Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

22 February 2024*

[Text rectified by order of 7 June 2024]

(Appeal – State aid – Article 107 TFEU – Concept of 'aid' – Advantage – Private investor test – Arbitration award setting reduced electricity tariffs – Whether the arbitration award can be imputed to the State – Regulation (EU) 2015/1589 – Article 4(2) – Decision that the measure does not constitute aid)

In Joined Cases C-701/21 P and C-739/21 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 19 November 2021 and 1 December 2021, respectively,

Mytilinaios AE – Omilos Epicheiriseon, established in Marousi (Greece), represented by V. Christianos, D. Diakopoulos, G. Karydis, A. Politis, P. Selekos and M.Ch. Vlachou, dikigoroi,

appellant in Case C-701/21 P,

the other parties to the proceedings being:

Dimosia Epicheirisi Ilektrismou AE (DEI), established in Athens (Greece), represented initially by E. Bourtzalas, A. Oikonomou, E. Salaka, C. Synodinos and H. Tagaras, dikigoroi, and D. Waelbroeck, avocat, and subsequently by E. Bourtzalas, E. Salaka, C. Synodinos and H. Tagaras, dikigoroi,

applicant at first instance,

European Commission, represented by A. Bouchagiar, I. Georgiopoulos and P.-J. Loewenthal, acting as Agents,

defendant at first instance,

supported by:

Federal Republic of Germany, represented initially by J. Möller and D. Klebs, and subsequently by J. Möller, acting as Agents,

intervener in the appeal,

* Language of the case: Greek.

and

European Commission, represented by A. Bouchagiar, I. Georgiopoulos and P.-J. Loewenthal, acting as Agents,

appellant in Case C-739/21 P,

supported by:

Federal Republic of Germany, represented initially by J. Möller and D. Klebs, and subsequently by J. Möller, acting as Agents,

intervener in the appeal,

the other parties to the proceedings being:

Dimosia Epicheirisi Ilektrismou AE (DEI), established in Athens, represented initially by E. Bourtzalas, A. Oikonomou, E. Salaka, C. Synodinos and H. Tagaras, dikigoroi, and D. Waelbroeck, avocat, and subsequently by E. Bourtzalas, E. Salaka, C. Synodinos and H. Tagaras, dikigoroi,

applicant at first instance,

Mytilinaios AE – Omilos Epicheiriseon, established in Marousi, represented by D. Diakopoulos, N. Keramidas and N. Korogiannakis, dikigoroi,

intervener at first instance,

THE COURT (Fourth Chamber),

composed of C. Lycourgos, President of the Chamber, O. Spineanu-Matei, J.-C. Bonichot, S. Rodin and L.S. Rossi (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 27 April 2023,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2023,

gives the following

Judgment

1 By their appeals, Mytilinaios AE – Omilos Epicheiriseon (‘Mytilinaios’) and the European Commission seek to have set aside the judgment of the General Court of the European Union of 22 September 2021, *DEI* v *Commission* (T-639/14 RENV, T-352/15 and T-740/17, EU:T:2021:604; ‘the judgment under appeal’), whereby the General Court annulled the Commission’s letter COMP/E3/ON/AB/ark *2014/61460 of 12 June 2014 informing Dimosia Epicheirisi Ilektrismou

AE (DEI) that no further action would be taken on its complaints ('the letter at issue'), Commission Decision C(2015) 1942 final of 25 March 2015 in Case SA.38101 (2015/NN) (ex 2013/CP) concerning alleged State aid granted to Alouminion SA in the form of electricity tariffs below cost following an arbitration decision (OJ 2015 C 219, p. 2; 'the first decision at issue') and Commission Decision C(2017) 5622 final of 14 August 2017 in Case SA.38101 (2015/NN) (ex 2013/CP) concerning alleged State aid granted to Alouminion SA in the form of electricity tariffs below cost following an arbitration decision (OJ 2017 C 291, p. 2; 'the second decision at issue').

Legal context

2 Article 1 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), entitled 'Definitions', provides:

'For the purposes of this Regulation, the following definitions shall apply:

…

(h) "interested party" means any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.'

3 Article 4 of that regulation, entitled 'Preliminary examination of the notification and decisions of the Commission', provides:

'1. The Commission shall examine the notification as soon as it is received. Without prejudice to Article 10, the Commission shall take a decision pursuant to paragraphs 2, 3 or 4 of this Article.

2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the internal market of a notified measure, in so far as it falls within the scope of Article 107(1) TFEU, it shall decide that the measure is compatible with the internal market ("decision not to raise objections"). The decision shall specify which exception under the TFEU has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the internal market of a notified measure, it shall decide to initiate proceedings pursuant to Article 108(2) TFEU ("decision to initiate the formal investigation procedure").

…'

4 The preceding provisions were reproduced from 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), which is repealed by Regulation 2015/1589.

Background to the dispute and the judgment under appeal

5 The background to the dispute is set out in paragraphs 1 to 53 of the judgment under appeal and may be summarised as follows for the purposes of the present proceedings.

6 The cases before the General Court concern three related disputes which have arisen one after the other and concern essentially the same subject matter, namely whether the electricity supply tariff ('the tariff in question') which DEI, an electricity producer and supplier controlled by the Greek State, must charge, by virtue of an arbitration award, to its main customer, namely Mytilinaios, an aluminium producer, involves the grant of State aid.

7 On 4 August 2010, DEI and Mytilinaios signed a framework agreement concerning the electricity supply tariff to be applied during the period from 1 July 2010 to 31 December 2013, in addition to the arrangements for the amicable settlement of an alleged debt owed by Mytilinaios to DEI, which had accrued during the period from 1 July 2008 to 30 June 2010.

8 On the basis of the criteria laid down in that framework agreement, Mytilinaios and DEI have been unsuccessful in negotiating the content of a draft electricity supply contract, since those parties have been unable to agree on the tariff to be applied for the supply of electricity which DEI was to provide to Mytilinaios.

