Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

24 October 2019*

(State aid — Toll-motorway concession — Law providing for an exemption from tolls for certain vehicles — Compensation granted to the concession holder by the Member State for loss of revenue — Shadow toll — Decision declaring aid incompatible with the internal market and ordering its recovery — Procedural rights of the interested parties — Commission's obligation to exercise particular vigilance — Concept of State aid — Advantage — Improvement of the concessionaire's expected financial situation — Criterion of the private operator in a market economy — Article 107(3)(a) TFEU — Regional State aid)

In Case T-778/17,

Autostrada Wielkopolska S.A., established in Poznań (Poland), represented by O. Geiss, D. Tayar and T. Siakka, lawyers,

applicant,

v

European Commission, represented by L. Armati, K. Herrmann and S. Noë, acting as Agents,

defendant,

supported by

Republic of Poland, represented by B. Majczyna and M. Rzotkiewicz, acting as Agents,

intervener,

ACTION under Article 263 TFEU seeking annulment of Commission Decision (EU) 2018/556 of 25 August 2017 on the State aid SA.35356 (2013/C) (ex 2013/NN, ex 2012/N) implemented by Poland for Autostrada Wielkopolska S.A. (OJ 2018 L 92, p. 19),

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni (Rapporteur), President, L. Madise and R. da Silva Passos, Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 6 June 2019,

gives the following

* Language of the case: English.

Judgment[1]

Background to the dispute

Background

1 On 10 March 1997, following a public tender, the Republic of Poland granted to the applicant, Autostrada Wielkopolska S.A., a concession for the construction and operation of the section of the A2 motorway between Nowy Tomyśl (Poland) and Konin (Poland) ('the relevant section of the A2 motorway') for a period of 40 years.

2 Under the Concession Agreement signed on 12 September 1997, the applicant committed to obtain, at its own cost and risk, external funding for the construction and operation of the relevant section of the A2 motorway and, in exchange, had the right to collect tolls from the users of the motorway. That agreement also allowed it to increase the toll rates to maximise revenue, provided that they did not exceed the maximum rates defined by vehicle category.

3 Upon joining the European Union in 2004, the Republic of Poland was obliged to transpose into Polish law Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (OJ 1999 L 187, p. 42). Article 7(3) of that directive provides that tolls and user charges may not both be imposed at the same time for the use of a single road section.

4 The Polish Parliament therefore adopted the ustawa o zmianie ustawy o autostradach płatnych oraz o Krajowym Funduszu Drogowym oraz ustawy o transporcie drogowym (Law amending the Law on toll motorways and the National Road Fund and the Law on road transport) of 28 July 2005 (Dz. U. nº 155, position 1297) ('the Law of 28 July 2005'). That law eliminated the double charging of heavy goods vehicles ('HGVs') for the use of a single road section. Accordingly, HGVs holding a vignette (toll card) for using national roads in Poland were exempted, as from 1 September 2005, from tolls on motorways covered by concession agreements.

5 Under the Law of 28 July 2005, the concession holders had to be compensated by the National Road Fund for the loss of revenue caused by the exemption from tolls. That law provided that the concession holders were entitled to a reimbursement equivalent to 70% of the amount obtained by multiplying the actual number of journeys by HGVs bearing a vignette by the shadow-toll rate negotiated with the concession holders for each category of HGV. The reduction to 70% set by that law was intended to offset the expected increase in HGV traffic on the motorways which were the subject of a concession, following the exemption of HGVs from tolls. The law in question also provided that the shadow-toll rates could not exceed the real rates applied to the corresponding vehicle category. Finally, it specified that the method of compensation was to be determined in each concession agreement.

6 With regard to the applicant, following negotiations with the Polish authorities, the method of compensation and the shadow-toll rates were set out in Annex 6 to the Concession Agreement ('Annex 6'), concluded on 14 October 2005.

[*omissis*]

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

14 By letter of 28 November 2007, the Generalna Dyrekcja dróg krajowych i autostrad (Poland's General Directorate for National Roads and Motorways) informed the applicant that in view of doubts regarding the correctness of assumptions made for the purposes of Annex 6, it did not accept the proposed adjusted shadow-toll rates. Notwithstanding that letter, the applicant continued to receive monthly shadow-toll payments, in accordance with the provisions of that annex. Then, on 13 November 2008, the Polish Minister for Infrastructure made a statement of withdrawal from that annex claiming, inter alia, to have concluded it in error.

