



Reports of Cases

ORDER OF THE GENERAL COURT (Second Chamber)

24 September 2019*

(Action for annulment – State aid – Aid scheme established by Italy for certain providers of socio-sanitary services – Costs associated with staff absences in respect of maternity and care provided to dependent family members – Contributions paid by the State to private undertakings – Decision not to raise any objections – No placement in an unfavourable competitive position – Lack of direct concern – Inadmissibility)

In Case T-491/17,

Istituzione pubblica di assistenza e beneficenza ‘Opere Pie d’Onigo’, established in Pederobba (Italy), represented by G. Maso, lawyer,

applicant,

v

European Commission, represented by L. Armati and D. Recchia, acting as Agents,

defendant,

ACTION under Article 263 TFEU seeking annulment of the Commission’s decision of 27 March 2017 not to raise objections to the aid scheme established by Italy for certain private providers of socio-sanitary services (State aid SA.38825 (2016/NN)) (OJ 2017 C 219, p. 1),

THE GENERAL COURT (Second Chamber),

composed of M. Prek, President, F. Schalin (Rapporteur) and M.J. Costeira, Judges,

Registrar: E. Coulon,

makes the following

* Language of the case: Italian.

Order

Background to the dispute

- 1 The applicant, Istituzione pubblica di assistenza e beneficenza 'Opere Pie d'Onigo', is an Italian public autonomous non-profit entity which has status as an *Istituzione Pubblica di Assistenza e Beneficenza* (public assistance and welfare institution; 'IPAB') providing socio-sanitary assistance, for example, to the elderly or persons with disabilities. On 20 May 2014, the European Commission received a complaint from the applicant, which was subsequently supported by other public autonomous non-profit entities, IPABs or *Aziende Pubbliche di Servizi alla Persona* (public undertakings providing services to individuals; 'APSP') ('the complainants'). Nineteen of the complainants have their registered offices in Veneto (Italy).
- 2 In the complaints, it was stated that, unlike public autonomous non-profit entities such as IPABs and APSPs, only private providers of socio-sanitary services benefited from the following national schemes ('the national measures at issue'):
 - Access to the insurance scheme managed by the Istituto nazionale per la previdenza sociale (National Social Welfare Institute; 'the INPS') in respect of the costs laid down in the provisions concerning the protection and support of maternity and paternity, provided for in Decreto legislativo n. 151 – Testo unico delle disposizioni legislative in materia di tutela e sostegno della maternità e della paternità, a norma dell'articolo 15 della legge 8 marzo 2000, n. 53 (Legislative Decree No 151 on the Sole Text of the Legislative Provisions concerning the Protection and Support of Maternity and Paternity, pursuant to Article 15 of Law No 53 of 8 March 2000), of 26 March 2001 (Ordinary Supplement to the GURI No 93, 26 April 2001, p. 1); and
 - The reimbursement of expenses borne by employers in respect of leave days provided to employees who care for family members affected by a serious disability, laid down in Article 33 of Legge n. 104 – Legge quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate (Law No 104, known as 'Framework law on assistance for, social inclusion and rights of persons with disabilities'), of 5 February 1992 (GURI No 39, 17 February 1992 – Ordinary Supplement to the GURI No 30), and two years' paid leave provided for in Article 42(5) of Legislative Decree No 151 (Article 33 of Law No 104) and other types of leave (Legislative Decree No 151, as amended by Legislative Decree No 115 of 23 April 2003).
- 3 According to the complainants, the IPABs and APSPs that they represented directly bore the costs associated with the national measures at issue, without having the possibility of contributing to the INPS and benefiting from the corresponding services (maternity and paternity leave) and without receiving any reimbursement from the INPS (and, ultimately, from the State) in respect of other types of leave. The complainants claimed that that situation gave rise to a selective advantage and constituted State aid for private providers of socio-sanitary services, within the meaning of Article 107(1) TFEU.
- 4 The complainants further argued that, although they had historically been deemed to be public entities subject to the control of the State in so far as concerns the regularity and adequacy of the management of those entities and in order to avoid the dispersion of their assets, they were actually self-financing autonomous entities and consequently ought to be deemed to be entities

governed by private law. They claimed that the Italian State ought to change their statutes and allow them to benefit from the insurance-based social security scheme, that is to say, the scheme managed by the INPS.