9 Under an arbitration agreement signed on 16 November 2011, Mytilinaios and DEI agreed to entrust the resolution of their dispute to the permanent arbitration body of the Rythmistiki Archi Energeias (Greek Energy Regulator, Greece; 'the RAE'), in accordance with Article 37 of nomos 4001/2011, gia ti leitourgia Energeiakon Agoron Ilektrismou kai Fysikou Aeriou, gia Erevna, Paragogi kai diktya metaforas Ydrogonanthrakon kai alles rythmiseis (Law 4001/2011 on the operation of the electricity and gas energy markets, research, production and hydrocarbon transport networks and other regulations) (FEK A' 179/22.8.2011; 'Law 4001/2011').

10 According to that arbitration agreement the task with which the arbitration tribunal was entrusted consisted in determining, on the basis of negotiations which took place between DEI and Mytilinaios, the electricity supply tariff corresponding to the specific characteristics of Mytilinaios and covering at least the costs borne by DEI.

11 By decision of 31 October 2013 ('the arbitration award'), the arbitration tribunal of the RAE settled that dispute.

12 By judgment of 18 February 2016, the Efeteio Athinon (Court of Appeal, Athens, Greece) dismissed an action for annulment of the arbitration award brought by DEI.

13 On 23 December 2013, DEI lodged a complaint ('the 2013 complaint') with the Commission, maintaining that the arbitration award constituted State aid.

14 By the letter at issue, the Commission informed DEI that it was closing the investigation of its 2013 complaint.

15 By application lodged at the Registry of the General Court on 22 August 2014, DEI brought an action, registered as Case T-639/14, seeking the annulment of the letter at issue.

16 On 25 March 2015, the Commission adopted the first decision at issue, in which it confined itself to assessing whether the fixing and implementation of the tariff in question was consistent with the granting of an advantage to Mytilinaios for the purposes of Article 107(1) TFEU. To that end, it examined whether, by agreeing to settle the dispute with Mytilinaios by having recourse to the arbitration procedure and by complying with the arbitration award, DEI, in its capacity as a public undertaking, had acted in accordance with the requirements of the private investor test. It concluded, first, that the conditions for applying that test were satisfied in the present case and that, therefore, no advantage had been granted to Mytilinaios and, second, that, since the first decision at issue reflected its final position in that regard, the letter at issue had to be regarded as having been replaced by that decision.

17 The Commission therefore found that the arbitration award did not constitute State aid.

18 By application lodged at the Registry of the General Court on 29 June 2015, DEI brought an action, registered as Case T-352/15, seeking the annulment of the first decision at issue.

19 By order of 9 February 2016, *DEI* v *Commission* (T-639/14, EU:T:2016:77), the General Court decided that there was no longer any need to adjudicate on the action in Case T-639/14 on the ground, inter alia, that the first decision at issue had formally replaced the letter at issue.

20 On 22 April 2016, DEI brought an appeal against that order.

21 By judgment of 31 May 2017, *DEI* v *Commission* (C-228/16 P, EU:C:2017:409), the Court of Justice set aside the order of 9 February 2016, *DEI* v *Commission* (T-639/14, EU:T:2016:77), referred the case back to the General Court and reserved the costs.

22 Following the delivery of that judgment, Case T-639/14 is now registered as Case T-639/14 RENV.

23 On 14 August 2017, the Commission adopted the second decision at issue, whereby it once more decided, while expressly repealing and replacing both the letter at issue and the first decision at issue, that the arbitration award did not involve the grant of State aid within the meaning of Article 107(1) TFEU. The reasons given in support of that conclusion, based on the private investor test having been complied with and on the lack of an advantage, are identical to those set out in the first decision at issue.

24 By letters of 24 August 2017, thus following the adoption of the second decision at issue, the Commission requested the General Court to make a finding that the actions in Cases T-639/14 RENV and T-352/15 had become devoid of purpose and that there was no longer any need to adjudicate on them.

25 By application lodged at the Registry of the General Court on 3 November 2017, DEI brought an action, registered as Case T-740/17, seeking the annulment of the second decision at issue.

26 By decision of the President of the Third Chamber, Extended Composition, of the General Court of 26 February 2020, Cases T-639/14 RENV, T-352/15 and T-740/17 were joined for the purposes of the oral part of the procedure and the decision which closes the proceedings.

27 By the judgment under appeal, the General Court annulled the letter at issue and the first and second decisions at issue, ordered the Commission to bear its own costs and to pay those incurred by DEI and ordered Mytilinaios to bear its own costs.

Forms of order sought by the parties before the Court of Justice

Case C-701/21 P

28 By its appeal, Mytilinaios, supported by the Commission, claims that the Court should:

– set aside the judgment under appeal;

– if necessary, refer the case back to the General Court for judgment; and

– order DEI to pay the costs.

29 DEI claims that the Court should:

– dismiss the appeal;

– give final judgment in the present proceedings; and

– order Mytilinaios to pay the costs of the proceedings at first instance and on appeal.

Case C-739/21 P

30 By its appeal, the Commission, supported by Mytilinaios, claims that the Court should:

– set aside the judgment under appeal;

– dismiss the action in Case T-740/17 or, in the alternative, reject the third and fourth pleas in law as well as the first and second parts of the fifth plea in law of that action and refer that case back to the General Court for a decision on the other pleas for annulment;

– declare that the actions in Cases T-639/14 RENV and T-352/15 have become devoid of purpose and that there is no longer any need to adjudicate; and

– order DEI to pay the costs.

31 DEI claims that the Court should:

– dismiss the appeal in its entirety as inadmissible and, in the alternative, as unfounded and order the Commission to pay all the costs at first instance and on appeal; or

– in the alternative, should the Court uphold the appeal, give final judgment on the actions in Cases T-639/14 RENV, T-352/15 and T-740/17, and dismiss the Commission's application for a declaration that there is no need to adjudicate in Cases T-639/14 RENV and T-352/15.

Procedure before the Court of Justice

32 By decisions of the President of the Court of Justice of 7 April 2022, the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by the Commission in Cases C-701/21 P and C-739/21 P.

33 After hearing the parties, the Court, by decision of 28 February 2023, joined Cases C-701/21 P and C-739/21 P for the purposes of the oral procedure and of the judgment.

The appeals

34 In support of its appeal in Case C-701/21 P, Mytilinaios, supported by the Commission, raises three grounds of appeal.

35 The first ground of appeal alleges an error of law by the General Court in the assessment of whether the action for annulment was admissible and concerns the principles *nemo auditur propriam turpitudinem allegans* and *nemo potest venire contra factum proprium*.