15 According to the Republic of Poland, the applicant overvalued the real-toll model's IRR by using outdated traffic and revenue forecasts. The applicant used a traffic and revenue study carried out by the consulting firm Wilbur Smith Associates (WSA) in 1999 ('the 1999 WSA study'), whereas an updated study, from June 2004 ('the 2004 WSA study'), was available. According to the report of 24 September 2010 commissioned by the Polish Ministry of Infrastructure and prepared by PricewaterhouseCoopers ('the PwC report'), the use of the traffic and revenue assumptions appearing in the 2004 WSA study instead of those appearing in the 1999 WSA study reduced the IRR in the real-toll model from 10.77% to 7.42%.

16 Thus, in the opinion of the Polish Minister for Infrastructure, the applicant received excessive shadow-toll compensation. Since the applicant refused to repay the overcompensation claimed by the Republic of Poland, that Minister requested that legal proceedings be commenced to recover that overcompensation.

17 At the same time, the applicant contested the repudiation of Annex 6 by bringing the case before an arbitral tribunal. By an award of 20 March 2013, the arbitral tribunal decided in favour of the applicant, finding that that annex was valid and that the Republic of Poland should respect its provisions. By a judgment of 26 January 2018, the Sąd Okręgowy w Warszawie, I Wydział Cywilny (Regional Court, Warsaw, first Civil Division, Poland) dismissed the Polish Minister for Infrastructure's action against the arbitral tribunal's award of 20 March 2013. That judgment was the subject of an appeal, which is pending before the Sąd Apelacyjny w Warszawie (Court of Appeal, Warsaw, Poland).

[*omissis*]

Administrative procedure and the contested decision

19 On 31 August 2012, the Republic of Poland notified to the European Commission a measure consisting of the grant of financial compensation to the applicant, in the form of shadow tolls, due to the loss of revenue caused by the Law of 28 July 2005.

[*omissis*]

21 On 25 August 2017, the Commission adopted Commission Decision (EU) 2018/556 of 25 August 2017 on the state aid SA.35356 (2013/C) (ex 2013/NN, ex 2012/N) implemented by Poland for Autostrada Wielkopolska (OJ 2018 L 92, p. 19; 'the contested decision').

[*omissis*]

38 The operative part of the contested decision is as follows:

'Article 1

The overcompensation for the period from 1 September 2005 to 30 June 2011 amounting to [EUR 223.74 million], granted by [the Republic of] Poland to [the applicant] on the basis of the [Law of 28 July 2005], constitutes State aid within the meaning of Article 107(1) of the Treaty.

Article 2

The State aid referred to in Article 1 is unlawful as it was granted in breach of the notification and standstill obligations stemming from Article 108(3) of the Treaty.

Article 3

The State aid referred to in Article 1 is incompatible with the internal market.

Article 4

1. [The Republic of] Poland shall recover the aid referred to in Article 1 from the beneficiary.

…'

[*omissis*]

Law

[*omissis*]

The first plea, alleging infringement of the right to be involved in the administrative procedure

46 The applicant maintains that the Commission breached its right to due process, and the principles of sound administration and protection of its legitimate expectations. More precisely, it takes the view that it was deprived of the opportunity to participate in the formal investigation procedure to the extent appropriate in light of the circumstances of the case.

[*omissis*]

51 According to settled case-law, respect for the rights of the defence is, in all proceedings initiated against a person and which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law which must be guaranteed even in the absence of specific rules (see judgment of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 51 and the case-law cited).

52 However, the administrative procedure relating to State aid is initiated solely against the Member State concerned. Consequently, the undertakings receiving aid are regarded solely as 'interested parties' in that procedure and they cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to the abovementioned Member State (see judgment of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 52 and the case-law cited). That conclusion is inevitable even if the Member State concerned and the recipient

undertakings thereof, may have diverging interests in the context of such a procedure (see judgment of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 54 and the case-law cited).