- 5 In other words, the complainants alleged unequal treatment between public and private providers of social services in so far as concerns the coverage of certain services granted to employees as well as the fact that the Italian State classed them as public rather than private entities.
- 6 By letters of 6 and 8 August 2014, the Commission services sent non-confidential versions of the complaints to the Italian authorities. The Italian authorities replied by letter of 25 September 2014. On 10 December 2014, the Commission services requested further information. On 7 May 2015, the Commission services requested by telephone that the Italian authorities provide additional information. The Italian authorities replied by letter of 5 June 2015. By letter of 5 August 2015, the Commission services sent a further request for information to the Italian authorities, which replied to that request by letter of 12 October 2015.
- 7 On 16 March 2016, the Commission services sent a preliminary assessment letter to the complainants, in which they concluded that the measure at issue did not constitute State aid within the meaning of Article 107(1) TFEU. The complainants replied on 13 and 22 April 2016 by providing further information and requesting that the Commission services reconsider their position. By letter of 19 May 2016, the Commission services confirmed their preliminary assessment that the measure at issue did not constitute State aid within the meaning of Article 107(1) TFEU. By letter of 26 May 2016, the complainants requested that the preliminary findings made by the Commission services be recorded in a formal decision. Accordingly, on 27 March 2017, the Commission adopted Decision C(2017) 1939 final on State aid SA.38825 'Alleged State aid for private providers of socio-sanitary services' ('the contested decision'). As the criteria laid down in Article 107 TFEU for categorising a measure as State aid are cumulative, the Commission's final decision relates solely to the criterion of selectivity and, for the sake of completeness, to that relating to the existence of an advantage, in order to find that those measures did not constitute State aid.

Procedure and forms of order sought

- 8 By application lodged at the Court Registry on 1 August 2017, the applicant brought the present action.
- 9 By a document lodged at the Court Registry on 9 November 2017, the Commission raised a plea of inadmissibility under Article 130(1) of the Rules of Procedure of the General Court.
- 10 As a result, the processing of the applications for leave to intervene lodged, respectively, by Ipab di Vicenza on 13 October 2017, Ipab Casa Gino e Pierina Marani on 23 October 2017, Ipab Centro Residenziale per Anziani di Cittadella on 9 November 2017, Azienda Pubblica dei Servizi alla Persona 'Grimani Buttari – residenze per Anziani in Osimo' on 10 November 2017, in support of the form of order sought by the applicant, and by the Italian Republic on 22 November 2017 in support of the form of order sought by the Commission, was suspended in accordance with Article 144(3) of the Rules of Procedure of the General Court.
- 11 On 5 January 2018, the applicant submitted its observations on the plea of inadmissibility.

- 12 By decision of the President of the Second Chamber of the General Court of 13 April 2018, the proceedings were stayed, in accordance with Article 69(b) of the Rules of Procedure, pending the decision of the Court of Justice determining the joined cases C-622/16 P to C-624/16 P *Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci*.
- 13 By judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873), the Court upheld the admissibility of the appeals in those cases on the basis of the last clause of the fourth paragraph of Article 263 TFEU.
- 14 By measure of organisation of procedure dated 7 November 2018, the parties were invited to inform the General Court of the consequences that they drew, in the present case, from the judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori and Commission v Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873). On 19 and 23 November 2018, the Commission and the applicant replied to the question put by the General Court.
- 15 The applicant claims that the Court should:
- annul the contested decision;
 - find that there is a second State aid measure, which consists in allowing only private operators providing socio-sanitary services to benefit from the insurance scheme managed by the INPS in respect of the costs laid down in the provisions concerning the protection and support of maternity and paternity;
 - declare that one or both of those State aid measures may be disapplied by legislative amendments;
 - Declare that the aforementioned two measures constitute State aid since the constituent conditions for a finding of State aid within the meaning of Article 107 TFEU – which the Commission examined in its two preliminary opinions of 16 March and 19 May 2016 and failed to examine in the contested decision – have been met;
 - order the Commission to pay the costs.
- 16 The Commission contends that the Court should:
- dismiss the application as inadmissible;
 - order the applicant to pay the costs.