36 The second ground of appeal alleges infringement of Article 107(1) TFEU with regard to the application of the private investor test and the classification of an arbitration tribunal as a State body.

37 The third ground of appeal alleges infringement of Article 4 of Regulation 2015/1589 as regards first, there being doubts or serious difficulties as to the existence of State aid at the stage of the preliminary examination of complaints, and, second, the reversal of the burden of proof.

38 In support of its appeal in Case C-739/21 P, the Commission, supported by Mytilinaios and the Federal Republic of Germany, raises a single ground of appeal, alleging infringement of Article 107(1) TFEU, since the General Court incorrectly interpreted and applied the condition of the 'advantage' which a State measure must satisfy in order to constitute State aid.

The first ground of appeal in Case C-701/21 P, alleging failure to have regard to the principles nemo auditur propriam turpitudinem allegans and nemo potest venire contra factum proprium

39 The first ground of appeal raised by Mytilinaios is divided into two parts and refers to the part of the judgment under appeal by which the General Court held that the action was admissible.

Arguments of the parties

40 By the first part of the first ground of appeal, Mytilinaios complains that the General Court failed to respond to its arguments seeking to demonstrate that DEI's lodging of the action for annulment runs counter to the principles *nemo auditur propriam turpitudinem allegans* and *nemo potest venire contra factum proprium*, those principles prohibiting the conduct by which a party to legal proceedings challenges as unlawful its previous voluntarily undertaken actions.

41 Mytilinaios argues that the fact that DEI has the capacity of an interested party within the meaning of Article 1(h) of Regulation 2015/1589, did not necessarily mean that, in the present case, it had standing to bring proceedings. Mytilinaios and the Commission maintained, in that regard, that the exercise by DEI of its procedural rights was improper, inasmuch as it failed to have regard to those principles. In the view of Mytilinaios, by failing to respond to their arguments, the General Court erred in holding, in paragraph 92 of the judgment under appeal, that DEI had, in the present case, standing to bring proceedings.

42 Mytilinaios states that those arguments, as summarised in paragraph 68 of the judgment under appeal, related to a specific procedural strategy of DEI and to its standing to bring proceedings and did not, contrary to the General Court's finding in paragraph 91 of the judgment under appeal, lead to confusion between DEI's situation, as an undertaking controlled by the Greek State, and the situation of that State.

43 Mytilinaios observes in that regard that the scope of EU regulations must not be extended to cover abuses on the part of undertakings (see, to that effect, judgment of 11 January 2007, *Vonk Dairy Products*, C-279/05, EU:C:2007:18, paragraph 31).

44 By the second part of the first ground of appeal, Mytilinaios claims that, in paragraph 91 of the judgment under appeal, the General Court rejected the argument concerning the failure to have regard to the principle *nemo potest venire contra factum proprium* by an incorrect statement of reasons.

45 According to Mytilinaios, the General Court deflected the question concerning that principle, which is linked to DEI's standing to bring proceedings, in order to examine the question, which is unrelated to that argument, of confusion between DEI and the Greek State. Mytilinaios claims that the General Court thus distorted the content of that argument.

46 DEI replies, principally, that Mytilinaios' first ground of appeal is manifestly inadmissible and manifestly unfounded.

47 The argument in support of that first ground of appeal is worded in a vague and ambiguous manner. Mytilinaios does not specify either DEI's action for annulment to which it refers, or the alleged error of law vitiating the judgment under appeal, or how DEI's conduct is improper and contradictory.

48 In the alternative, DEI submits that the two parts of the first ground of appeal are unfounded.

Findings of the Court

49 In order to give a ruling on the first ground of appeal raised by Mytilinaios in Case C-701/21, in the first place, the admissibility of that ground, which is disputed by DEI, must be examined.

50 In that regard, it is sufficient to note, first, that that ground is directed against paragraph 91 of the judgment under appeal, which forms part of the statement of reasons found in paragraphs 64 to 195 of that judgment, which deals with the action in Case T-740/17. It follows that, contrary to DEI's claims, it is clear from the appeal that that ground concerns that action for annulment.

51 Second, the wording of the first ground of appeal is sufficiently clear to make it possible to understand that, by its two parts, that ground seeks to dispute the lack of reasoning of the judgment under appeal as far as concerns the rejection of the argument alleging failure to have regard to the principles *nemo auditur propriam turpitudinem allegans* and *nemo potest venire contra factum proprium* and also an error of law made by the General Court in rejecting that argument on the basis of considerations unconnected with the question of DEI's allegedly improper conduct. The appellant states, in its appeal, that, by lodging its action, DEI sought, improperly, to profit from the alleged unlawfulness of State aid which it, as an undertaking controlled by the Greek State, contributed to putting into place.

52 Consequently, the first ground of appeal in Case C-701/21 P is admissible.

53 As regards, in the second place, the substance of that ground, it must be held that, as the Advocate General, in essence, noted in point 54 of his Opinion, the General Court, contrary to the claims relied on in support of the first part of that ground, in paragraph 91 of the judgment under appeal, gave reasons for rejecting the argument alleging failure to have regard to the principle *nemo auditur propriam turpitudinem allegans*. In paragraph 91, the General Court found that 'nor is the Commission justified in invoking an infringement of the principle of law that no one may rely on his or her own wrongdoing. That argument is merely a further variant of the argument intended to conflate DEI's situation with that of the Greek State and to attribute to it any satisfaction on the part of the Greek authorities with the outcome of the arbitration procedure; it cannot therefore be upheld either'. That reasoning, albeit succinct, is sufficient to make it possible for Mytilinaios to ascertain the reasons why the General Court has not allowed its argument and for the Court of Justice to carry out its judicial review in that regard.

54 The first part of the first ground of appeal, alleging a lack of reasoning must therefore be rejected as being unfounded.

55 By the second part of the first ground of its appeal, Mytilinaios raises an error of law made by the General Court in paragraph 91 of the judgment under appeal.

56 It is true that, in response to the argument of a failure by DEI to have regard to the principle that a person may not rely on his or her own wrongdoing, the General Court, in essence, confined itself, in paragraph 91, to finding that DEI's situation and that of the Hellenic Republic could not be conflated. As Mytilinaios has observed, by maintaining before the General Court that DEI had failed to have regard to that principle, Mytilinaios had claimed not that the situation of DEI and of the Hellenic Republic were conflated, but that DEI could not validly dispute the outcome of an arbitration procedure to which that undertaking had agreed.