53 Thus, the case-law confers on the parties concerned essentially the role of information sources for the Commission in the administrative procedure instituted under Article 108(2) TFEU. It follows that, far from enjoying the same rights of defence as those which individuals against whom a procedure has been instituted are recognised as having, the parties concerned have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (see judgment of 16 March 2016, *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 53 and the case-law cited).

54 In that regard, it should be recalled that, pursuant to Article 108(2) TFEU and Article 6(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), when the Commission decides to initiate the formal investigation procedure in respect of draft aid, it must give interested parties the opportunity to submit their observations. This rule is in the nature of an essential procedural requirement within the meaning of Article 263 TFEU (judgment of 11 December 2008, *Commission* v *Freistaat Sachsen*, C-334/07, EU:C:2008:709, paragraph 55). With regard to that duty, the Court of Justice has ruled that the publication of a notice in the Official Journal was an appropriate means of notifying the persons concerned that the procedure was to be initiated, while also pointing out that the sole aim of this communication is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action (see judgment of 16 March 2016 *Frucona Košice* v *Commission*, T-103/14, EU:T:2016:152, paragraph 56 and the case-law cited).

55 Moreover, under Article 6(1) of Regulation No 659/1999, the initiating decision summarises the relevant issues of fact and law, includes a preliminary assessment on the part of the Commission and sets out the reasons for doubts as to the compatibility of the measure with the internal market. Since the purpose of the formal investigation procedure is to allow the Commission to examine in depth and to clarify the issues raised in the decision to open that procedure, in particular by obtaining observations from the Member State concerned and other interested parties, it may happen that in the course of that procedure the Commission is made aware of new factors or that its analysis changes. In that regard, it should be pointed out that, according to the case-law, the Commission's final decision may differ somewhat from the decision to initiate the formal investigation procedure, without, however, those differences affecting the legality of the final decision (judgment of 2 July 2015, *France and Orange* v *Commission*, T-425/04 RENV and T-444/04 RENV, EU:T:2015:450, paragraph 134).

56 Nevertheless, the Commission must, however, without being required to submit a final analysis of the aid in question, define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to put forward their comments (judgment of 31 May 2006, *Kuwait Petroleum (Nederland)* v *Commission*, T-354/99, EU:T:2006:137, paragraph 85). The Court has in particular held that, where the legal rules under which a Member State had notified proposed aid changed before the Commission takes its decision, the Commission had, with a view to giving its decision, as it was obliged to do, on the basis of the new rules, to ask the interested parties to express their views on the compatibility of that aid with those rules (see judgment of 11 December 2008, *Commission* v *Freistaat Sachsen*, C-334/07 P, EU:C:2008:709, paragraph 56 and the case-law cited). It has also been held that it is not only if the Commission realised, once a decision to open the formal investigation procedure has been adopted, that that decision is based either on incomplete facts or on an incorrect legal classification of those facts, that it had to be able, even be under an obligation, to alter its position by adopting a correction decision or a new opening decision, in order to allow the interested parties to submit useful observations (see, to that effect, judgment of 30 April 2019 in *UPF* v *Commission*, T-747/17, EU:T:2019:271, paragraph 76 and the case-law cited). It is only when the Commission changes its reasoning, following the decision to open an investigation, on facts or a legal

description of those facts which prove decisive in its assessment of the existence of an aid or its compatibility with the internal market, that it must correct the opening decision or extend it, in order to allow the interested parties to submit useful observations (see, to that effect, judgment of 30 April 2019, *UPF* v *Commission*, T-747/17, EU:T:2019:271, paragraph 77).

57 The first plea in law of the action must be examined in the light of those principles.

58 It should be pointed out at the outset that, as the applicant rightly claims, the present case differs from most of the cases concerning aid granted by the States, in that the Republic of Poland, which had not only divergent but also opposing interests to those of the applicant, argued during the administrative procedure that the notified measure, in so far as it allowed the applicant to receive excessive compensation, constituted State aid incompatible with the internal market. In that context, it was particularly important for the Commission to give the applicant the opportunity to submit meaningful comments in order to ensure that information which could demonstrate that the notified measure did not constitute State aid or was not incompatible with the internal market could be brought to the Commission's attention. That procedural obligation was all the more important given that the applicant was entitled to compensation because of the exemption from tolls of the relevant section of the A2 motorway and that a dispute between the opponent and the Republic of Poland on the extent of such compensation was pending before the national courts. In such a situation, it was incumbent on the Commission to exercise particular vigilance as regards respect for the applicant's right to be involved in the administrative procedure.

