Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

9 September 2020*

(State aid – Aid for an investment project in western Slovakia – Regional investment aid – Dismissal of a complaint – Decision not to raise any objections – Conditions for exemption – Article 14 of Regulation (EU) No 651/2014 – Scope of the Commission's supervisory power – Guidelines on regional State aid for 2014-2020 – Concept of SME – Article 3(2) and (3) of Annex I to Regulation No 651/2014 – Data used for the staff headcount and the financial amounts and reference period – Article 4 of Annex I to Regulation No 651/2014 – Doubts as to the compatibility of the aid with the internal market – Article 4(4) of Regulation (EU) 2015/1589 – Serious difficulties)

In Case T-745/17,

Kerkosand spol. s r. o., established in Šajdíkove Humence (Slovakia), represented by A. Rosenfeld and C. Holtmann, lawyers,

applicant,

v

European Commission, represented by K. Blanck and A. Bouchagiar, acting as Agents,

defendant,

APPLICATION pursuant to Article 263 TFEU seeking annulment of Commission Decision C(2017) 5050 final of 20 July 2017 concerning investment aid to the Slovak glass sand producer NAJPI a. s. (SA.38121 (2016/FC) – Slovakia) (OJ 2017 C 336, p. 1),

THE GENERAL COURT (Third Chamber),

composed of A.M. Collins, President, V. Kreuschitz (Rapporteur) and G. Steinfatt, Judges,

Registrar: S. Bukšek Tomac, Administrator,

having regard to the written part of the procedure and further to the hearing on 21 January 2020,

gives the following

* Language of the case: German.

Judgment

Background to the dispute

1 The applicant, Kerkosand spol. s r. o., operates a glass sand extraction site and processing plant in Šajdíkove Humence (Slovakia).

2 On 12 December 2013, the applicant lodged a complaint with the European Commission, alleging that, by decision of 22 July 2013, the Slovenská inovačná a energetická agentúra (Slovak Innovation and Energy Agency, Slovakia), had granted the company NAJPI a. s. ('the recipient undertaking') unlawful aid of EUR 4 999 999.46 for an investment project in western Slovakia ('the aid at issue').

3 That aid was granted on the basis of the Schéma štátnej pomoci na podporu zavádzania inovatívnych a vyspelých technológií v priemysle a v službách (SA.28652 (X518/2009)) (State aid scheme to support the deployment of innovative and advanced technologies in industry and services; 'the aid scheme at issue'), which was classified as a regional investment and employment aid measure in accordance with Article 13 of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 [EC] (General block exemption Regulation) (OJ 2008 L 214, p. 3). It concerned an investment project of the recipient undertaking, by which it sought to set up a glass sand extraction site located in the deposits at Borský Peter (Slovakia) and Šajdíkove Humence ('the investment project').

4 By letters of 24 February and 2 May 2014, the Commission forwarded a non-confidential version of the complaint to the Slovak authorities and invited them to submit their observations, which they did by letters of 30 May and 1 July 2014.

5 On 30 July 2014, the Commission sent a preliminary assessment letter to the applicant, in which it took the view that the aid at issue had been granted in accordance with Regulation No 800/2008.

6 The applicant submitted additional information to the Commission by letters of 12 February, 4 September, 7 and 21 November 2014, of 28 May, 8 July, 15 July, 1 September, 15 October and 3 November 2015 and of 13 June, 5 July and 17 August 2016.

7 The Commission sent requests for information to the Slovak authorities by letters of 2 May, 30 June and 10 September 2014, of 9 January 2015, of 25 February, 10 March, 22 April and 23 June 2016 and of 25 January, 15 March and 13 June 2017. The Slovak authorities responded by letters of 1 July and 3 October 2014, of 6 February 2015, of 22 April, 19 May and 1 July 2016 and of 7 February, 12 April and 21 June 2017.

8 On 9 July 2015, the Commission sent a further preliminary assessment letter to the applicant, in which it took the view that the aid at issue was lawful since it had been granted in accordance with Regulation No 800/2008, and compatible with the common market. In particular, it took the view that, when that aid was granted, that is to say on 22 July 2013, the recipient undertaking was an enterprise falling into the category of small and medium-sized enterprises (SMEs) and it was not in difficulties.

9 By letter of 15 October 2015 (see also paragraph 6 above), the applicant responded to that further preliminary assessment letter and submitted additional information.

10 The applicant met with the Commission on 26 November 2015.

11 On 20 July 2017, the Commission adopted Decision C(2017) 5050 final, concerning investment aid to the Slovak glass sand producer NAJPI a. s. (SA.38121 (2016/FC) – Slovakia) (OJ 2017 C 336, p. 1; 'the contested decision'), which was addressed to the Slovak Ministry of Foreign Affairs but the legal basis of which was not indicated. In that decision, it considered, in essence, that, first, State aid within the meaning of Article 107(1) TFEU was present (paragraphs 43 and 44), secondly, the aid at issue had been granted on 7 November 2013, which was the day after that on which the Grant Agreement concluded on 29 October 2013 was recorded in the Slovak Central Register of Contracts (paragraphs 45 to 47), thirdly, both the aid scheme at issue on the basis of which the aid at issue had been granted and that aid as such fulfilled the conditions established by Regulation No 800/2008, with the exception, however, of the condition set out in Article 3(2) of that regulation, according to which an individual aid measure must indicate that it has been granted on the basis of that regulation (paragraphs 50 to 55), fourthly, it was necessary to analyse whether that aid could be regarded as compatible with the internal market in the light of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 [TFEU] (OJ 2014 L 187, p. 1), in accordance with Article 58 of that regulation (paragraph 56), and, fifthly, that aid fulfilled the conditions set out by that regulation, in particular the condition relating to the SME status of the recipient undertaking, so that it was exempt from the notification obligation and must be regarded as compatible with the internal market (paragraphs 57 to 63). It thus concluded that it was not competent to analyse the aid at issue as part of a preliminary examination provided for by Article 4 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9) (paragraph 64 of that decision). As a result, it 'rejected' as unfounded the complaint which the applicant had submitted, anonymously, on the basis of Article 24(2) of Regulation 2015/1589 (paragraph 65 of that decision).

12 By letter of 5 September 2017, the Commission provided the applicant with a copy of the contested decision, describing it as a 'decision on the aid at issue'.

13 On 6 October 2017, the contested decision was published in the *Official Journal of the European Union*, in the form of a summary notice (otherwise known as a 'factsheet' publication) within the meaning of Article 32(1) of Regulation 2015/1589 (OJ 2017 C 336, p. 1), under the title 'Authorisation for State aid pursuant to Articles 107 and 108 [TFEU]' and also under the heading of 'Cases where the Commission raises no objections'.

Procedure and forms of order sought

14 By application lodged at the Registry of the Court on 14 November 2017, the applicant brought the present action.

15 By letter of 16 July 2019 lodged at the Registry of the Court, the applicant produced a document setting out the annual results of the recipient undertaking in the period from 2014 to 2018, requesting the Court to accept it as new evidence. In its observations submitted in the time allowed, the Commission requested the Court, inter alia, to reject that evidence as late, within

the meaning of Article 85 of the Rules of Procedure of the General Court, and manifestly not relevant to the outcome of the dispute, and to order the removal of that document from the case file.

16 Following a change in the composition of the Chambers of the Court, pursuant to Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Third Chamber, to which the present case was, consequently, allocated.

17 Acting on a proposal from the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral part of the procedure and, by way of the measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, put written questions to the parties, asking them to respond in writing. The parties lodged their responses at the Registry of the Court in the time allowed.

