applicant itself recognises, it can longer engage in economic activity, even if the contested decision were to be annulled, thereby exempting it from the obligation to restore the aid. Lastly, the interest of Saremar's creditors in seeing the amount of the disputed aid being excluded from its liabilities is distinct from the interest in pursuing its economic activity. The Commission states by way of conclusion that such a lack of interest in bringing proceedings should lead the Court to rule that there is no need to adjudicate in the present case.

48 In response to those arguments, Saremar submits that the annulment of the contested decision will produce legal effects for it, in that it will reduce its liabilities in the arrangement with creditors by over EUR 11 million, thereby enabling full satisfaction of all creditors' claims.

49 In accordance with established case-law, an interest in bringing proceedings is an essential and fundamental prerequisite for any legal proceedings (see judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 58 and the case-law cited).

50 In that regard, it follows from Article 263 TFEU that there is a clear distinction between the right to bring an action for annulment as recognised for EU institutions and the Member States, referred to in the second paragraph of that article, and that of natural and legal persons, referred to in the fourth paragraph thereof. Thus, according to settled case-law, in order to exercise their right to bring proceedings, the EU institutions and the Member States need not demonstrate that they have *locus standi* or an interest in bringing proceedings (see, to that effect, judgment of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, T-443/08 and T-455/08, EU:T:2011:117, paragraph 64, and order of 19 February 2013, *Provincie Groningen and Others* v *Commission*, T-15/12 and T-16/12, not published, EU:T:2013:74, paragraphs 42 and 44 and the case-law cited).

51 By contrast, the admissibility of an action brought by natural and legal persons as referred to in the fourth paragraph of Article 263 TFEU is subject, firstly, to the condition that they have *locus standi*, that is to say, in accordance with the wording of that provision, that their action is directed at an act which is addressed to them or an act which is of direct and individual concern to them, or a regulatory act not entailing implementing measures if that act is of direct concern to them. Secondly, that interest in bringing proceedings must exist at the stage of lodging the action, which is a distinct condition of admissibility from *locus standi*. Like the purpose of the action, the interest in bringing

proceedings must continue until the final decision, failing which there will be no need to adjudicate (see judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraphs 57 and 59 to 62 and the case-law cited).

52 The lack of legal interest in bringing proceedings constitutes an absolute bar to proceedings which it is for the Court to examine of its own motion either at the time the action is lodged in order to determine whether the action is admissible in the first place, or during the course of the proceedings in order to ascertain whether there is still a need to adjudicate on the action (see, to that effect, order of 24 March 2011, *Internationaler Hilfsfonds* v *Commission*, T-36/10, EU:T:2011:124, paragraph 46 and the case-law cited).

53 Such an interest requires that the annulment of that act must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party which brought it (judgments of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraph 42, and 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 55). An applicant's interest in bringing proceedings must be vested and current and may not concern a future and hypothetical situation (see judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 56 and the case-law cited).

54 As a preliminary point, the present action meets the admissibility conditions referred to in paragraphs 51 to 53 above both in terms of the applicant's *locus standi* and its having an interest in bringing proceedings at the time the action is lodged, a point not disputed by the Commission.

55 Regarding, in particular, the interest in bringing proceedings, it should be noted that, on the date the action was lodged, the contested decision adversely affected the applicant, in that the Commission declared incompatible and unlawful the aid the applicant had received and ordered that it be recovered. By that fact alone, the contested decision brought about a change in the legal position of the company which, as from the time of adoption of that decision, was no longer entitled to receive that aid and had to expect, in principle, to have to repay that aid (see judgment of 21 December 2011, *ACEA* v *Commission*, C-319/09 P, not published, EU:C:2011:857, paragraphs 68 and 69 and the case-law cited).

56 It is clear that, notwithstanding Saremar's being placed under liquidation, it has not lost its interest in bringing proceedings as defined in paragraph 55 above.

57 First of all, the contested decision has not been repealed or withdrawn, so that the present action retains its purpose (see, to that effect, judgment of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraph 48).

58 Next, the legal effects of the contested decision have not become obsolete solely due to Saremar's bankruptcy.

59 First of all, because of the contested decision, the RAS is still not allowed to disburse to Saremar that part of the disputed capital increase which it had not paid because of being notified of that operation by the Commission, as indicated in the minutes of the shareholders' meeting of Saremar dated 11 July 2012, annexed to the application. There is nothing in the case file ruling out the possibility that, should the contested decision be annulled, that part of the disputed capital increase, which Saremar would then be entitled to receive, might be integrated into its assets.

60 Secondly, regarding the part of the disputed aid already paid by the RAS to Saremar, according to settled case-law, the mere fact that the undertaking has been placed in bankruptcy proceedings, inter alia when those proceedings lead to the undertaking's being liquidated, does not affect the principle that aid is to be recovered. In such a scenario, the re-establishment of the previous situation and the elimination of the distortion of competition resulting from the unlawfully paid aid may, in principle,

be achieved by entry of the liability relating to the repayment of the aid in question in the schedule of liabilities (see judgment of 1 July 2009, *KG Holding and Others* v *Commission*, T-81/07 to T-83/07, EU:T:2009:237, paragraphs 192 and 193 and the case-law cited). Consequently, because of the contested decision, the disputed aid must, at the very least, remain in Saremar's liabilities, so that, even if it cannot be repaid to the RAS, it is no longer included in the applicant's assets.

61 Consequently, it should be noted that Saremar's bankruptcy does not affect the finding in paragraph 55 above, to the effect that annulment of the contested decision would be liable to procure an advantage for the applicant, as it would necessarily bring about a change to its legal position in regards to the disputed aid. Annulment would also have the effect of improving significantly its economic situation, as the disputed aid could once again be integrated into its assets. Furthermore, that analysis is confirmed by the judgment of 13 September 2010, *Greece and Others* v *Commission* (T-415/05, T-416/05 and T-423/05, EU:T:2010:386), in which the Court held that companies in liquidation that had repaid the aid at issue therein retained an interest in bringing proceedings since, in the event of annulment, the Hellenic Republic would be liable to return to them the amounts repaid, which would then be entered in the assets of their respective liquidation balance sheets (judgment of 13 September 2010, *Greece and Others* v *Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraph 62).

62 Nor has the Court been informed to date that the process of liquidating Saremar has been completed.

63 It follows from all the foregoing that Saremar retains an interest in bringing the present proceedings and, therefore, that there is a need to adjudicate in the present case.

[*omissis*]

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Saremar — Sardegna Regionale Marittima SpA to bear its own costs and to pay those incurred by the European Commission and Compagnia Italiana di Navigazione SpA.

Gratsias Kancheva Półtorak

Delivered in open court in Luxembourg on 6 April 2017.

[Signatures]