Law

- 17 Under Article 130(1) and (7) of the Rules of Procedure, if the defendant so requests, the Court may give a ruling on inadmissibility or lack of competence without going to the substance of the case.

- 18 In the present case, as the Commission has applied for a decision on inadmissibility, the Court, finding that it has sufficient information from the documents in the case file, has decided to rule on that application without taking further steps in the proceedings.
- 19 The Commission submits, in the plea of inadmissibility, that the facts and points of law on which the applicant relies are not indicated coherently and intelligibly in the application itself and that the form of order sought exceeds the scope of an action for annulment. It also submits that the application is inadmissible within the meaning of the last clause of the fourth paragraph of Article 263 TFEU.
- 20 The applicant takes issue with the Commission's arguments. It contends that the application is sufficiently clear and that the General Court may declare that the national measures at issue are State aid measures even though, in the contested decision, the Commission's observations relate solely to the criterion of selectivity and, for the sake of completeness, to that relating to the existence of an advantage within the meaning of Article 107 TFEU. The applicant claims that the application is admissible in the light of the last clause of the fourth paragraph of Article 263 TFEU. The contested decision, it is argued, is a regulatory act not entailing implementing measures, which directly concerns its legal situation. In that connection, the applicant refers to the judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission, Commission v Scuola Elementare Maria Montessori* and *Commission v Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873).
- 21 The Court considers it appropriate to examine the admissibility of the application in the light of the last clause of the fourth paragraph of Article 263 TFEU before, if necessary, examining the other grounds of inadmissibility raised by the Commission. As stated in paragraph 20 above, it is clear from that provision that any natural or legal persons may institute proceedings against regulatory acts of direct concern to them which do not entail implementing measures. Bearing in mind the circumstances of the present case, the Court considers it appropriate to examine first the requirement of direct concern then, if necessary, the other requirements under the last clause of the fourth paragraph of Article 263 TFEU.
- 22 As regards the requirement of direct concern, the applicant maintains, inter alia, that it is directly concerned by the contested decision to the extent that the latter allows the Italian Republic to apply a benefit scheme for labour costs to private undertakings providing socio-sanitary services, and that that decision produces its legal effects on a purely automatic basis, pursuant solely to EU law and without any intermediary rule, which allows the Italian Republic to apply the benefit scheme in question. The applicant recalls that the Commission does not dispute the fact that the applicant operates – as do the 21 other public entities that lodged complaints with the Commission in 2014 concerning unlawful State aid – on the Italian market for the provision of socio-sanitary services, in competition with private service providers. It is argued that public entities have the same revenue as private providers whilst having to meet higher costs on account of the national measures at issue. The complaint made by 21 public entities and the applicant quantified the scale of the actual damage that public providers of socio-sanitary services allegedly suffer because they cannot benefit from the national measures at issue when these are reserved for private service providers. The applicant explains, in essence, that, in so far as the labour cost is the greatest cost (approximately 70% of turnover) for providers of socio-sanitary services, it suffers damage in the approximate sum of EUR 528 000 per annum on account of the fact that it cannot benefit from the national measures at issue. The applicant also explains that the relevant factual situation for the purposes of Article 107 TFEU, which sets the applicant, as a public entity, against private undertakings providing identical services, is the market for providers of socio-sanitary

services, as defined in the Legge n. 328 – Legge quadro per la realizzazione del sistema integrato di interventi e servizi sociali (Law No 328, known as 'Framework law on the implementation of the integrated system of interventions and social services'), of 8 November 2000 (GURI No 265, 13 November 2000 – Ordinary Supplement to the GURI No 186, p. 1).