18 The parties presented oral argument and answered the questions put by the Court at the hearing on 21 January 2020.

19 The applicant claims that the Court should:

– annul the contested decision;

– in the alternative, annul the letter of 5 September 2017;

– order the Commission to pay the costs.

20 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

Pleas for annulment

21 In support of the action, the applicant raises two pleas in law.

22 By the first plea in law, the applicant alleges infringement of an essential procedural requirement, namely of Article 15(1) of Regulation 2015/1589, read in conjunction with Article 4 of that regulation.

23 The second plea in law is divided into three separate parts.

24 By the first part of the second plea in law, the applicant alleges infringement of Article 107(3)(a) TFEU. It considers, in essence, that the Commission could not merely assert that the aid at issue was compatible with the internal market in view of Regulation No 651/2014, but should also have checked whether it was compatible in the light of that provision.

25 In the second part of the second plea in law, the applicant alleges infringement of Article 109 TFEU, read in conjunction with Article 58(1) and Article 6(3)(a) of Regulation No 651/2014. It argues, in essence, that the aid at issue does not fulfil the conditions laid down by that regulation, since it constitutes ad hoc aid for a large enterprise.

26 By the third part of the second plea in law, the applicant invokes infringement of Article 108(2) TFEU, read in conjunction with Article 4(4) of Regulation 2015/1589. It considers that the Commission breached the obligation to initiate the formal investigation procedure which was incumbent on it on account of the serious difficulties which it encountered in examining the aid at issue.

Admissibility

27 During the written part of the procedure, the Commission argued, on the one hand, that the second head of claim, by which the applicant seeks annulment of the letter of 5 September 2017 notifying it of the contested decision, was inadmissible and, on the other, that the applicant had not shown that it had *locus standi* in relation to the first and second parts of the second plea in law.

28 The applicant disputes the Commission's arguments.

29 Questioned in that regard at the hearing, the Commission indicated that it no longer had doubts concerning the admissibility of the action, which was noted in the transcript of the hearing.

30 Even though the contested decision is formally addressed to the Slovak Republic alone, according to paragraph 65, the final paragraph of that decision, which appears under the heading 'Conclusion', 'the complaint filed by an anonymous complainant on the basis of Article 24(2) of [Regulation 2015/1589] is rejected as unfounded'. As that complainant was clearly the applicant, it must be found that, by proceeding in that manner, the Commission expressly rejected that complaint in one of the essential grounds supporting that decision, even resembling the operative part of that decision, notwithstanding the settled case-law which does not oblige the Commission to do so (judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraphs 45 and 46), so that the applicant must be regarded as individually distinguished in a manner analogous to the person to which that decision is addressed, within the meaning of the fourth paragraph of Article 263 TFEU.

31 It follows that the action is admissible in its entirety, regardless of whether the contested decision must be classified as a decision not to raise objections under Article 4(3) of Regulation 2015/1589 (see paragraphs 35 to 59 below). In any event, according to established case-law, an applicant may invoke, against such a decision, any plea to show that the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified should have raised doubts as to the compatibility of that measure with the internal market (see judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 59 and the case-law cited). In the present case, by the present action, the applicant, as a competitor of the recipient of the aid at issue and an interested party within the meaning of Article 108(2) TFEU, aims, inter alia, to safeguard the procedural rights which it would have had under that provision if the Commission had decided to initiate the formal investigation procedure. Thus, to that end, not only are the first plea in law and the third part of the second plea in law admissible, but so too are the first and second parts of the second plea in

law, which are intended to show that the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase should have raised doubts as to the compatibility of the aid at issue with the internal market.

32 Finally, as the applicant's first head of claim is admissible, it is not necessary to examine the admissibility of the second head of claim, presented in the alternative in case the first head of claim was declared inadmissible.

Substance

First plea in law, alleging infringement of Article 15(1) of Regulation 2015/1589, read in conjunction with Article 4 of that regulation

33 By the first plea in law, the applicant alleges infringement of an essential procedural requirement, namely of Article 15(1) of Regulation 2015/1589, read in conjunction with Article 4 thereof. In essence, it considers that, in response to the complaint submitted by it, the Commission should have adopted one of the decisions provided for in Article 4(2) to (4) of that regulation instead of the contested decision.

34 In response, the Commission argues, essentially, that, in view of its conclusion that the aid at issue was exempted under Regulation No 651/2014 from the notification and authorisation obligation referred to in Article 108(3) TFEU, the review it carried out in the present case was not covered by the preliminary examination procedure, and that it was neither competent nor obliged to adopt one of the decisions provided for in Article 4(2) to (4) of Regulation 2015/1589. The contested decision constitutes a *sui generis* decision of a purely declaratory nature.

35 According to settled case-law, Article 15(1) of Regulation 2015/1589 obliges the Commission, once any additional comments have been lodged by interested parties, or the reasonable period has expired, to close the preliminary examination stage by adopting a decision pursuant to Article 4(2), (3) or (4) of that regulation, that is to say a decision stating that aid does not exist, raising no objections or initiating the formal investigation procedure (see, to that effect, judgment of 31 May 2017, *DEI* v *Commission*, C-228/16 P, EU:C:2017:409, paragraph 29 and the case-law cited).

36 That obligation is the corollary of recognition of the right enjoyed by a complainant in a State aid matter to set in motion, by submitting a complaint or information regarding any allegedly unlawful aid, the preliminary examination stage, which the Commission is obliged to close by means of a decision pursuant to Article 4 of Regulation 2015/1589 (see, to that effect, judgments of 17 July 2008, *Athinaïki Techniki* v *Commission*, C-521/06 P, EU:C:2008:422, paragraphs 37 to 40; of 16 December 2010, *Athinaïki Techniki* v *Commission*, C-362/09 P, EU:C:2010:783, paragraphs 62 and 63; and of 16 May 2013, *Commission* v *Ryanair*, C-615/11 P, not published, EU:C:2013:310, paragraph 35).

37 It must be held that, in the present case, the Commission was faced with a complaint including information regarding aid which was allegedly unlawful because it had not been notified and was incompatible with the requirements arising both under Regulation No 651/2014 and under Article 107(3)(a) TFEU.

38 Contrary to the Commission's arguments, the principles set out in paragraphs 35 and 36 apply *mutatis mutandis* to a complaint introduced by an interested party which alleges that the conditions of a block exemption regulation, such as Regulation No 651/2014, providing a basis on which to consider that an aid measure is exempted from the notification obligation under Article 108(3) TFEU, are inapplicable or have been incorrectly applied. By adopting such block exemption regulations, the Commission does not delegate to the national authorities its supervisory and decision-making powers concerning State aid, including in relation to the handling of complaints, but fully retains its power of oversight under Article 108 TFEU and Article 12(1) of Regulation 2015/1589, as regards, inter alia, those authorities' observance of the fundamental obligation to notify aid measures and of the prohibition on their implementation under Article 108(3) TFEU. That assessment is all the more compelling in the light of the criteria recognised by the recent case-law of the Court of Justice (see, to that effect, judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraphs 132 to 135 and 140 to 144 and the case-law cited), on the relevance of which the parties had the opportunity to state their views in response to a written question from the General Court (see paragraph 17 above) and at the hearing.

