



Reports of Cases

Case T-778/17

(publication by extracts)

Autostrada Wielkopolska S.A. against European Commission

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 tolls – 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)

1. *State aid – Examination by the Commission – Administrative procedure – Obligation of the Commission to give notice to the interested parties to submit their comments – Right of the aid beneficiary to be sufficiently associated with the proceedings – Scope – Member State submitting the claim of incompatibility of the aid with the internal market – Commission’s obligation to exercise particular vigilance to ensure that the procedural rights of the aid recipient are respected*
(Art. 108(2) EC; Council Regulation No 659/1999, Art. 6(1))

(see paragraphs 51-60)

2. *State aid – Examination by the Commission – Administrative procedure – Obligation of the Commission to give notice to the interested parties to submit their comments – Right of the aid beneficiary to be sufficiently associated with the proceedings – Infringement – Annulment of the decision declaring the aid incompatible with the internal market and ordering its recovery – Condition – Possibility for the administrative procedure to lead to a different result in the absence of that infringement*
(Arts 108(2) TFEU and 263 TFEU; Council Regulation No 659/1999, Art. 6(1))

(see paragraphs 61-65, 69)

Résumé

By the judgment of 24 October 2019, *Autostrada Wielkopolska v Commission* (T-778/17), the General Court dismissed the action for annulment brought by the company Autostrada

Wielkopolska S.A. against the decision of the Commission that Poland had granted it State aid incompatible with the internal market.¹

This case arises from a Concession Agreement signed in 1997, in execution of which Autostrada Wielkopolska built a section of the A2 motorway in Poland. In exchange, it benefitted from the right to collect tolls from motorway users.

Following its accession to the European Union in 2004, Poland transposed into Polish law the directive on the charging of heavy goods vehicles for the use of certain infrastructures,² under which tolls and user charges may not both be imposed at the same time for the use of a single road section. The Polish Parliament therefore adopted a law providing that HGVs holding a vignette for using national roads were exempted from tolls on motorways covered by concession agreements. Under that law, concession holders like Autostrada Wielkopolska were, however, to be compensated for the loss of revenue caused by that exemption.

After the Polish authorities had started paying compensation to Autostrada Wielkopolska, they notified the Commission that they considered the compensation to be excessive. In the contested decision, the Commission took the view that although Autostrada Wielkopolska in principle had the right to be compensated for the loss of revenue caused by the change in the Polish legislation, it had received excessive compensation, which constituted aid incompatible with the internal market.

In its action for annulment of that decision, Autostrada Wielkopolska relied, inter alia, on the infringement of its right to be involved in the administrative procedure conducted by the Commission.

The Court recalled that Autostrada Wielkopolska, as a beneficiary of the aid at issue, could not rely on the guarantee of the same rights of defence as those which individuals against whom a procedure had been opened were recognised as having, but the parties concerned had only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case. In that regard, the General Court stated that, in order not to render meaningless Autostrada Wielkopolska's right to submit comments, it was necessary for the Commission to define sufficiently the framework of its investigation procedure concerning the financial compensation in question. If the Commission changed its reasoning, after the adoption of the decision to open the investigation, on facts or a legal description of those facts which proved decisive in its assessment, it had to correct the opening decision in order to allow the interested parties to effectively submit observations.

Next, the General Court pointed out that the present case differed from most of the cases concerning State aid, in that Poland, the Member State providing aid, had opposing interests to those of Autostrada Wielkopolska and had itself argued that the notified measure constituted State aid incompatible with the internal market. In that context, it was particularly important for the Commission to give Autostrada Wielkopolska the opportunity to effectively submit comments. That procedural obligation was all the more important given that Autostrada Wielkopolska was entitled to compensation due to the exemption from tolls and that a dispute between it and Poland on the extent of such compensation was pending before the national

¹ 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).

² 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).

courts. The General Court concluded that, in such a situation, it was incumbent on the Commission to exercise particular vigilance regarding respect for the applicant's right to be involved in the administrative procedure.

In that regard, the Court observed that, although the Commission had published the decision to open formal proceedings in the Official Journal and invited Autostrada Wielkopolska to submit observations on that occasion, it subsequently did not give Autostrada Wielkopolska the opportunity to submit observations during the approximately three years which had preceded the contested decision, whereas it had, in contrast, exchanged views with Poland on several occasions. The General Court held that, given the duration and intensity of the exchanges with Poland after the opening decision, the Commission should have once again given Autostrada Wielkopolska the opportunity to submit comments. The General Court inferred that the Commission had failed to exercise the particular vigilance which it was required to in the present case.

Having regard to the circumstances of the case, the General Court nevertheless held that the Commission's failure to involve Autostrada Wielkopolska in the exchanges with Poland which took place after the decision to open formal proceedings was not such as to lead to the annulment of the contested decision. In that regard, the General Court found that the Commission had sufficiently defined the framework for its examination in the opening decision, and, in so doing, had enabled Autostrada Wielkopolska to provide it with all relevant information on the facts and the legal classification of those facts, which were decisive in the contested decision. The General Court also held that it had not been established that, had Autostrada Wielkopolska been involved in the abovementioned exchanges between the Commission and Poland, the legal analysis accepted by the Commission in the latter decision could have been different.