

Form of order sought

The applicant claims that the Court should:

- annul Commission Decision C(2005) 2706 final of 14 September 2005 in its entirety or otherwise in part;
- order the Commission to pay the costs.

Pleas in law and main arguments

When the Greek state airline Olympic Airways was privatised, the new company Olympic Airlines ('NOA') began operating, taking over the flying operations, while Olympic Airways — Services S.A. ('OA'), as the old company was renamed, retained all other activities, principally ground services, maintenance and aircraft repairs. In the contested decision, the Commission held the grant to NOA and OA of State aid to be incompatible with the Treaty, by reason of:

- payment by NOA, for the subleasing of aircraft, of rental payments lower than those paid for head leases, causing loss to the Greek State and to OA,
- overvaluation of NOA's assets at the time when it was set up,
- payment of money to OA by the Greek State, and payment by the latter, instead of OA, of certain loan instalments and rental payments on leases,
- the continuous forbearance displayed by the Greek State towards OA with regard to tax debts and social security contributions.

By its action, Greece contests first of all the part of the decision that relates to the rental payments for aircraft which NOA pays. It maintains that there is no State aid and that therefore the contested decision infringes Article 87(1) EC. According to Greece, both OA and the Greek State acted as any well-advised individual would act while, in addition, the rental payments made by NOA correspond to market prices. In the same context, Greece pleads that the duty to state reasons for the contested decision has been infringed.

So far as concerns the part of the decision relating to the value of NOA's assets, Greece considers that the Commission's assessment was manifestly mistaken as regards quantification of the assets of OA that were transferred to NOA and that the Commission's conclusions in this regard suffer from a lack of reasoning. In any event, Greece considers that the Commission also failed to state reasons with regard to the part of the contested decision that relates to the conditions for rescue aid and for application of Article 87(3) not being met, and also

submits that the Commission's legal assessment is mistaken on this point.

Greece observes with regard to payment by the Greek State of certain loan instalments and rental payments on leases that it made those payments because of its liability as guarantor, on the basis of guarantees which had been given before adoption of a previous relevant Commission decision and are covered by that decision. According to Greece, after payment of the sums in question, the procedure provided for by Greek law for their forced recovery from OA was followed. On the basis of those submissions, Greece pleads that the reasons stated in the contested decision are inadequate, leading, in its view, to a manifestly mistaken legal assessment.

So far as concerns the part of the decision that reaches the conclusion that NOA is OA's successor, Greece sets out a series of arguments to rebut the Commission's view and, on this basis, pleads infringement of Articles 87(1) and 88(2) EC and a failure to state reasons.

Greece further pleads infringement of the right to be heard and of the principle of good administration, since it considers that it was not given the opportunity to set out its views on the study by the independent experts whom the Commission had instructed. Finally, it pleads infringement of the principle of proportionality and a failure to state reasons, since the contested decision seeks the recovery of aid in respect of the period from 2002 to 2004 from NOA too, although it began to operate only on 11 December 2003.

Action brought on 29 November 2005 — ENDESA v Commission

(Case T-417/05)

(2006/C 22/38)

Language of the case: Spanish

Parties

Applicant: ENDESA S. A. (represented by: M. Merola, M. Odriozola, S. Baxter and M. Muñoz de Juan, lawyers, J. Flynn, Q. C.)

Defendant: Commission of the European Communities

Applicant's claims

The applicant claims that the Court should annul the Commission Decision of 15 November 2005, Case COMP/M.3986 Gas Natural/Endesa.

Pleas in law and main arguments

The application seeks the annulment of the Commission Decision of 15 November 2005 declaring that the public bid announced on 5 September 2005 by Gas Natural SDG to acquire 100 % of the shares of Endesa S.A. does not result in a concentration with a Community dimension.

The action for annulment against the Commission raises, as a preliminary matter, the existence of several procedural defects. In that regard, the applicant states, first of all, that the contested decision should have been adopted prior to the decision on referral, provided for in Article 22 of the Regulation on concentrations, since it is clear from the wording of that provision itself that decisions relating to requests for a referral must relate to concentrations which comply with the threshold laid down by the laws of one or more countries and which lack a Community dimension.

Second, the applicant criticises the Commission for lack of transparency in the procedure and the resulting infringement of its rights of defence.

Thirdly, the applicant asserts that the Commission should have requested the suspension of the national proceedings that were taking place in parallel before the national authorities. The applicant considers that the fact that such a suspension was not requested in itself presupposes a serious procedural omission in the light of the basic principles of the system of control of concentrations.

As regards the merits, the action raises the infringement of specific articles of Regulation (EC) No 139/2004⁽¹⁾ and the existence of manifest errors of assessment. Thus, on one hand the Decision infringes, in the applicant's view, the rules of jurisdiction established in the Regulation on concentrations, in trying to shift the burden of proof concerning the definition of the Community dimension onto Endesa, which is manifestly incompatible with the public policy nature of the rules which establish the exclusive competence of the Commission.

Likewise, the applicant maintains that by failing to take into consideration Endesa's consolidated accounts for the last accounting year, which were properly drawn up in accordance with Community accounting criteria (NIC/NIIF) in force at the time when the concentration took place, the Decision infringes

Article 5 of the Regulation on concentrations by departing from the Commission's practice and conflicting with the principles set out in the Notice on calculation of turnover.

The applicant adds that in relation to the adjustments, which the Decision examines in the light of the Notice on calculation of turnover, a number of those adjustments comply with the strict application of the Community accounting criteria in force and they should not be confused with adjustments in accordance with Article 5 of the Regulation on concentrations. In any event, all the adjustments which are examined in the Decision should be recognised as fulfilling the objective of determining the real economic value of the undertakings which are the subject of the concentration.

Lastly, the applicant submits that the Decision, by incorrectly defining the exclusive competence of the Commission, infringes the principle of legal certainty and is contrary to the uniform application of the Regulation on concentrations.

⁽¹⁾ OJ L 24, of 29.1.2004, p. 1.

Action brought on 9 November 2005 — Investire Partecipazioni v Commission

(Case T-418/05)

(2006/C 22/39)

Language of the case: Italian

Parties

Applicant(s): Investire Partecipazioni S.p.A. (Italy) (represented by: Gian Michele Roberti and Alessandra Franchi)

Defendant(s): Commission of the European Communities

Form of order sought

The applicant(s) claim(s) that the Court should:

- annul the Commission decision of 11 August 2005, file No 08405, and the supplementary decision of 23 August 2005, file No 08720;