



Reports of Cases

Case T-108/16

Naviera Armas, SA
v
European Commission

(State aid — Conditions of use of the Puerto Las Nieves port infrastructure by a shipping company — Exclusive use of infrastructures financed by public funds, without a concession contract — Partial exoneration of payment of port dues — Complaint lodged by a competitor — Decision finding no State aid at the end of the preliminary investigation procedure — Serious difficulties in the examination of the measures concerned — Developments in the situation during the administrative procedure — Concept of advantage granted by means of State resources — Errors of assessment of the facts and errors of law — Decision of a national court suspending the effects of a tendering procedure — Requirement of diligent and impartial examination of the complaint)

Summary — Judgment of the General Court (Ninth Chamber), 15 March 2018

1. *State aid — Examination by the Commission — Preliminary review and main review — Commission's duty to initiate the main review procedure in the event of serious difficulties — Circumstances enabling the existence of such difficulties to be determined — Length of the preliminary investigation procedure — State measures not notified but having formed the subject of complaints from interested third parties — Particularly long duration of the preliminary investigation procedure due to objective circumstances unrelated to any serious difficulties*

(Arts 107 TFEU and 108 TFEU)

2. *State aid — Examination by the Commission — Preliminary review and main review — Commission's duty to initiate the main review procedure in the event of serious difficulties — Circumstances enabling the existence of such difficulties to be determined — Indicia found in the content of the contested decision — Scope of judicial review — Examination of parts of the complaint being vitiated by significant lacuna and important errors of assessment — Indicia of serious difficulties*

(Arts 107 TFEU and 108 TFEU)

3. *State aid — Examination by the Commission — Preliminary review and main review — Commission's duty to initiate the main review procedure in the event of serious difficulties — Circumstances enabling the existence of such difficulties to be determined — Judicial review — Burden of proof*

(Arts 107 TFEU and 108 TFEU)

4. *State aid — Meaning — Grant attributable to the State of an advantage by means of State resources — Objectives pursued by the State — Irrelevant*

(Art. 107(1), TFEU)

5. *State aid — Examination of complaints — Obligations of the Commission — Preliminary examination phase — Obligation of the Commission to conduct inquiries — Scope — Diligent and impartial examination of the complaint*

(Arts 107(1), TFEU and 108 TFEU; Regulation No 659/1999, Article 10(1) and (2); Regulation No 2015/1589, Art. 12(1) and (2))

6. *State aid — Meaning — Assessment according to the criterion of the private investor — Grant of exclusive access to port infrastructure managed by a public authority — Criteria for assessment*

(Art. 107(1), TFEU)

7. *State aid — Meaning — Selective nature of the measure — Measure conferring a tax advantage — Measure of a general nature applicable without discrimination to all economic operators — Not selective in character*

(Art. 107(1), TFEU)

1. Where the Commission is unable to reach the firm view, following an initial examination in the context of the procedure under Article 108(3) TFEU, that a State aid measure either is not ‘aid’ within the meaning of Article 107(1) TFEU or, if classified as aid, is compatible with the Treaty, or where that procedure has not enabled the Commission to overcome all the difficulties involved in assessing the compatibility of the measure under consideration, the Commission is under a duty to initiate the procedure under Article 108(2) TFEU, without having any discretion in that regard.

The existence of serious difficulties, the presence of which obliges the Commission to open the formal investigation procedure, must be conducted objectively, focusing on both the circumstances surrounding the adoption of the act being challenged and the assessments on which the Commission based itself, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the internal market. In that regard, the particularly long period of more than 31 months from the preliminary examination procedure of a State measure which is not notified but having formed the subject of a complaint from a competing undertaking, may, along with other factors, indicate that the Commission encountered serious difficulties of assessment necessitating the initiation of the procedure under Article 108(2) TFEU.

However, in so far as both the preliminary investigation procedure and developments in the situation as well as the resulting additional exchanges between the Commission and the Member State concerned, on the one hand, and between the Commission and the competing undertaking, on the other, are objective facts that warranted extending the duration of the preliminary investigation into the measures identified in the complaint as State aid, such a duration of 31 months from the preliminary investigation procedure, even if it considerably exceeds what could generally be said to be required for an initial examination of the measures criticised in the complaint, does not in itself reveal serious difficulties that required the Commission to open the formal investigation procedure provided for in Article 108(2) TFEU.

(see paras 46, 48, 63-65, 72, 73)

2. Where the action is aimed at challenging the merits of a Commission decision finding that there is no State aid at the end of the preliminary investigation procedure in relation to a complaint alleging State aid, it is for the Court to assess the indicia found in the content of the contested decision in order to determine whether there are any serious difficulties, the presence of which obliges the Commission to open the formal investigation procedure.

That judicial review by the Court of the existence of serious difficulties will, by its nature, go beyond simple consideration of whether or not there has been a manifest error of assessment. A comprehensive judicial review is especially necessary where the applicant criticises the Commission's assessment of the very categorisation of the measures in question as State aid, as that concept, as defined in the Treaty FEU, is legal in nature and must be interpreted on the basis of objective factors.

In that regard, the significant lacuna which vitiates the examination of the parts of the complaint at the time of the preliminary investigation procedure and the errors of assessment which vitiate the decision finding that there is no State aid, constitute indications that the investigation of the measure questioned under those parts gave rise to some serious difficulty.

(see paras 48, 49, 76, 127, 145)

3. See the text of the decision.

(see paras 51, 154, 160-166)

4. Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, the concept of aid is objective, the test being whether a State measure confers an advantage on one or more particular undertakings.

An advantage may thus be granted contrary to Article 107(1) TFEU, even when it was not specifically instituted to benefit a particular undertaking or undertakings.

Accordingly, the finding that a port infrastructure was not developed in order to benefit a maritime company specifically nor awarded to it or any other undertaking whatsoever at the time of its construction does not rule out the possibility that the conditions under which that infrastructure was made available to that maritime company for commercial use may have involved a grant of State aid to it.

(see paras 86-88)

5. Thus, it results from both the Commission's diligent and impartial examination of the complaints filed with it and from the scheme of Article 10(1) and (2) of Regulation No 659/1999, reproduced in essence in Article 12(1) and (2) of Regulation 2015/1589, that it is for the Commission, when it has received a complaint alleging infringement of Article 107(1) TFEU and identifying in an unequivocal and reasoned manner the measures giving rise to that infringement, to examine carefully whether those measures may be categorised as State aid, if necessary by seeking out the cooperation of the Member State concerned and taking into consideration elements that were not expressly put forward by the complainant. This is especially necessary where a complainant does not have the powers of investigation conferred on the Commission by Article 108 TFEU nor, in principle, its investigatory capabilities.

(see para. 102)

6. See the text of the decision.

(see paras 116-128)

7. See the text of the decision.

(see paras 156-160)