39 Those criteria include the following.

40 First, only if an aid measure adopted by a Member State in fact satisfies all the relevant conditions laid down by Regulation No 651/2014 is that Member State exempted from its obligation to notify aid and, conversely, where aid was granted pursuant to that regulation, although all the conditions laid down for eligibility with respect to that regulation were not satisfied, that was a breach of the notification requirement, and such aid must be considered to be unlawful (see, to that effect, judgments of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 99, and of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraph 138).

41 Secondly, it is for the Commission, under Article 12(1) of Regulation 2015/1589, to examine either on its own initiative or in connection with a complaint introduced by an interested party, in view of Articles 107 TFEU and 108 TFEU, such aid granted in breach of Regulation No 651/2014 (see, to that effect, judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraph 140 and the case-law cited).

42 Thirdly, while the Commission is authorised to adopt regulations for block exemptions of aid, with a view to ensuring efficient supervision of the competition rules concerning State aid and simplifying administration, such regulations cannot in any way weaken Commission monitoring in that area (see judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraph 141 and the case-law cited).

43 Fourthly, it follows that, by adopting Regulation No 651/2014, the Commission did not confer any power to make final decisions on the national authorities with respect to the extent of the exemption from the notification obligation and, therefore, with respect to the assessment of the conditions laid down by that regulation on which such exemption depends, those authorities being, in that regard, in the same position as the potential beneficiaries of aid and being required to ensure that their decisions are in conformity with that regulation, so that, where a national authority grants aid while misapplying that regulation, its doing so is an infringement of both the provisions of that regulation and of Article 108(3) TFEU (see, to that effect, judgments of

5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 101 to 103, and of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraphs 142 and 143).

44 Fifthly, where a Member State considers that aid fulfils the conditions laid down by Regulation No 651/2014, that aid benefits, at the very most, from a presumption of compatibility with the internal market, and such aid's compliance with those conditions may be challenged both before a national court or a national authority and before the Commission (see, to that effect, judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraph 144).

45 Sixthly, Regulation No 651/2014 does not affect the exclusive competence which the Commission enjoys to assess, under Article 107(3) TFEU, the compatibility of aid granted pursuant to that regulation, and the Commission therefore remains uniquely entitled to declare such aid compatible with the internal market under that provision (see, to that effect, judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraph 146).

46 It follows from the foregoing considerations that the Commission's argument that it adopted the contested decision outside the preliminary examination procedure, and was not competent to carry out a preliminary examination to determine whether the aid at issue fulfilled the conditions for exemption in Regulation No 651/2014, must be dismissed. On the one hand, it must be held that the applicant's complaint set in motion that preliminary examination procedure, which the Commission was obliged to close by means of a decision pursuant to Article 4 of Regulation 2015/1589 (see the case-law cited in paragraphs 35 and 36 above). On the other hand, it is clear from paragraphs 38 to 45 above that the subject of such a complaint could relate specifically to a possible failure to observe the provisions of a block exemption regulation which the Commission was obliged to monitor on the basis of its power of oversight provided for in Article 107(3) TFEU and Article 108(3) TFEU. Consequently, in the present case, following the applicant's complaint, the Commission was required to carry out such a preliminary examination to check whether the Slovak authorities had correctly applied the provisions of Regulation No 651/2014 or whether, on the contrary, they had breached their notification obligation (see, to that effect, judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraphs 138, 140 to 144 and 146). That duty to examine on the part of the Commission therefore necessarily involved, subject to review by the EU Courts, the requirement to interpret the scope of the relevant conditions for exemption and to check whether they were correctly applied to this case, requirements with which the Commission appears, furthermore, to have intended to comply in the contested decision.

47 Moreover, the Commission's argument that it would have been competent to carry out such an examination only if the applicant had succeeded in demonstrating that the relevant conditions for exemption were not fulfilled cannot succeed, as that argument is based on a misjudgement of the scope of its supervisory duty or even an unacceptable reversal of the burden of proof. To the contrary, when the Commission receives a complaint alleging that certain provisions of a block exemption regulation have not been observed and, therefore, that aid has been granted which is unlawful because it was not notified, it is not only competent to ascertain whether the complainant's claims are well founded, but is also required to do so, for the purposes of determining whether the measure at issue should have been notified to it and thus constitutes

unlawful aid. If that were not the case, the national authorities would have excessive autonomy in implementing those provisions, which would be contrary to the case-law principles set out in paragraphs 40 to 43 above.

48 For the reasons set out in paragraphs 46 and 47 above, the Commission's argument that it cannot 'block' the implementation of a measure which is, according to the national authorities, considered to be exempted on the basis of such an exemption regulation, when, in reality, the conditions for exemption are not fulfilled is also entirely unfounded. In that case, the non-notification of that measure and its execution infringe Article 108(3) TFEU, which constitutes a grievance which must be able to be brought before the Commission, including by means of a complaint (see, to that effect, judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraphs 140 and 144).

49 Similarly, the Commission's argument that Article 4 of Regulation 2015/1589 covers only the examination of a notification and does not apply where an aid measure fulfils all the necessary conditions of a block exemption regulation is based on an incorrect interpretation of the case-law principles recalled in paragraphs 40 and 41 above, as a complaint can call into question the aid measure's compliance with those conditions and, therefore, its lawfulness in the light of Article 108(3) TFEU. In that way, the Commission confuses the premisses of the review which must be carried out following a complaint and as part of the preliminary examination procedure, namely the examination of whether unlawful aid exists on the grounds, inter alia, that the conditions for exemption are not fulfilled, with the result of that examination (see the case-law cited in paragraph 46 above).

50 For the same reasons, the Commission's circular argument that a complaint is admissible only where it relates to a breach of the notification obligation and, therefore, to the existence of unlawful aid, but not to notified aid, and that an aid measure fulfilling the conditions for exemption in an exemption regulation cannot constitute such unlawful aid, must be dismissed. That argument disregards the principles set out in paragraphs 138 to 144 of the judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission* (C-654/17 P, EU:C:2019:634), under which the Commission is obliged to examine that complaint specifically for the purposes of determining whether the claim that there has been a failure to observe the conditions for exemption and, therefore, the notification obligation is well founded.

51 It follows from the foregoing considerations that none of the arguments advanced by the Commission in support of the classification of the contested decision as a *sui generis* decision, adopted outside the preliminary examination procedure and the examination provided for in Article 4 of Regulation 2015/1589, can be upheld.

52 However, that conclusion does not imply that the contested decision must be annulled for error of law, lack of legal basis or incompetence. Regardless of the Commission's classification of the nature of that decision, it is ultimately for the EU Courts to determine its true legal nature and scope, in view of the applicable rules, like the interpretation which they are required to give on the question of whether an act of the Commission concerning State aid is open to challenge (see order of 11 July 2019, *Vattenfall Europe Nuclear Energy* v *Commission*, T-674/18, not published, EU:T:2019:501, paragraph 31 et seq. and the case-law cited). Such interpretation is necessary, inter alia, to allow the EU Courts to determine whether the act at issue is unlawful on the grounds that it was adopted by an incompetent authority or lacks sufficient legal basis (see, to that

effect, judgments of 6 September 2017, *Slovakia and Hungary* v *Council*, C-643/15 and C-647/15, EU:C:2017:631, paragraphs 57 to 84, and of 25 October 2017, *Commission* v *Council (WRC-15)*, C-687/15, EU:C:2017:803, paragraphs 40 to 59).

53 Thus, it is necessary to assess whether, by virtue of its substance and not its form, and notwithstanding the opposing view which the Commission expressed, in particular, in the course of the proceedings, the contested decision constitutes, in reality, a decision under Article 4 of Regulation 2015/1589.