57 That being so, it should be noted that the General Court examined, in paragraphs 86 to 92 of the judgment under appeal, whether, contrary to the Commission's and Mytilinaios' claims, DEI had standing to bring proceedings against the second decision at issue, with the result that paragraph 91 of that judgment must be read in the context of which it forms part.

58 In paragraph 89 of the judgment under appeal, which the appellant does not challenge in its appeal, the General Court rejected the Commission's and Mytilinaios' arguments alleging confusion between the Greek State and DEI in order to attribute to it the alleged satisfaction of the Greek authorities with the outcome of the arbitration procedure and the comparison of DEI's position with that of a local authority. In that respect, the General Court, in the same paragraph, found that DEI had set out in detail the reasons why it considered that, first, its economic situation

was affected by the arbitration award in so far as it required DEI to charge Mytilinaios for the supply of electricity a rate below its production costs and, second, the letter at issue and the first and second decisions at issue concluding that no further action would be taken in respect of its complaints prevented it from submitting its observations in a formal investigation procedure under Article 108(2) TFEU. In the light of those arguments, according to the General Court, any annulment, inter alia, of the second decision at issue, on the ground that the Commission was faced with doubts or serious difficulties as to the existence of State aid was capable of procuring an advantage for DEI precisely because it was liable to require the Commission to initiate the formal investigation procedure, in the context of which DEI could have relied on the procedural guarantees conferred on it under Article 108(2) TFEU.

59 In paragraph 90 of the judgment under appeal, which the appellant also does not dispute, the General Court also rejected the argument of the Commission and Mytilinaios that the binding legal effects adversely affecting DEI, linked to the tariff in question, are attributable not to the second decision at issue, but to the arbitration award. It rejected that argument on the grounds, first, that, by that decision, the Commission refused to classify the outcome of the arbitration procedure as an aid measure as DEI had requested and, second, that DEI had specifically complained that the Commission had unlawfully failed to investigate, in that decision, whether that tariff involved the grant of an advantage. According to the General Court, that assessment was unaffected by the fact that DEI had voluntarily referred its dispute with Mytilinaios to arbitration, since that step does not necessarily imply that it accepts the arbitration award a priori, which it also unsuccessfully challenged before the Efeteio Athinon (Court of Appeal, Athens).

60 It therefore follows from those two paragraphs of the judgment under appeal that the General Court rejected the arguments of the Commission and Mytilinaios seeking to establish that, on account of the Greek State's control over DEI, its position was conflated with that of that State, which had no interest in calling into question a Commission decision not to open a formal investigation procedure concerning a measure which it had itself adopted, just like the argument that DEI could not call into question the outcome of an arbitration procedure to which that undertaking had agreed.

61 It follows that the General Court made no error of law when it explained, in paragraph 90 of the judgment under appeal, the reason why it was appropriate to reject the arguments of the Commission and Mytilinaios, which, as reproduced in paragraph 68 of that judgment, and not disputed in the appeal, sought simply to support their position that DEI could not terminate, on the basis of State aid, a contract which it no longer considered to be profitable in order to release itself from its commitment.

62 Moreover, Mytilinaios has not disputed the finding, set out in paragraph 85 of the judgment under appeal, that the second decision at issue affects DEI's legal position and interests, as an interested party within the meaning of Article 1(h) of Regulation 2015/1589.

63 In its 2013 complaint, DEI had argued that the Commission ought to find that the measure capable of constituting State aid, namely the arbitration award, not the decision to have recourse to arbitration, required it to apply tariffs below its costs and that, accordingly, the decision to apply such tariffs was not attributable to it, as an undertaking controlled by the Greek State, but was directly attributable to that State, through the arbitration tribunal.

64 Although it is true that it was for the Commission to ascertain whether that was so in the present case, that cannot call into question the fact that that undertaking has standing to bring proceedings against the Commission's decision rejecting that complaint without opening the formal investigation procedure. To argue otherwise would lead to the effectiveness of the review of State measures in the field of State aid being compromised.

65 In view of those considerations, the second part of the first ground of appeal must be rejected as being unfounded and, therefore, the first ground of appeal must be rejected in its entirety.

The second ground of appeal in Case C-701/21 P and the single ground of appeal in Case C-739/21 P, alleging infringement of Article 107(1) TFEU

66 The second ground of appeal raised by Mytilinaios in Case C-701/21 P is divided into two parts, the second of which corresponds, in essence, to the single ground of appeal raised by the Commission in Case C-739/21 P.

67 By the first part of its second ground of appeal, Mytilinaios submits, in essence, that, in paragraphs 160 to 163 and 185 to 191 of the judgment under appeal, the General Court infringed Article 107 TFEU and the private investor test.

68 It should be noted in that regard that the paragraphs of the judgment under appeal criticised in that first part are based on the premiss, set out in paragraphs 150 to 159 of the judgment under appeal, that the State measure capable of constituting State aid was the arbitration award.

69 Since those paragraphs have been challenged in the second part of Mytilinaios' second ground of appeal and in the Commission's single ground of appeal, it is appropriate to first deal with that second part and that ground of appeal.

Arguments of the parties

70 By the second part of its second ground of appeal, Mytilinaios submits that the General Court erred, in paragraphs 150 to 159 of the judgment under appeal, in finding that the arbitration tribunal in question ought to be classified as 'a body exercising a power coming within the scope of public authority rights and powers'.

71 In that respect, it observes that the arbitration provided for in Article 37(1) of Law 4001/2011 is contractual arbitration. That article provides that a permanent arbitration body is set up by the RAE, before which it is possible to resolve disputes occurring in the energy sector following a special written agreement, namely an arbitration agreement established between the parties involved under Article 37(2) of that law.

72 According to Mytilinaios, first of all, the fact that the possible intervention of an arbitration tribunal in the resolution of a dispute is provided for by law does not mean that that tribunal has been established under that law, as the General Court incorrectly held in paragraph 153 of the judgment under appeal.