- 23 It should be recalled that, according to settled case-law of the Court of Justice, the condition that a natural or legal person must be directly concerned by the decision against which the action is brought, laid down in the fourth paragraph of Article 263 TFEU, requires two cumulative criteria to be met, namely, first, the contested measure must directly affect the legal situation of the individual and, second, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from the EU rules alone without the application of other intermediate rules (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission*, *Commission v Scuola Elementare Maria Montessori* and *Commission v Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 42 and the case-law cited).
- 24 As regards specifically the rules on State aid, it must be noted that their objective is to preserve competition. So, in that field, the fact that a Commission decision leaves intact all the effects of the national measures which the applicant, in a complaint addressed to that institution, claimed were not compatible with that objective and placed it in an unfavourable competitive position makes it possible to conclude that the decision directly affects its legal situation, in particular its right under the provisions on State aid of the FEU Treaty not to be subject to competition distorted by the national measures concerned (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission*, *Commission v Scuola Elementare Maria Montessori* and *Commission v Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 43 and the case-law cited).
- 25 It should be borne in mind that a direct effect on an applicant cannot be deduced from the mere potential existence of a competitive relationship (see judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission*, *Commission v Scuola Elementare Maria Montessori* and *Commission v Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 46 and the case-law cited).
- 26 Given that the condition of direct concern requires the contested measure to produce effects directly on the applicant's legal situation, the EU judiciary must ascertain whether the applicant has adequately explained the reasons why the Commission's decision is liable to place him in an unfavourable competitive position and thus to produce effects on his legal situation (judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission*, *Commission v Scuola Elementare Maria Montessori* and *Commission v Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 47).
- 27 The applicant claims, in essence, that it has suffered damage as a result of the fact that it is subject to higher labour costs than those of private providers of socio-sanitary services benefitting from the national measures at issue, which have been maintained by the Italian State on account of the contested decision.
- 28 It should, in that connection, be recalled that the applicants in the cases which gave rise to the judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission*, *Commission v Scuola Elementare Maria Montessori* and *Commission v Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 50), demonstrated, with evidence in support, that their establishments

were situated in the immediate vicinity of entities a priori eligible for the national measures assessed in the decision at issue, carrying on similar activities to theirs and that they were therefore active in the same market for services and the same geographical market.

- 29 In the present case, the sole mention of damage suffered as a result of higher labour costs than those of private operators that are active on the Italian market for 'socio-sanitary services' cannot itself serve adequately to explain the reasons why the contested decision is likely to place the applicant in an unfavourable competitive position and, consequently, produce effects on its legal situation. In that connection, it should be clarified that the national measures at issue do not cover certain services or geographical markets in particular, but rather private operators in Italy in general. Moreover, it should be pointed out that, while Law No 328 may relate to providers of socio-sanitary services on account of its nature as a framework law, it contains statements of a general nature on the organisation of the sector but no specific elements on the relevant market, so that it is not possible to determine whether all operators to which that law applies are in competition with each other.
- 30 In those circumstances, it is necessary to verify whether the applicant has adequately explained the market on which it is active and stated which of the operators benefiting from the national measures at issue it is in competition with, in order to understand the negative impact that the national measures – which were maintained by the contested decision – could have on the applicant's competitive position.
- 31 It should be observed in that regard that the applicant provides socio-sanitary services and, as is apparent from the case file, is established in the municipality of Pederobba, in the region of Veneto. The applicant takes the view that it is in competition with private operators providing socio-sanitary services. It lists certain undertakings from other EU Member States, which are established in Italy and active in the same sector, in order to demonstrate that the condition relating to the effect on trade between Member States within the meaning of Article 107 TFEU has been met in the present case.
- 32 However, it must be held, in the first place, that the applicant's arguments and the evidence referred to in paragraph 31 above do not serve to establish the relevant market or the competitive situation on that market. The applicant has in fact referred solely to socio-sanitary services – which involve, for example, the provision of care to the elderly – without any clarification as to the circumstances in which those services are offered and without further explanation as to whether the expression 'socio-sanitary services' refers to a separate market or several markets for services. That is not apparent from the applicant's written submissions, which appear to refer to a sector rather than a separate market. That impression is borne out by the fact that the applicant makes reference to several types of service, as does Law No 328, to which the applicant also refers. As an example, it lists undertakings which provide 'socio-medical' services, 'healthcare' services and services in 'the healthcare and social accommodation sectors' or undertakings which own 'old people's homes'.
- 33 Moreover, it is not clear from the information before the Court on which geographical market the applicant claims to be active. The applicant states, without further explanation, that it operates on the Italian market. At the same time, it lists entities and foreign operators operating in a number of Italian regions, such as Emilia-Romagna, Lazio, Liguria, Lombardy, Piedmont, Puglia, Tuscany, Sardinia and Veneto. The applicant also states that it is established in the municipality of Pederobba. However, that information does not allow it to be inferred on which geographical market the applicant considers itself actually to be operating, particularly as there is no

indication as to the circumstances in which socio-sanitary services are provided. The applicant has failed to specify whether those services are provided at local, regional, national or international level.