54 In that regard, it must be recalled that, in paragraph 64 of the contested decision, the Commission concluded that, on account of its compatibility with, inter alia, Regulation No 651/2014, the aid at issue was exempted and, therefore, the Commission was not competent to examine it on the basis of the preliminary examination procedure provided for in Article 4 of Regulation 2015/1589. Moreover, paragraph 65 of that decision states that the applicant's complaint, within the meaning of Article 24(2) of that regulation, is dismissed as unfounded. Similarly, in the letter of 5 September 2017 conveying that decision to the applicant, the Commission chose not to specify the legal basis on which that decision relied, but merely stated that it was 'a decision on the aid at issue'. Finally, in its written pleadings and at the hearing, it maintained that the decision in question constituted a *sui generis* decision, adopted outside the preliminary examination procedure and the examination provided for in Article 4 of Regulation 2015/1589, read in conjunction with Article 15(1) of that regulation, and was purely declaratory, but it was not able to state an express or appropriate legal basis for that position.

55 It is in the light of those grounds that, in its first plea in law, the applicant argues that the Commission infringed an essential procedural requirement, meaning that the contested decision should be annulled.

56 However, as was held in paragraphs 35 to 51 above, it is legally impossible not to classify the contested decision as a decision which was adopted at the end of the preliminary examination procedure and thus under Article 4(3) of Regulation 2015/1589.

57 In that regard, it must be emphasised that, like a decision under Article 4(3) of Regulation 2015/1589, the contested decision is formally addressed to the Slovak Republic and, more precisely, to the Slovak Ministry of Foreign Affairs (see paragraph 11 above), and not to the applicant, which received, in accordance with the third subparagraph of Article 24(2) of that regulation, only a copy of that decision (see paragraph 12 above).

58 Moreover, it must be pointed out that the contested decision was published in the Official Journal, in the form of a summary notice (otherwise known as a 'factsheet' publication) within the meaning of Article 32(1) of that regulation (OJ 2017 C 336, p. 1), under the title 'Authorisation for State aid pursuant to Articles 107 and 108 [TFEU]' and also under the heading of 'Cases where the Commission raises no objections' (see paragraph 13 above) and, therefore, that is to say, of cases in which the Commission has adopted decisions within the meaning of Article 4(3) of Regulation 2015/1589.

59 Thus, in view of the fact that the contested decision can only constitute a decision not to raise objections to the aid at issue under Article 4(3) of Regulation 2015/1589, the first plea in law, alleging infringement of an essential procedural requirement inasmuch as the Commission did not adopt one of the decisions provided for in Article 4(2) to (4) of that regulation, must be dismissed.

60 That conclusion is, however, without prejudice to the scope of the review that the Court is required to carry out in respect of the contested decision on the basis, inter alia, of the second plea in law.

First part of the second plea in law, alleging infringement of Article 107(3)(a) TFEU

61 By the first part of the second plea in law, the applicant alleges infringement of Article 107(3)(a) TFEU, essentially on the grounds that, besides examining the compatibility of the aid at issue on the basis of Regulation No 651/2014, the Commission should have determined whether that aid was compatible with the internal market in the light of Article 107(3)(a) TFEU, as read in the light of the Guidelines on regional State aid for 2014-2020 (OJ 2013 C 209, p. 1; 'the Guidelines on regional aid'), which provide that the criterion of the prevention of overcapacity is to be taken into account. The Commission argues in response, in essence, that the relevant legal framework in the present case is constituted exclusively by the applicable block exemption regulations and not by those guidelines.

62 It must be held that this part cannot be upheld. It is based on the incorrect premiss that, when the Commission receives a complaint alleging a failure to observe the conditions of a block exemption regulation which seeks to implement, inter alia, the criteria of Article 107(3)(a) TFEU, the latter may not simply examine whether the aid at issue fulfils those conditions, but must also check whether that aid is compatible with the internal market in the light of that provision of the FEU Treaty. In addition, the applicant wrongly takes the view that that provision must be read, inter alia, in the light of the rules of conduct which the Commission has imposed on itself, such as its Guidelines on regional aid.

63 First, without prejudice to the possibility of challenging the legality of an allegedly incomplete provision of a block exemption regulation in the light of Article 107(3)(a) TFEU, by raising a plea of illegality within the meaning of Article 277 TFEU, which the applicant did not do in the present case, from the point of view of the Member State concerned and of individual persons, the provisions of such a regulation regulate on an exhaustive basis the directly applicable conditions for exemption laid down in it. Any other interpretation would mean that, despite the fact that those conditions for exemption were met, the national authorities would not be automatically authorised to refrain from notifying the measure at issue and to implement it and would continue to risk infringing Article 108(3) TFEU (see, to that effect, judgments of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 59, 86, 87 and 99 and the case-law cited, and of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraphs 128 and 138).

64 Such an interpretation would potentially undermine not only the direct applicability, within the meaning of the second paragraph of Article 288 TFEU, of the provisions of a block exemption regulation, but also their effectiveness, which resides precisely in the objective referred to in Article 109 TFEU, of determining the categories of aid which are *ipso facto* exempted from the procedure under Article 108(3) TFEU, and, therefore, the principle of legal certainty. Thus, it is apparent from recital 7 of Regulation No 651/2014 that only State aid not covered by that regulation should remain subject to the notification requirement laid down in Article 108(3) TFEU (see, to that effect, judgments of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 57 to 59, and of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraphs 127 and 128).

65 Those principles apply *mutatis mutandis* when the Commission is called upon to check whether the national authorities have correctly applied the provisions of a block exemption regulation. If it were otherwise, the legal consequences of such a regulation, namely the immediate effect of exemption from the obligation to notify aid and the directly applicable and legally exhaustive nature of the conditions for exemption to that end, would be called into question solely on the grounds that the Commission had received a complaint leading it to check *ex post facto* whether the national authorities had made errors in that regard and thus breached their notification obligation. While the Commission is obliged, subject to review by the EU Courts, to determine whether such errors exist, its duty of oversight is nevertheless not capable of affecting such legal nature of the provisions of a block exemption regulation.

66 Secondly, the criterion of the prevention of overcapacity in the market at issue is not mentioned as a condition for exemption of regional investment aid within the meaning of Article 14 of Regulation No 651/2014. Consequently, the applicant does not have grounds to argue that that regulation requires the national authorities or the Commission to take into consideration the possible creation of such overcapacity. The Commission is therefore correct to argue that, on the basis of that regulation, it was not competent to assess that aspect as part of the examination of the applicant's complaint and its analysis of the conditions of Article 14 of that regulation, as set out in paragraph 57(a) and (b) of the contested decision was, in principle, sufficient.

67 It follows that it is also necessary to dismiss the applicant's argument that, by enacting a block exemption regulation, the Commission has not 'exhausted' its discretion under Article 107(3) TFEU. Even assuming that certain provisions of a block exemption regulation turned out to be incomplete and incompatible with primary law, for example with Article 107(3) TFEU, which would automatically result in a breach of the notification obligation and, where applicable, of the prohibition on putting the aid at issue into effect within the meaning of Article 108(3) TFEU, the Court could hear an argument to that effect only following a plea of illegality invoked under Article 277 TFEU. However, in the present case, the applicant has not raised, under that provision and on those grounds, the at least partial illegality of Article 14 of Regulation No 651/2014.