73 Next, Mytilinaios claims that the General Court's assessment, in paragraph 156 of that judgment, relating to the nature of the awards of the arbitration tribunals referred to in Law 4001/2011 is not decisive in the present case in order to determine whether those tribunals may be classified as

State courts, since that assessment concerns the binding nature of those awards, which the General Court conflates with the mandatory jurisdiction of arbitration courts, namely the obligation to submit a dispute to their arbitration.

74 Moreover, Mytilinaios submits that paragraph 157 of that judgment, which relates to the possibility of appealing before an ordinary court the awards of the arbitration tribunals referred to in Law 4001/2011, also does not suffice to classify those tribunals as State courts. An arbitration award is subject not to the ordinary channels of appeal, namely an appeal and an appeal on a point of law, to which the decisions of the ordinary courts are subject, but to an action for annulment, which is specifically established under Article 897 of the Kodikas politikis dikonomias (Greek Code of Civil Procedure). That action for annulment may be brought only on limited grounds. Consequently, Greek civil procedure provides for a limited judicial review of arbitration awards compared with the review of the decisions of the ordinary courts, which results in civil procedure distinguishing the two dispute resolution mechanisms. On the basis of those findings, the assessment in paragraph 157 of the judgment under appeal highlights the significant differences of the arbitration tribunals, on account of their nature and of their functioning, compared with the ordinary courts.

75 Lastly, Mytilinaios criticises the General Court for having failed to ascertain whether the arbitration tribunal in question had mandatory jurisdiction. According to the case-law, such mandatory jurisdiction is lacking in the case of arbitration bodies which have been established by contract, since the contracting parties are under no obligation, in law or in fact, to refer their disputes to arbitration, whereas the public authorities of the Member State concerned are neither involved in the decision to opt for arbitration nor required to intervene of their own accord in the proceedings before the arbitrator. By contrast, only a legislative provision which lays down the possibility of unilaterally submitting a dispute to the jurisdiction of an arbitration tribunal is capable of conferring the mandatory jurisdiction of a State court on an arbitration panel. In the present case, first, Law 4001/2011 includes no provision to that effect and, second, recourse to arbitration was based exclusively on the agreement of the parties, without which DEI or Mytilinaios could have had recourse to the ordinary courts in order to resolve their dispute.

76 In support of its single ground of appeal, the Commission argues, for its part, that, first of all, the criteria referred to in paragraphs 153, 155 and 156 of the judgment under appeal, namely the carrying out by arbitration tribunals established under Law 4001/2011 of judicial functions identical to those of the ordinary courts, the application by those tribunals of provisions of the Greek Code of Civil Procedure as well as the legally binding nature of their decisions which are enforceable and have the force of *res judicata* apply to any arbitration taking place in Greece and are subject to Greek law.

77 Next, the criterion referred to in paragraph 157 of that judgment, namely the possibility of disputing the award of an arbitration tribunal established under Article 37 of Law 4001/2011 before an ordinary court, also does not demonstrate any particular feature of those arbitration tribunals compared with any other arbitration taking place in Greece. In that regard, the Commission argues that, although the award by such an arbitration tribunal may be disputed for specific reasons, before an ordinary court by an annulment request or a request for recognition that the arbitration award does not exist, the same applies to any other arbitration award made in Greece. Accordingly, not only does that element not demonstrate a particular feature of the arbitration tribunals established under Article 37 of Law 4001/2011, but, on the contrary, the

limited possibility of disputing the arbitration awards of those tribunals distinguishes those awards from the decisions of the ordinary courts which are generally open to appeal for the purpose of disputing the factual or legal assessments of the first-instance court.

78 Lastly, the Commission acknowledges that the element referred to in paragraph 154 of that judgment, namely the obligation on the parties which agree to refer the dispute to arbitration under Article 37 of Law 4001/2011 to choose the arbitrators on the basis of a list drawn up by decision of the President of the RAE, does in fact distinguish that arbitration from any other arbitration, since there is no general obligation requiring the parties which have recourse to arbitration in Greece to appoint the arbitrators on the basis of a specific list. However, such an element is merely a procedural detail and has no particular feature which would justify treating the arbitration tribunals provided for in that Article 37 in the same way as an ordinary Greek court.

79 The Commission adds that treating the arbitration tribunal in question in the same way as an ordinary Greek court is contrary to the case-law concerning Article 267 TFEU.

80 That case-law distinguishes two categories of arbitration tribunals.

81 The first of those categories includes arbitration tribunals appointed by contract whose jurisdiction is based on an agreement between the parties, which are not regarded as courts of a Member State. Those arbitration tribunals are the norm, since recourse to arbitration generally requires the agreement of the parties. In that connection, the Court refused to recognise as courts of a Member State the bodies responsible for commercial arbitration, other types of arbitration based on the agreement of the parties or arbitration based on a bilateral investment treaty.

82 The second of those categories includes arbitration tribunals whose jurisdiction is mandatory by law and irrespective of the will of the parties, which could be regarded as courts of a Member State if the other conditions set out in Article 267 TFEU are satisfied. In that regard, the Court accepted, in exceptional cases, that an arbitration tribunal which has been established by law, whose decisions are binding on the parties and whose jurisdiction does not depend on the agreement of the parties may be regarded as a court of a Member State.

83 According to the Commission, the arbitration tribunals referred to in Article 37 of Law 4001/2011 fall with the first category of tribunals, given that, in order to be able to submit a dispute to those tribunals, the parties must provide their written agreement, as the General Court has also stated, in particular, in paragraphs 9, 90 and 232 of the judgment under appeal. Moreover, the Greek public authorities did not intervene in the decision to opt for arbitration by DEI and Mytilinaios or, of its own motion, in the arbitration proceedings. It follows that those arbitration tribunals have no mandatory jurisdiction, that is to say, no jurisdiction which is independent of the will of the parties.

84 By relying on the arbitration tribunal in question incorrectly being treated in the same way as the ordinary Greek courts, the General Court also erred in finding that the arbitration award, as a judicial decision, constituted a State measure and that the Commission ought therefore to have assessed whether that award conferred an advantage on Mytilinaios by examining the amount of the tariff in question compared with the market price. In actual fact, the General Court ought to have regarded recourse to the arbitration tribunal as a private method of dispute settlement and

therefore concluded that the private investor test did apply to DEI's decision to agree to settle its dispute with Mytilinaios by arbitration, since that decision by DEI as a public undertaking was the only State measure in the present case.