- 34 It must be held, in the second place, that the applicant has not stated with which entities, potentially benefitting from the national measures at issue, it considers itself to be in competition. In the absence of specific information in that regard, the applicant cannot establish that it is in an unfavourable competitive position. In that connection, it should be observed that, as stated in paragraph 25 above, a direct effect on an applicant cannot, however, be deduced from the mere potential existence of a competitive relationship. It is therefore not sufficient to refer, as the applicant does, to an abstract concept such as private operators or to list undertakings that are active in the same sector; it must instead be explained why and how those undertakings ought to be regarded as the applicant's competitors.
- 35 In the light of the foregoing, it must be held that, in the absence of the clarifications referred to in paragraphs 32 to 34 above, the applicant has not, in accordance with the case-law cited in paragraph 26 above, adequately explained why the contested decision is liable to place it in an unfavourable competitive position and, consequently, produce effects on its legal situation, with the result that the requirement of direct concern has not been satisfied in the present case.
- 36 It follows that, without it being necessary to rule on the other requirements under the last clause of the fourth paragraph of Article 263 TFEU or the other grounds of inadmissibility raised by the Commission, the action must be dismissed in its entirety as inadmissible.
- 37 Pursuant to Article 144(3) of the Rules of Procedure, where the defendant lodges a plea of inadmissibility or of lack of competence, as provided in Article 130(1) of those rules, a decision on applications for leave to intervene is not to be given until after the plea has been rejected or the decision on the plea reserved. Furthermore, pursuant to Article 142(2) of the Rules of Procedure, an intervention is ancillary to the main proceedings and becomes devoid of purpose, *inter alia*, when the application is declared inadmissible.
- 38 In the present case, since, the application is dismissed in its entirety, there is no longer any need to rule on the applications for leave to intervene submitted by Ipab di Vicenza, Ipab Casa Gino e Pierina Marani, Ipab Centro Residenziale per Anziani di Cittadella, Azienda Pubblica dei Servizi alla Persona 'Grimani Buttari – residenze per Anziani in Osimo' and the Italian Republic.

Costs

- 39 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 40 Since the applicant has been unsuccessful, it must, in accordance with the forms of order sought by the Commission, be ordered to pay, in addition to its own costs, the costs incurred by the latter.
- 41 Furthermore, pursuant to Article 144(10) of the Rules of Procedure, Ipab di Vicenza, Ipab Casa Gino e Pierina Marani, Ipab Centro Residenziale per Anziani di Cittadella, Azienda Pubblica dei Servizi alla Persona 'Grimani Buttari – residenze per Anziani in Osimo' and the Italian Republic are each to bear their own costs relating to the applications for leave to intervene.

On those grounds,

THE GENERAL COURT (Second Chamber)

Hereby orders:

- 1. The action is dismissed as inadmissible.**
- 2. There is no longer any need to rule on the applications for leave to intervene submitted by Ipab di Vicenza, Ipab Casa Gino e Pierina Marani, Ipab Centro Residenziale per Anziani di Cittadella, Azienda Pubblica dei Servizi alla Persona 'Grimani Buttari – residenze per Anziani in Osimo' and the Italian Republic.**
- 3. Istituzione pubblica di assistenza e beneficenza 'Opere Pie d'Onigo' shall pay the costs.**
- 4. Ipab di Vicenza, Ipab Casa Gino e Pierina Marani, Ipab Centro Residenziale per Anziani di Cittadella, Azienda Pubblica dei Servizi alla Persona 'Grimani Buttari – residenze per Anziani in Osimo' and the Italian Republic shall each to bear their own costs relating to the applications for leave to intervene.**

Luxembourg, 24 September 2019.

E. Coulon
Registrar

M. Prek
President