68 It should be added that if, in any event, following the submission of a complaint, the Commission were to find that the national authorities had incorrectly applied the conditions of a block exemption regulation, so that, in reality, the aid at issue should have been notified under Article 108(3) TFEU, it would, admittedly, be required to assess the compatibility of that aid in the light of Article 107(3)(a) TFEU, taking into account the additional criteria of the Guidelines on regional aid which it imposed on itself in that regard. On the other hand, the conduct as such of that review of the national authorities' observance of the conditions for exemption laid down in a block exemption regulation is tantamount to a simple review of legality, which necessarily excludes considerations covered by the discretion which the Commission has only when it applies Article 107(3)(a) TFEU in an individual case (see, to that effect, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 78 and 79).

69 Thirdly, regardless of the foregoing, the applicant has not demonstrated that the case-law relating to Article 107(3)(a) TFEU provides that the criterion of the prevention of overcapacity in the market at issue is to be taken into consideration as a requirement arising under primary law as such. In that regard, it should be recalled that that derogation does not require that there be no distortion or threat of distortion of competition, which is only a criterion of the concept of aid provided for in Article 107(1) TFEU. To the contrary, the application of Article 107(3)(a) TFEU or a block exemption regulation specifying its scope in terms of secondary law necessarily

assumes that the measure at issue meets all the conditions of the concept of aid, including that relating to the distortion of competition, without its being necessary to re-examine its anticompetitive effect, including on account of the creation of overcapacity in the market at issue (see, to that effect, judgments of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraphs 93 and 94, and of 20 June 2019, *a&o hostel and hotel Berlin* v *Commission*, T-578/17, not published, EU:T:2019:437, paragraph 123). Unlike Article 107(3)(c) TFEU, in the context of Article 107(3)(a) TFEU, it is not even necessary to check whether trading conditions are adversely affected to an extent contrary to the common interest.

70 On the other hand, the case-law invoked by the applicant is exclusively related to the interpretation and implementation of rules of conduct which the Commission imposed on itself, and not to that of the scope of primary law with which those rules must, however, be compatible, which rules the Court of Justice has recognised were not capable of completely exhausting the Commission's discretion under Article 107(3) TFEU (see, to that effect, judgments of 8 March 2016, *Greece* v *Commission*, C-431/14 P, EU:C:2016:145, paragraphs 71 and 72; of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 41; and of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraph 83). Moreover, outside the scope of a block exemption regulation, the EU Courts have merely assessed whether the Commission incorrectly applied rules of conduct which expressly covered the problem of overcapacity and whether it therefore made a manifest error of assessment in that regard (see, to that effect, judgments of 14 January 1997, *Spain* v *Commission*, C-169/95, EU:C:1997:10, paragraph 22, and of 9 September 2009, *Holland Malt* v *Commission*, T-369/06, EU:T:2009:319, paragraph 136). In that context, those Courts have not, however, either examined whether, conversely, as the applicant claims, certain criteria adopted in such rules of conduct arose directly from requirements imposed by primary law as such, or assessed the legal scope or even the legality of a block exemption regulation in the light of primary law.

71 Fourthly, it is appropriate to recall the established case-law which recognises that, in the exercise of its wide discretion under Article 107(3) TFEU, the Commission may adopt guidelines in order to establish the criteria on the basis of which it proposes to assess the compatibility with the internal market of aid measures envisaged by the Member States. In adopting such guidelines and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of that discretion and cannot, as a general rule, depart from those guidelines, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraphs 81 and 82 and the case-law cited). Moreover, although the Commission is bound by such guidelines, that is so only to the extent that they do not depart from the proper application of the Treaty, since the guidelines cannot be interpreted in a way which reduces the scope of Articles 107 TFEU and 108 TFEU or which contravenes the aims of those articles (see judgment of 11 September 2008, *Germany and Others* v *Kronofrance*, C-75/05 P and C-80/05 P, EU:C:2008:482, paragraph 65 and the case-law cited).

72 Those considerations apply *mutatis mutandis* to the provisions of a block exemption regulation which also constitute the result of an *ex ante* exercise by the Commission of its powers under Article 107(3) TFEU (see, to that effect, judgments of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraphs 65 and 102, and of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraph 135), but which, unlike rules of conduct, are legally binding and directly applicable under the domestic legal system of

Member States under the second paragraph of Article 288 TFEU. Those provisions have a limiting effect on the Commission inasmuch as they specify the criteria for aid which must be regarded as *ipso facto* exempted under Article 107(3) TFEU, so that that aid is not subject to the obligation to notify it and have it checked by the Commission, admittedly, on the condition that those criteria comply with higher-ranking rules of law, including Articles 107 TFEU and 108 TFEU. Moreover, the scope of the legally binding and directly applicable provisions of a block exemption regulation cannot, in principle, be limited by rules of conduct. That is all the less likely given that, on the one hand, under no circumstances are those rules legally binding on Member States (see, to that effect, judgment of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 44) and, on the other, they are, in particular, intended to guide and limit the exercise by the Commission of its discretion when applying Article 107(3) TFEU as part of the procedure under Article 108(2) TFEU and, therefore, outside the scope of a block exemption regulation.

73 Consequently, such rules of conduct adopted by the Commission on the basis of its power to organise its State aid procedures cannot derogate from higher-ranking rules of law, including block exemption regulations. Thus, whatever the scope of those rules of conduct, they are not, as such, capable of limiting the scope of the conditions for exemption laid down by such regulations.

74 Fifthly, it must be observed that Article 14 of Regulation No 651/2014, which is applicable in the present case, does not refer to the Guidelines on regional aid, including to paragraph 114 thereof relating to the anticompetitive effects of a capacity expansion instigated by State aid. In that regard, that article is clearly distinguishable from Article 15(1) of that regulation concerning regional operating aid, inasmuch as it expressly mentions paragraph 161 of those guidelines. Thus, the Commission did not intend to make the conditions for compatibility of regional investment aid dependent on the rules of conduct laid down in those guidelines. Therefore, contrary to what the applicant claims, neither the national authorities nor the Commission were required to take account of them when interpreting and applying Article 14 of that regulation.

75 Finally, that assessment is not called into question by the applicant's arguments based on the principle of proportionality and its freedom to conduct a business. In that regard, it is sufficient to observe that the applicant failed to point out the possible illegality of Article 14 of Regulation No 651/2014 in view of those higher-ranking rules of law under Article 277 TFEU or, at least, to explain how, notwithstanding its clear and exhaustive wording, that regulation could be given an interpretation consistent with those rules to the effect that the possible creation of overcapacity in the market at issue should be taken into consideration.

76 Consequently, the first part of the second plea in law must be dismissed as unfounded.

Second part of the second plea in law, alleging infringement of Article 109 TFEU, read in conjunction with Article 58(1) and Article 6(3)(a) of Regulation No 651/2014

– *First complaint, alleging that the recipient undertaking was incorrectly classified as an SME*

77 By the second part of the second plea in law, the applicant alleges, as a first complaint, an error of assessment or of law on the part of the Commission in applying Article 6(3)(a) of Regulation No 651/2014, principally on the grounds that the aid at issue constitutes, in reality, ad hoc aid granted to a large enterprise. The Commission infringed that provision by accepting, wrongly, and failing to check the classification by the Slovak authorities of the recipient enterprise as an SME within the meaning of Article 2(1) of Annex I to that regulation. In view of the societal and

control-based links which characterised that undertaking's situation before and after the transfer of the shares in that undertaking by company P. to company N., under Article 3, and, at the least, Article 4(2) of that annex, that undertaking should have been classified as a large enterprise. The Commission, in particular, failed to investigate sufficiently the links existing between company P., on the one hand, and a family and other companies which its members directed or controlled, on the other, as well as the situation of company N.'s principal shareholder from 7 August 2013, including his links with other companies. For those reasons, the Commission erred in applying the criteria governing ad hoc aid granted to large undertakings within the meaning of Article 6(3)(a) of that regulation and, in the absence of diligent and complete investigation of those points, should have had doubts as to the compatibility of that aid with the internal market. In its response to the Court's written questions, the applicant adds that, in any event, in order to be able to classify the undertaking in question as an SME, the Commission should have examined whether the conditions of Article 4(2) of that annex were met, of which there is no evidence in the statement of reasons for the contested decision, contrary to the requirements of the second paragraph of Article 296 TFEU.