85 DEI contends that the second part of the second ground of appeal is based on a misreading of the judgment under appeal.

86 First, the General Court did not treat the arbitration tribunal in question 'in the same way' as an ordinary court and the arbitration award 'in the same way' as an ordinary judicial decision, respectively. In actual fact, the General Court, in paragraph 150 of the judgment under appeal, expressly distinguished the arbitration award from the decisions of the ordinary Greek courts and confined itself, in paragraph 159 of that judgment, to classifying the arbitration tribunal 'as a body exercising a power coming within the scope of public authority rights and powers'. In addition, public authority rights and powers could be exercised by a number of other State bodies, without those bodies being 'treated in the same way', for that reason, as arbitration tribunals or ordinary courts. Furthermore, as is apparent from paragraph 149 of the judgment under appeal, the General Court examined the extent to which the arbitration tribunal 'is akin to an ordinary Greek court', whereas, in paragraph 231 of the judgment under appeal, it stated that 'the arbitration award is comparable to judgments delivered by an ordinary Greek court'.

87 In any event, even if the General Court had in fact treated the arbitration tribunal in question in the same way as an ordinary Greek court, it merely drew a parallel between ordinary courts and arbitration tribunals as regards the specific and precise question of the review of arbitration tribunals' awards in the light of the rules on State aid and the question whether State aid may be granted by arbitration awards.

88 Second, in respect of the characteristics of the arbitration tribunal in question examined by the General Court in paragraphs 153 to 157 of the judgment under appeal, DEI states that Mytilinaios disputes only the characteristics referred to in paragraphs 153 and 157 of that judgment and the fact that General Court failed to take into consideration the non-mandatory nature of the arbitration tribunal's jurisdiction.

89 In that respect, DEI observes, first of all, that Mytilinaios disputes that the arbitration tribunal had been established under Article 37 of Law 4001/2011. In actual fact, in paragraph 153 of the judgment under appeal, the General Court found that the characteristic according to which the arbitration tribunal is akin to an ordinary court is the fact that it performs 'a judicial function which is identical to that of the ordinary courts' and that 'the opening of arbitration proceedings deprives them of their jurisdiction'. The reference, in paragraph 153, in a subordinate clause to the 'arbitration tribunals established under Article 37 of [Law 4001/2011]' was only intended to limit the General Court's assessment to the arbitration tribunal in question in the present case.

90 Next, as regards the characteristic of the arbitration tribunal relating to the limited judicial review of arbitration awards examined in paragraph 157 of the judgment under appeal, DEI submits that Mytilinaios' argument is inadmissible, in so far as it does not explain why 'limited judicial review' distinguishes the review of arbitration awards based on the State aid rules from the review of the decisions of the ordinary courts.

91 In any event, that argument is unfounded. First, the fact that the review by the Efeteio Athinon (Court of Appeal, Athens) of the arbitration award is more limited than the review in an 'ordinary' appeal cannot be relevant for assessing whether that award may grant State aid. The

Court, in the judgment of 11 December 2019, *Mytilinaios Anonymos Etairia – Omilos Epicheiriseon* (C-332/18 P, EU:C:2019:1065, paragraph 68), held that State aid was capable of being granted by an order for interim measures made by an ordinary Greek court, notwithstanding the limited nature of the judicial review carried out in an interim order. Second, DEI observes that the fact of an arbitration award being contrary to public policy is one of the, limited, reasons on the basis of which the annulment of such an award may be requested. Since the prohibition of State aid necessarily falls within the scope of public policy, Mytilinaios' argument is ineffective. Third, the fact that Greek law provides for a judicial review of arbitration awards by an ordinary court, following an action brought by an unsuccessful party before an arbitration tribunal, proves that those awards may not be made without being 'validated' by an ordinary State court. Consequently, an arbitration decision is made not simply in itself, but rather as a decision validated by an ordinary court. In addition, the condition of imputability of an aid measure is satisfied in the event of 'involvement' of 'public authorities' in the adoption of that measure. The Efeteio Athinon (Court of Appeal, Athens), which, in the present case, gave a ruling and dismissed the action for annulment directed against the arbitration award, is indisputably such a public authority.

92 Lastly, as regards the fact that the General Court failed to take into account the criterion relating to the mandatory jurisdiction of the arbitration tribunal, DEI maintains that Mytilinaios does not explain the reasons why that criterion, which is legitimate for the purposes of applying Article 267 TFEU, ought also to be satisfied so that arbitration awards are treated in the same way as the decisions of the ordinary courts in respect of the application of the rules on State aid.

93 In any event, that argument is unfounded.

94 First, Article 267 TFEU refers to any 'court or tribunal of a Member State', whereas Article 107(1) TFEU refers to any aid granted 'by a Member State or through State resources'. The Court of Justice has ruled that a large range of undertakings which exercise public authority rights and powers are covered by the concept of 'State' within the meaning of Article 107(1) TFEU, without however being able to submit a question for a preliminary ruling. In the present case, the question which arises is not whether the arbitration tribunal in question acted as 'court or tribunal of a Member State', but whether it could be regarded as a 'body exercising a power coming within the scope of public authority rights and powers'. In order to carry out that examination, the General Court established a parallel with the situation of granting State aid via a decision of an ordinary court. In addition, the characteristic of bodies exercising a 'power coming within the scope of public authority rights and powers' is that their will applies unilaterally, as is the case for the will expressed in the arbitration award, validated by the Efeteio Athinon (Court of Appeal, Athens).

95 Second, awards by arbitration tribunals, whether created under national law or by virtue of a bilateral investment treaty, constitute measures whereby State aid may be granted. DEI observes, in that respect, that in the case which gave rise to the judgment of 25 January 2022, *Commission* v *European Food and Other*s (C-638/19 P, EU:C:2022:50), concerning an arbitration award attributable to the State, as in the present case, the jurisdiction of the arbitration tribunal was not mandatory.