59 However, although the Commission published the opening decision in the Official Journal and invited the applicant to submit observations on that occasion, it subsequently did not give the applicant the opportunity to submit observations during the approximately 3 years preceding the contested decision. In contrast, it appears from paragraphs 8 to 13 of that decision that, after receiving the applicant's comments on 7 October 2014, the Commission exchanged views with the Republic of Poland on several occasions without the applicant being involved in the procedure. In particular, the Commission forwarded the applicant's comments to the Republic of Poland on 26 November 2014 and received the latter's comments on 23 February 2015. It then requested additional information from the Republic of Poland by letters dated 26 June 2015 and 20 April 2016, to which the latter replied by letters dated 10 and 17 July 2015 and 18 May 2016. Finally, on 7 December 2016, the Commission services and the Polish authorities participated in a teleconference, following which the Commission again requested additional information from the Republic of Poland, which it provided on 23 May 2017.

60 In the particular circumstances referred to in paragraph 58 above, given the duration and intensity of the exchanges with the Republic of Poland after the opening decision, the Commission should have given the applicant the opportunity to submit comments again. By failing to involve the applicant in the administrative procedure to an adequate extent after receiving its comments of 7 October 2014, the Commission failed to exercise the particular vigilance to which it was bound in this case.

61 However, the fact that the Commission failed to involve the applicant in the exchanges with the Republic of Poland which took place after the opening decision, however regrettable it may be, is not such as to lead to the annulment of the contested decision in so far as, in the circumstances of the case, in the absence of such an omission, the legal analysis adopted by the Commission in the latter decision could not have been different.

62 First, it should be noted that, on 20 September 2014, the Commission published the opening decision in the Official Journal and invited interested parties to submit their comments on the notified measure, which the applicant did on 7 October 2014.

63 In this respect, it should be noted that the opening decision mentions, in a sufficiently precise manner, the relevant factual and legal elements in this case, includes a preliminary assessment and sets out the reasons which led the Commission to doubt the method of calculating the compensation granted to the applicant, the level of such compensation and the compatibility of the notified measure with the internal market. In particular, the opening decision states in paragraphs 76 to 78, first, that the Commission's doubts concerned in particular the IRR of the real-toll collection model, secondly, that, according to the Republic of Poland, the applicant had used a study on traffic and revenue forecasts for 1999 rather than a more recent study for 2004 and, thirdly, that if the IRR of the real-toll collection model were higher than the IRR of the project before the shadow-toll system was introduced, this would result in overcompensation.

64 Secondly, it appears from the documents on the file that the Commission did not rely in the contested decision on facts or a legal classification of those facts, which are decisive for its legal analysis within the meaning of the case-law referred to in paragraph 56 above, which were not mentioned in the opening decision or which were communicated by the Republic of Poland after the opening decision.

65 Thirdly, the applicant's argument that the evidence submitted in the arbitration should have been examined by the Commission during the administrative phase of the procedure must be rejected, since the applicant does not specify the nature of the evidence in question and, in addition, the Commission was duly informed of the existence and content of the arbitral tribunal's award, as follows from paragraph 46 of the contested decision and the applicant's observations of 7 October 2014.

[*omissis*]

69 It follows from the above that the Commission has sufficiently defined the framework for its examination in the opening decision and, in so doing, has enabled the applicant to provide it with all relevant information on the facts and the legal classification of those facts, which are decisive in the contested decision. It also follows from this that, contrary to the applicant's contention, it is not established that, if the Commission had allowed the applicant to submit further observations due to the exchanges with the Republic of Poland which took place after the opening decision, that could have had an effect on the legal analysis contained in the contested decision, so that such an omission is not such as to lead to the annulment of the contested decision.

70 Consequently, the first plea in law must be rejected.

[*omissis*]

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Autostrada Wielkopolska S.A. to bear its own costs and to pay those incurred by the European Commission;**

3. **Orders the Republic of Poland to bear its own costs.**

Gervasoni Madise da Silva Passos

Delivered in open court in Luxembourg on 24 October 2019.

E. Coulon
Registrar

S. Gervasoni
President