78 In response, the Commission argues essentially, that, following an agreement for the transfer of 100% of the shares in the recipient undertaking, concluded between companies P. and N. on 31 December 2012 and recorded in the Slovak Business Register on 7 August 2013, at the time when the aid at issue was granted, namely on 7 November 2013, the recipient undertaking was an SME owned only by company N. The argument based on the control of company P. by certain natural persons is therefore ineffective, as company P. and that undertaking were linked enterprises within the meaning of the third subparagraph of Article 3(3) of the annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124, p. 36; 'the SME Recommendation') only prior to the purchase of the shares by company N. In any event, there was no reason to doubt the information provided by the Slovak authorities, according to which company P. and the enterprises linked to it did not have more than 120 employees in 2010 and 2011 and did not have a turnover exceeding EUR 50 million or a balance sheet total exceeding EUR 43 million. Moreover, that enterprise's holdings in other enterprises with effect from 9 July 2011 did not meet the criteria referred to in Article 3(2) and (3) of Annex I to Regulation No 651/2014. The argument that a family continued to exercise a dominant influence over company P. is ineffective, as that company no longer held shares in the undertaking in question when the aid at issue was granted. According to the Commission, the argument based on the period of two years laid down in Article 4(2) of that annex is equally ineffective, since company P. could not be classified as a large enterprise during the period at issue.

79 The Commission adds that the recipient undertaking and company N. were not linked to other enterprises through certain natural persons, within the meaning of the fourth subparagraph of Article 3(3) of Annex I to Regulation No 651/2014. Admittedly, the managing director of the recipient undertaking in the period from 1 March to 28 December 2012, and its deputy director from 28 December 2012, holds a number of positions in various enterprises. However, with the exception of a lease entered into with company E.F., none of those enterprises is active in the same market as the recipient undertaking or in an adjacent market. In particular, according to the information available in the Slovak Business Register, company L. is active in multiple sectors of the economy. The map of the deposit at Borský Peter produced by the applicant is imprecise and has no probative value as regards possible links between company L. and the recipient undertaking. The Commission asserts that it has no evidence showing that that managing

director had a dominant influence or owner status in respect of company L., or that the recipient undertaking or company N. acted jointly with company L. to the point that they could not be regarded as enterprises which were economically independent of one another.

80 The Commission concludes that the recipient undertaking met all the conditions for classification as an SME when the aid at issue was granted. In order to demonstrate the incentive effect of that aid within the meaning of Article 6(2) of Regulation No 651/2014, it was therefore sufficient to establish that the grant application had been made before work on the investment project started.

81 As a preliminary point, it must be recalled that, according to the transcript of the hearing, the parties take the view that the question whether the recipient undertaking constituted an SME within the meaning of Annex I to Regulation No 651/2014 when the aid at issue was granted, the wording of which corresponds to that of the annex to the SME Recommendation, is a matter of law, subject to review by the Court, which is critical to the outcome of the present dispute. In that regard, the Commission explains, without being contradicted by the applicant, that, as is apparent from paragraph 57(b) of the contested decision, under Article 14(12) of that regulation, the aid intensity in gross grant equivalent (GGE) must not exceed the maximum aid intensity established in the regional aid map which is in force at the time the aid is granted in the area concerned, namely, in the present case, the Slovak regional aid map relating to the period from 2007 to 2013, which lays down a GGE ceiling of 40% for large enterprises. Moreover, according to that paragraph, in accordance with Article 14(2) thereof, read in conjunction with the definition of 'assisted areas' appearing in Article 2 of that regulation, the maximum GGE under the Slovak regional aid map relating to the period from 2014 to 2020 had to be respected, namely 25% for large, 35% for medium-sized and 45% for small enterprises.

82 With regard to the content of the contested decision, it must be observed that the applicant's complaint is succinctly summarised in paragraph 24 of that decision by a statement of the alleged links between the recipient undertaking, on the one hand, and company P. and its owners or directors, on the other. Paragraphs 38 and 39 of that decision set out the information provided by the Slovak authorities concerning the societal links affecting that undertaking's situation when the aid at issue was granted, when 100% of the shares in that undertaking were held by company N. alone, which was itself controlled by two natural persons, 99.94% and 0.06% respectively, the first of whom is the managing director of that undertaking.

83 However, paragraphs 38 and 39 of the contested decision do not contain a statement of the recipient undertaking's societal and control-based links with, notably, company P. and its shareholders or directors, the predecessor of company N. That corresponds to the content of the observations submitted by the Slovak authorities, by letter of 13 May 2016, in response to a request for information from the Commission. In those observations, those authorities argued that the applicant's claims were ineffective on the grounds that, when the aid at issue was granted, company P. did not have societal or control-based links, within the meaning of Article 3 of Annex I to Regulation No 651/2014, either with the recipient undertaking or with company N. With regard to the situation of company P., the Slovak authorities merely argued that they were not familiar with that company's shareholder structure, because such information was not publicly accessible. Moreover, according to the claims of those authorities, the vice-chairman of the board of directors of the recipient undertaking until 14 March 2012 was neither a shareholder nor a member of another company established in Slovakia in the period from 14 March to 31 December 2012.

84 Those factors indicate, in conjunction with the arguments advanced by the Commission in the course of the proceedings, including in response to the Court's written questions (see paragraphs 78 to 80 above), that the Commission was satisfied with those observations on the part of the Slovak authorities on the recipient undertaking's situation, such as it was prior to the transfer of the shares in that undertaking to company N., that is to say when it was still under the control of company P. That assessment is confirmed by the grounds in paragraph 57(d) of the contested decision, in which the Commission states its position on the applicant's complaint, taking account of the Slovak authorities' observations. In essence, the Commission points out in that paragraph that those authorities adequately demonstrated that the recipient undertaking constituted an SME when the aid at issue was granted, which happened, under the applicable Slovak law, on 7 November 2013. The Commission considers in that paragraph that the recipient undertaking and company N. have no links, within the meaning of the concepts of 'partner enterprises' or 'linked enterprises' as defined in Article 3(2) and the first to third subparagraphs of Article 3(3) of the annex to the SME Recommendation, the wording of which corresponds to that of Article 3(2) and (3) of Annex I to Regulation No 651/2014. Similarly, it considers that, taking account of the case-law and its decision-making practice, in the present case the criterion of enterprises linked through a natural person or group of natural persons acting jointly, provided that, at least, part of their activity is carried out in the same relevant market or in adjacent markets, within the meaning of the fourth and fifth subparagraphs of Article 3(3) of the annex to that recommendation, the wording of which corresponds to that of the fourth and fifth subparagraphs of Article 3(3) of Annex I to that regulation, is not satisfied. In the absence of evidence of significant commercial links, in particular in the form of contracts of sale or purchase, shared suppliers or other business interests, with the recipient undertaking, on the one hand, and company N. and its principal shareholder, on the other, that undertaking and that company cannot be classified as linked enterprises as at the time the aid at issue was granted. The Commission thus concludes, like the Slovak authorities, that that undertaking, taken together with company N., constitutes an SME. In support of that conclusion, the contested decision includes a table setting out the joint staff headcount, the combined turnover and the combined annual results of the recipient undertaking and company N. for the years 2010 to 2015.