Findings of the Court

96 It should be noted that, in paragraph 151 of the judgment under appeal, the General Court found, first, that 'by the arbitration award, the arbitration tribunal took a legally binding decision on the fixing of the tariff in question which was capable of procuring an advantage for [Mytilinaios] in the

event that it did not correspond to normal market conditions and, therefore, of constituting State aid which has not been notified by the Hellenic Republic under Article 108(3) TFEU' and, second, that 'the arbitration tribunal, as established by the RAE under Article 37 of [Law 4001/2011], the arbitration proceedings conducted before it, and its decisions, have characteristics similar to those of ordinary Greek courts, the disputes brought before them and their decisions'.

97 To support that conclusion, the General Court, in paragraphs 153 to 157 of that judgment, analysed five criteria for the purpose of concluding, in paragraph 158 of that judgment that 'the arbitration tribunals established and operating in accordance with Article 37 of [Law 4001/2011] form an integral part of the judicial system of the Greek State', and, in paragraph 159 of that judgment, that the arbitration tribunal in question 'must be classified, in the same way as an ordinary Greek court, as a body exercising a power coming within the scope of public authority rights and powers'.

98 It is therefore in the light of the assessment contained in paragraphs 151 to 159 of the judgment under appeal that the General Court was able to make the finding, in paragraph 160 of that judgment, that the tariff in question, as fixed by the arbitration award, constituted a State measure which had not been notified.

99 It follows that the General Court held that the arbitration tribunal of the RAE ought to be classified as a body exercising a power coming within the scope of public authority rights and powers and that, accordingly, its decisions could be attributed to the Hellenic Republic, within the meaning of Article 107 TFEU on the sole ground that that tribunal formed an integral part of the Greek State legal system in so far as it could be treated as similar to an ordinary Greek court. Such reasoning is vitiated by errors of law.

100 As regards, in the first place, the criteria adopted by the General Court in paragraphs 153 to 157 of the judgment under appeal in order to treat the arbitration tribunal in question as similar to an ordinary State court, those criteria are, first, that the arbitration tribunals established under Article 37 of Law 4001/2011 perform a judicial function which is identical to that of the ordinary courts, or even replace those courts in so far as the opening of arbitration proceedings deprives them of their jurisdiction, second, that the arbitrators, selected from a list drawn up by decision of the President of the RAE, must demonstrate their independence and impartiality before their appointment, third, that proceedings before arbitration tribunals are governed, inter alia, by the provisions of the Greek Code of Civil Procedure and, in addition, by the RAE's arbitration rules, fourth, that the decisions of the arbitration tribunals are legally binding, have the force of *res judicata* and are enforceable in accordance with the relevant provisions of that code and, fifth, that the decisions of the arbitration tribunals may be the subject of an appeal brought before an ordinary court.

101 However, as the Commission contends and as the Advocate General observed in point 95 of his Opinion, none of those criteria make it possible to distinguish the arbitration tribunals provided for in Article 37 of Law 4001/2011 from any other arbitration tribunal appointed by contract.

102 First, any arbitration tribunal appointed by contract replaces the ordinary courts, second, the procedure before such a tribunal is usually governed by law, which, third, may make the decisions of those tribunals binding, have the force of *res judicata* and be enforceable and, fourth, those decisions may, in certain circumstances, be subject to appeal before an ordinary court.

103 In that connection, it is true, as the Commission acknowledges, that the fact that, in the present case, the arbitrators are selected from a list drawn up by decision of the President of the RAE and must demonstrate their independence and their impartiality before their appointment distinguishes the arbitration tribunal of the RAE from other arbitration tribunals appointed by contract, whose arbitrators are not necessarily selected from a list such as that drawn up by the President of the RAE. However, that fact cannot, in itself, make it possible to find that that arbitration tribunal is to be distinguished from any other arbitration tribunal appointed by contract, since it constitutes merely a purely procedural element which does not affect the function or the nature of that tribunal.

104 In the second place, as Mytilinaios and the Commission submit, the General Court erred in law in failing to ascertain whether the arbitration tribunal of the RAE had, as is, the case, generally, for courts which form part of the State judicial system, mandatory jurisdiction which therefore did not depend solely on the will of the parties.

105 Such a factor could in fact result in the General Court finding that the arbitration tribunal of the RAE differed from an arbitration tribunal appointed by contract whose jurisdiction is based on an arbitration agreement, namely a specific agreement reflecting the freely expressed wishes of the parties concerned (see, to that effect, judgments of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*, C-377/13, EU:C:2014:1754, paragraph 27, and of 25 January 2022, *Commission* v *European Food and Others*, C-638/19 P, EU:C:2022:50, paragraph 144 and the case-law cited).

106 In view of the foregoing and irrespective of any other consideration, the General Court erred in law in finding that the arbitration tribunal of the RAE could be treated in the same way as an ordinary court and that the arbitration award was a State measure capable of constituting State aid.

107 That assessment cannot be called into question by the arguments raised by DEI.

108 First of all, the present case must be distinguished from the case which gave rise to the judgment of 25 January 2022, *Commission* v *European Food and Others* (C-638/19 P, EU:C:2022:50).

109 First, the arbitration tribunal which made the arbitration award in question in the case which gave rise to that judgment was not an arbitration tribunal appointed by contract, but had been established on the basis of a bilateral investment treaty. As follows from the settled case-law referred to, in essence, in paragraphs 143 and 144 of that judgment, the consent of a Member State to the possibility of litigation being brought against it in the context of the arbitration procedure provided for by a bilateral investment treaty, unlike that which would have been given in contractual arbitration proceedings, does not have its origin in a specific agreement reflecting the freely expressed wishes of the parties concerned, but is derived from a treaty concluded between two Member States in which they have, generally and in advance, agreed to exclude from the jurisdiction of their own courts disputes which may concern the interpretation or application of EU law in favour of arbitration proceedings.

110 Second, in the judgment of 25 January 2022, *Commission* v *European Food and Others* (C-638/19 P, EU:C:2022:50), the Court confined itself to ascertaining whether the Commission, in the case in point, was competent *ratione temporis* to exercise its powers under Article 108 TFEU. To that end, in paragraph 123 of that judgment, it found that the decisive factor for establishing the date on which the right to receive State aid was conferred on its beneficiaries by a particular

measure is the acquisition by those beneficiaries of a definitive right to receive that aid and to the corresponding commitment, by the Member State, to grant that aid. Although, in paragraph 124 of that judgment, the Court, in essence, noted that such a right had been granted only by the arbitration award in question, it in no way concluded that that arbitration award, in itself, constituted State aid. By contrast, the Court, as follows from paragraphs 80 and 131 of that judgment, explained that it was not competent, in the case which gave rise to that judgment, to rule on whether the measure in question in that case, namely, the arbitration award, constituted, in substance, 'State aid' within the meaning of Article 107(1) TFEU.