85 In that regard, it is important to recall that, admittedly, when the aid at issue was granted, on 7 November 2013, there was in fact no longer any structural link between the recipient undertaking and company P., which had transferred all of its holdings in that undertaking to company N. As the Commission argues, in accordance with the case-law (judgments of 21 March 2013, *Magdeburger Mühlenwerke*, C-129/12, EU:C:2013:200, paragraph 40, and of 6 July 2017, *Nerea*, C-245/16, EU:C:2017:521, paragraphs 32 and 33), the definition of the 'date of granting of the aid' appearing in Article 2(28) of Regulation No 651/2014 provides that it is the date when the legal right to receive it is conferred on the beneficiary under the applicable national legal regime. As is apparent from paragraphs 45 to 47 of the contested decision, under the applicable Slovak civil law, the Grant Agreement, as concluded between the Slovak Innovation and Energy Agency and the recipient undertaking on 29 October 2013, did not enter into force until 7 November 2013, that is to say a day after it was published in the Slovak Central Register of Contracts. Consequently, in the present case, the Commission was required to assess whether the Slovak authorities had correctly considered whether, on 7 November 2013, when it was exclusively controlled by company N., the recipient undertaking constituted an SME.

86 However, notwithstanding the fact that the relevant date for assessing the SME status of the recipient undertaking was 7 November 2013, the evidence provided by the applicant relating to the links between the recipient undertaking and company P., the legal predecessor of company N., was capable of giving rise to doubts on the part of the Commission, within the meaning of

Article 4(4) of Regulation 2015/1589, as to the characterisation of the recipient undertaking as an SME within the meaning of Annex I to Regulation No 651/2014 and, therefore, suspicions as to the existence of aid which was unlawful and incompatible with the internal market.

87 In that regard, the applicant is entitled to rely on Article 4 of Annex I to Regulation No 651/2014, which is headed 'Data used for the staff headcount and the financial amounts and reference period', the wording of which exactly corresponds to that of Article 4 of the annex to the SME Recommendation. Article 4(1) and (2) of that regulation provides as follows:

'1. The data to apply to the headcount of staff and the financial amounts are those relating to the latest approved accounting period and calculated on an annual basis. They are taken into account from the date of closure of the accounts. The amount selected for the turnover is calculated excluding value added tax (VAT) and other indirect taxes.

2. Where, at the date of closure of the accounts, an enterprise finds that, on an annual basis, it has exceeded or fallen below the headcount or financial thresholds stated in Article 2, this will not result in the loss or acquisition of the status of [SME] unless those thresholds are exceeded over two consecutive accounting periods.'

88 Article 4 of Annex I to Regulation No 651/2014 lays down the method of calculation, related to the latest approved accounting period and on an annual basis, which is intended to determine the presence of the three criteria for being an SME, as referred to in Article 2(1) of that annex, namely a staff headcount of less than 250 persons, a maximum annual turnover of EUR 50 million and an annual balance sheet total not exceeding EUR 43 million. Moreover, the parties do not dispute that, in the event of there being linked enterprises within the meaning of Article 3(3) of that annex, that calculation must cover the relevant data of all those enterprises. Thus, in accordance with that requirement, in paragraph 57(d) *in fine* of the contested decision, there is a table which presents the combined data of the recipient undertaking and company N. relating to the three cumulative criteria for being an SME, as referred to in Article 2(1) of that annex, for 2010 to 2015.

89 At the hearing, the Commission, invoking page 14 of the 'User guide to the SME Definition', as published in 2015 by the Publications Office of the European Union, nevertheless disputed that Article 4(2) of Annex I to Regulation No 651/2014 is applicable to a change of owner of an enterprise, like the one which took place, in the present case, between companies P. and N. in relation to the recipient undertaking. That guide states, inter alia, that the corresponding rule in the annex to the SME Recommendation 'does not apply in the case of enterprises that exceed the relevant SME thresholds as a result of a change in ownership following a merger or acquisition' and that such enterprises 'need to be assessed on the basis of their shareholder structure at the time of the transaction, not at the time of closure of the latest accounts'. That statement is followed by a reference to section 1.1.3.1, paragraph 6(e) of Commission Decision 2012/838/EU, Euratom of 18 December 2012 on the adoption of the Rules to ensure consistent verification of the existence and legal status of participants, as well as their operational and financial capacities, in indirect actions supported through the form of a grant under the Seventh Framework Programme of the European Community for research, technological development and demonstration activities and under the Seventh Framework Programme of the European Atomic Energy Community for nuclear research and training activities (OJ 2012 L 359, p. 45), in which it is specified that that 'rule is not applicable if an SME is merged or acquired by a larger group, in which case the SME shall lose its status immediately from the date of the transaction'.

90 In that regard, it is sufficient to point out that the 'User guide to the SME Definition', to which the contested decision furthermore does not make reference, does not constitute a legally binding text capable of derogating from or reducing the scope of the binding rule referred to in Article 4(2) of Annex I to Regulation No 651/2014. Similarly, a 'disclaimer' appearing at the second page of that guide specifies that it 'serves as general guidelines for entrepreneurs and other stakeholders when applying the SME Definition', but that it 'does not have any legal force and does not bind the Commission in any way', as the SME Recommendation 'is the sole authentic basis for determining the conditions regarding qualification as an SME'. The reference to section 1.1.3.1, paragraph 6(e) of Decision 2012/838 cannot invalidate that assessment, since that provision, the scope of which is limited to nuclear research and training activities, is not applicable to this case. Therefore, that argument on the part of the Commission must be dismissed as unfounded.

91 Consequently, in the present case, the Commission was required to apply Article 4(2) of Annex I to Regulation No 651/2014.

92 However, on the one hand, it is not apparent either from the observations of the Slovak authorities placed in the case file, or from the contested decision, or from the Commission's written pleadings in the course of the proceedings, even following a specific written question from the Court in that regard, what, in the present case, was the approved accounting period which those authorities took into consideration to carry out the calculation, on an annual basis, under Article 2(1) of [Annex I to] Regulation No 651/2014, read in conjunction with Article 3(3) and Article 4(2) of Annex I to that regulation. On the other hand, the presentation, in that decision, of the combined data of the recipient undertaking and company N. for 2010 to 2012 does not take account of the fact that, during that period and a substantial part of 2013, the recipient undertaking was controlled by company P., whose data are nevertheless not used. In any event, when the aid at issue was granted, on 7 November 2013, the latest approved accounting period for which a calculation on an annual basis had to be carried out was that of 2012, during which the recipient undertaking was exclusively controlled by company P. and not by company N. In its response to the Court's written questions, the Commission furthermore confirmed the relevance of 2012 for the purposes of the application of Article 4(1) of that annex.

93 Even if it were necessary to take into account 2013 for that purpose, the applicant rightly argues that the annual balance sheet of the recipient undertaking necessarily covered data from the period during which the shares in that undertaking were still held by company P., as the change of shareholder was not entered in the Slovak Business Register until 7 August 2013 (see the third subparagraph of paragraph 57(d) of the contested decision). In such a scenario, in order to satisfy the criteria laid down in Article 2(1) of [Annex I to] Regulation No 651/2014, read in conjunction with Article 4(1) and (2) of Annex I to that regulation, and correctly to determine whether the recipient undertaking constituted an SME when the aid at issue was granted, it was not sufficient to take into consideration the data of the transferee parent company, as a linked enterprise of the recipient undertaking, which acquired control of it during the relevant accounting period, but it was necessary to take account also of the data of the transferor parent company, under the control of which that undertaking carried out a substantial part of its economic activities during that period. Any other interpretation would go against the spirit of Article 4(2) of that annex, which seeks to ensure that aid is in fact awarded to an SME and that the definition of SME is not circumvented by purely formal means (see, to that effect, judgment of 27 February 2014, *HaTeFo*, C-110/13, EU:C:2014:114, paragraph 33 and the case-law cited).

94 It follows that, in the present case, both the Slovak authorities and the Commission were required, on the one hand, to determine precisely the relevant approved accounting period and year for the purposes of the joint calculation of the respective data of the 'linked enterprises', within the meaning of Article 2(1) of [Annex I to] Regulation No 651/2014, read in conjunction with Article 3(3) and Article 4(2) of Annex I to that regulation, and, on the other, to specify which company or companies had to be taken into consideration to that end. Moreover, on that basis, they were required to assess whether or not, under Article 4(2) of that annex, the relevant thresholds for classifying the recipient undertaking as an SME were exceeded in two consecutive accounting periods.

95 However, as was pointed out in paragraphs 83 and 84 above, the contested decision is silent in that regard, which confirms a lack of investigation and examination of the relevant factors in the present case. Moreover, the Commission's lack of diligence in investigating the situation of companies P. and N., and that of their directors, is confirmed in the light of the information placed in the case file and cannot be justified by the argument that that institution could rely, without having any doubts within the meaning of Article 4(4) of Regulation 2015/1589, on the information submitted by the Slovak authorities, on the grounds that they were bound by their duty of sincere cooperation under Article 4(3) TEU.

96 First, as is apparent from Annexes A.21 and A.22 to the application, in 2012 and 2013, the boards of directors and boards of management of the recipient undertaking and company P. were partly and temporarily composed of members of the same family, one member of which sat on both boards of directors. In that regard, notwithstanding the evidence provided by the applicant in the course of the administrative procedure concerning the groups of enterprises managed by that family in Slovakia, the Commission relied, without any further investigation in that regard, on the vague assertions of the Slovak authorities that, on the one hand, they were not familiar with company P.'s shareholder structure, because such information was not publicly accessible and, on the other, that member of that family was neither a shareholder nor a member of another company established in Slovakia in the period from 14 March to 31 December 2012. In any event, as was pointed out in paragraph 83 above, those factors were neither set out nor assessed in the contested decision. Finally, in that regard, the Commission could not merely state its position on the situation of company P. succinctly, in its letter of 9 July 2015, in order to dispel the doubts in that regard and prove that the applicant had adequate knowledge of the factors which led the Commission to classify that company also as an SME.

97 Secondly, with regard to the situation of company N. and, in particular, its principal shareholder, despite the evidence submitted by the applicant in the course of the administrative procedure, the Commission merely found, vaguely and relying on the information provided by the Slovak authorities, in the seventeenth subparagraph of paragraph 57(d), at page 16, of the contested decision, that 'most of the undertakings in which [that shareholder] ha[d] a management position [we]re not active in the same market as [the recipient undertaking]'. However, it did not investigate further the question of whether company L., in which that shareholder was chairman of the board of directors, was in fact active in the same market or in an adjacent market, within the meaning of the fourth and fifth subparagraphs of Article 3(3) of Annex I to Regulation No 651/2014, even though there was significant evidence to that effect giving rise to doubts, in particular the map of the deposit at Borský Peter, which clearly gives company L.'s name as the owner of a sand extraction site neighbouring the extraction sites of the applicant and the recipient undertaking.

98 As a result, the Commission should have experienced doubts in that regard, within the meaning of Article 4(4) of Regulation 2015/1589.

99 Consequently, the first complaint must be upheld, without its being necessary to rule on the admissibility of the applicant's new evidence concerning the recipient undertaking's balance sheets between 2014 and 2018 (see paragraph 15 above).

– *Second complaint, based on the granting of the aid at issue on the basis of an aid scheme*

100 By the second complaint of the second part of the second plea in law, the applicant criticises the Commission, in essence, for not having checked whether the aid at issue corresponded to the criteria laid down by the aid scheme at issue, including that of the innovative nature of the investment project. By so doing, it seeks to demonstrate that that aid constituted, in reality, ad hoc aid granted to a large enterprise within the meaning of Article 6(3)(a) of Regulation No 651/2014.

101 The Commission argues in response, essentially, that it does not have the power to declare incompatible with Regulation No 651/2014 measures which fulfil all the conditions of that regulation, solely on the grounds that those measures potentially breach additional criteria arising under national law. As the innovative nature of the aid at issue is not a criterion required by that regulation, it is not material for the purposes of the declaration of compatibility.

102 It must be found that the present complaint cannot succeed, as none of the provisions of Regulation No 651/2014 lays down a requirement for the Commission to check whether individual aid was granted in accordance with the grant criteria of the aid scheme concerned, which falls principally within the competence of national authorities and courts (see, to that effect and by analogy, judgment of 6 July 2017, *Nerea*, C-245/16, EU:C:2017:521, paragraphs 35 and 37, and Opinion of Advocate General Campos Sánchez-Bordona in *Nerea*, C-245/16, EU:C:2017:271, points 76 to 78). Neither Article 6(3)(a) of that regulation, which the applicant believes should have been applied in the present case on the grounds that the recipient undertaking was a large enterprise, nor Article 14 of that regulation lays down such a requirement.

103 Therefore, the second complaint of the second part of the second plea in law must be rejected as unfounded.

Third part of the second plea in law, alleging infringement of Article 108(2) TFEU, read in conjunction with Article 4(4) of Regulation 2015/1589

104 By the third part of the second plea in law, the applicant alleges infringement of Article 108(2) TFEU, read in conjunction with Article 4(4) of Regulation 2015/1589, on the grounds that the Commission chose not to initiate the formal investigation procedure, despite the serious difficulties which it encountered in examining the aid at issue.

105 The Commission takes the view that it never encountered serious difficulties concerning the compatibility of the aid at issue with the internal market.

106 In that regard, it is sufficient to find that, in view of the upholding of the first complaint of the second part of the second plea in law on account of the existence of doubts within the meaning of Article 4(4) of Regulation 2015/1589 (see paragraphs 81 to 99 above), the concept of which

corresponds to that of serious difficulties (see, to that effect, judgment of 12 February 2008, *BUPA and Others* v *Commission*, T-289/03, EU:T:2008:29, paragraph 328), the third part of the second plea in law must also be upheld.

107 Therefore, it is necessary to annul the contested decision and to uphold the action in its entirety.

Costs

108 Under Article 134(1) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls Commission Decision C(2017) 5050 final of 20 July 2017 concerning investment aid to the Slovak glass sand producer NAJPI a. s. (SA.38121 (2016/FC) – Slovakia);**

2. **Orders the European Commission to pay the costs.**

Collins Kreuschitz Steinfatt

Delivered in open court in Luxembourg on 9 September 2020.

[Signatures]

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