111 Next, the fact that in the present case an action for annulment of the arbitration award has been dismissed by a Greek court such as the Efeteio Athinon (Court of Appeal, Athens) cannot mean that that award may, on that ground alone, be attributable to the Greek State. The judicial review carried out by that court does not relate to the lawfulness of the arbitration award, which remains a measure attributable only to the arbitration body which adopted it. In addition, it follows from the case-law of the Court that the establishment as such of State aid cannot result from a judicial decision, since such an establishment of State aid entails a decision as to the appropriate course of action which falls outside the scope of a court's powers and obligations (judgment of 12 January 2023, *DOBELES HES*, C-702/20 and C-17/21, EU:C:2023:1, paragraph 76). Consequently, the existence of such a judicial decision cannot, in any event, suffice to classify the arbitration award, as confirmed by that decision, as a measure capable of constituting State aid.

112 Lastly, DEI's claim that the General Court did not in reality treat the arbitration tribunal of the RAE in the same way as a court is manifestly contradicted by paragraph 160 of the judgment under appeal, in which it is clearly stated that 'the arbitration tribunal must be treated in the same way as an ordinary State court'.

113 It follows, in the present case, that in view, inter alia, of the particularities of the dispute between DEI and Mytilinaios and the specific features of the task voluntarily entrusted by those parties to the arbitration tribunal of the RAE, the Commission was fully entitled to consider, first, that the only State measure capable of constituting State aid was DEI's decision to conclude the arbitration agreement with Mytilinaios, given that DEI is controlled by the Greek State, and, second, that, in order to know whether that decision had conferred an advantage on Mytilinaios, it had been necessary to ascertain whether a private operator, under normal market conditions would have taken that decision under the same conditions.

114 In that respect, it should be noted that it could have been otherwise if the arbitration procedure in its entirety, from the conclusion of the arbitration agreement until the arbitration award, had been the product of a scheme imposed by the Greek State on the undertakings concerned in order to use that procedure to circumvent the rules in the field of State aid. A private operator would not have agreed, under normal market conditions, to be part of such scheme. However, DEI has not claimed that the conclusion of the arbitration agreement with Mytilinaios had been imposed on it, against its will, by the Greek State in order to grant Mytilinaios State aid.

115 In the light of the foregoing considerations, the second part of Mytilinaios' second ground of appeal and the Commission's single ground of appeal are well founded and must be upheld.

116 In those circumstances, the judgment under appeal must be set aside, without there being any need to examine either the first part of the second ground of appeal, or Mytilinaios' third ground of appeal.

The actions before the General Court

117 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.

118 That is so in the present case, in respect of the third and fourth pleas in law and the first and second parts of the fifth plea in law in Case T-740/17, by which, in essence, DEI criticised the Commission for having infringed Article 107 TFEU, in so far as it did not examine, in the second decision at issue, the tariff in question, as follows from the arbitration award, before ruling out the existence of an advantage and confining itself to ascertaining whether, under normal market conditions, a private operator would, in the same circumstances, have entered into the arbitration agreement under the same conditions.

119 It is sufficient to note that, in paragraphs 9, 90 and 232 of the judgment under appeal, the General Court held, in essence, that DEI and Mytilinaios had voluntarily referred the dispute to an arbitration tribunal of the RAE, such a finding not having been disputed in the present appeal. Accordingly, for the reasons set out in paragraphs 96 to 105 of the present judgment, the Commission was, in any event, not required, in the circumstances of the case, to analyse the content of the arbitration award for the purpose of ascertaining whether DEI's decision to conclude an arbitration agreement had procured an advantage for Mytilinaios within the meaning of Article 107 TFEU.

120 The third and fourth pleas in law and the first and second parts of the fifth plea in law in Case T-740/17 must therefore be rejected.

121 However, the General Court did not examine the other parts of that fifth plea in law or the other pleas of the action in Case T-740/17, the first, alleging a misinterpretation of the judgment of 31 May 2017, *DEI* v *Commission* (C-228/16 P, EU:C:2017:409), the second, alleging a failure, by the Commission, to fulfil its obligations under Article 24(2) of Regulation 2015/1589 and, in particular, an infringement of DEI's right to be heard as guaranteed by Article 41(2)(a) of the Charter of Fundamental Rights of the European Union, the sixth, alleging an infringement of Article 107(1) and Article 108(2) TFEU by the Commission on account of manifest errors of assessment of the facts relating to the applicability of the test of the prudent private investor operating in a market economy, and the seventh, alleging a manifest error in the interpretation and application of Article 107(1) TFEU, an infringement of the obligation to state reasons and a manifest error of assessment of the facts, since the Commission did not further investigate the first complaint lodged by DEI in 2012 pursuant to Article 108(2) TFEU, on the ground that that complaint had become devoid of purpose following the arbitration award.

122 Since the examination of those parts and pleas in law entails complex factual assessments, in respect of which the Court of Justice does not have available to it all the necessary facts, the state of the proceedings, as regards those parts and pleas in law, does not permit a decision by the Court of Justice and the case must therefore be referred back to the General Court so it may give a ruling on them.

123 [As rectified by order of 7 June 2024] Lastly, it is for the General Court to draw conclusions from the setting aside of the judgment under appeal for the actions which are the subject of Cases T-639/14 RENV and T-352/15, including for the Commission's applications for a declaration that there is no need to adjudicate on those cases.

Costs

124 Since the case is to be referred back to the General Court, the costs relating to the present appeal proceedings must be reserved.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 22 September 2021, *DEI* v *Commission* (T-639/14 RENV, T-352/15 and T-740/17, EU:T:2021:604);**

2. **Refers Cases T-639/14 RENV, T-352/15 and T-740/17 back to the General Court of the European Union for it to adjudicate on the pleas in law and arguments raised before it on which the Court of Justice of the European Union has not given a ruling;**

3. **Reserves the costs.**

[Signatures]