Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

30 June 2016*

(Appeal — Aid granted by the Belgian authorities to finance screening tests of transmissible spongiform encephalopathies in bovine animals — Selective advantage — Decision declaring that aid incompatible in part with the internal market)

In Case C-270/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 4 June 2015,

Kingdom of Belgium, represented by C. Pochet and J.-C. Halleux, acting as Agents, assisted by L. Van den Hende, advocaat,

applicant,

the other party to the proceedings being:

European Commission, represented by S. Noë and H. van Vliet, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Sixth Chamber),

composed of A. Arabadjiev, President of the Chamber, J.-C. Bonichot (Rapporteur) and E. Regan, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 21 April 2016,

gives the following

* Language of the case: Dutch.

Judgment

1 By its appeal, the Kingdom of Belgium asks the Court to set aside the judgment of the General Court of the European Union of 25 March 2015 in *Belgium* v *Commission* (T-538/11, EU:T:2015:188, 'the judgment under appeal'), by which that court dismissed its action for annulment in part of Commission Decision 2011/678/EU of 27 July 2011 concerning the State aid for financing of screening of transmissible spongiform encephalopathies (TSE) in bovine animals implemented by Belgium (State aid C 44/08 (ex NN 45/04)) (OJ 2011 L 274, p. 36, 'the contested decision').

Legal context

Regulation (EC) No 999/2001

2 Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies (OJ 2001 L 147, p.1) was adopted on the basis of Article 152(4)(b) EC.

3 According to recital 2 in the preamble thereto, that regulation concerns the adoption of specific rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies ('TSEs'), including bovine spongiform encephalopathy ('BSE'), in view of the magnitude of the risk they pose to human and animal health.

4 Article 6 of Regulation No 999/2001, entitled 'Monitoring system', provides in the first subparagraph of paragraph 1:

'Each Member State shall carry out an annual programme for monitoring BSE and scrapie in accordance with Annex III, Chapter A. That programme shall include a screening procedure using rapid tests.'

5 Part I of Chapter A, Annex III to Regulation No 999/2001 establishes minimum requirements for a programme for monitoring BSE in bovine animals. It provides, inter alia, for the selection of certain sub-populations of bovine animals over 30 months of age, including those slaughtered normally for human consumption, for the purposes of that programme.

6 In addition, Part IV of Chapter A, Annex III to Regulation No 999/2001 provides:

'Member States shall ensure that no parts of the body of animals sampled pursuant to this Annex are used for human food, animal feed and fertilisers, until the laboratory examination has been concluded with negative results.'

7 Commission Regulation (EC) No 1248/2001 of 22 June 2001 amending Annexes III, X and XI to Regulation No 999/2001 (OJ 2001 L 173, p. 12) extended, with effect from 1 July 2001, the obligation to test for BSE using rapid tests to all bovine animals aged over 24 months of age subject to special emergency slaughtering.

8 Commission Regulation (EC) No 1494/2002 of 21 August 2002 amending Annexes III, VII and XI to Regulation No 999/2001 (OJ 2002 L 225, p. 3) extended that obligation to bovine animals over 24 months of age which have died or been killed for purposes other than, in particular, human consumption.

TSE Guidelines

9 In 2002 the Commission of the European Communities adopted the Community guidelines for State aid concerning TSE tests, fallen stock and slaughterhouse waste (OJ 2002 C 324, p. 2; 'the Community TSE Guidelines').

10 Paragraph 12 of the TSE Guidelines states that those Guidelines 'concern State aid towards the costs of TSE [screening] tests, fallen stock and slaughterhouse waste granted to operators active in the production, processing and marketing of animals and animal products falling within the scope of Annex I to the Treaty'.

11 As regards, more particularly, TSE screening tests, paragraphs 23 to 25 of the TSE Guidelines state the following:

'23. In order to promote the taking of measures for the protection of animal and human health, the Commission has decided that it will continue to authorise State aid of up to 100% towards the costs of TSE [screening] tests, following the principles of point 11.4 of the agricultural guidelines.

24. ... from 1 January 2003, as far as compulsory BSE testing of bovine animals slaughtered for human consumption is concerned, total direct and indirect support, including Community payments, may not be more than EUR 40 per test. The obligation for testing may be based on Community or national legislation. This amount refers to the total costs of testing, comprising: test-kit, taking, transporting, testing, storing and destruction of the sample. This amount may be reduced in future, as test costs fall.

25. State aid towards the cost of TSE [screening] tests has to be paid to the operator where the samples for the tests have to be taken. However, in order to facilitate administration of such State aid, payment of the aid may be made to laboratories instead, provided that the full amount of State aid is passed on to the operator. State aid directly or indirectly received by an operator where the samples for the tests have been taken must be reflected in correspondingly lower prices charged by this operator.'

12 As regards State aid towards the costs of TSE and BSE screening tests granted unlawfully before 1 January 2003, paragraph 45 of the TSE Guidelines provides that the Commission will evaluate the compatibility of such aid in line with point 11.4 of the Community Guidelines for State aid in the agriculture sector (OJ 2000 C 28, p. 2) and the Commission's practice since 2001 of accepting such aid of up to 100%.

Background to the dispute

13 The background to the dispute has been set out in paragraphs 11 to 39 of the judgment under appeal. For the purposes of the appeal it may be summarised as follows.

14 By the contested decision, the Commission took the view that the Belgian system of financing the compulsory BSE screening tests by means of State resources for the period from 2001 to 2005 fulfilled the four cumulative conditions to constitute State aid for the purposes of Article 107(1) TFEU. It concluded that that aid was unlawful for the period from 1 January 2001 to 30 June 2004 because it had been granted in infringement of Article 108(3) TFEU.

15 The Commission in addition considered that, for the period from 1 January 2003 to 30 June 2004, the amounts exceeding the threshold of EUR 40 per test, as laid down in paragraph 24 of the Guidelines, were incompatible with the internal market and had to be recovered. It was of the view that, for the rest of the period concerned, that is, from 1 January 2001 to 31 December 2002, and 1 July 2004 to

31 December 2005, financing of the tests by State resources constituted aid compatible with the internal market. Finally, other measures of financing which occurred during the period concerned were considered not to be aid.

16 The operative part of the contested decision is worded as follows:

‘Article 1

1. The measures financed through fees do not constitute aid.

2. For the period from 1 January 2001 to 31 December 2002 and for the period from 1 July 2004 to 31 December 2005, financing of BSE [screening] tests from State resources constitutes aid compatible with the internal market for farmers, slaughterhouses and other entities that process, handle, sell or trade in bovine animal products that are subject to compulsory BSE testing.

3. For the period from 1 January 2003 to 30 June 2004, financing of BSE [screening] tests from State resources constitutes aid compatible with the internal market for farmers, slaughterhouses and other entities that process, handle, sell or trade in bovine animal products that are subject to compulsory BSE testing for amounts of up to EUR 40 per test. Amounts in excess of EUR 40 per test are incompatible with the internal market and must be recovered, with the exception of aid granted to specific projects which, at the time the aid was granted, met all the conditions set in the applicable de minimis Regulation.

4. Belgium unlawfully implemented aid to finance BSE [screening] tests in breach of Article 108(3) of the TFEU during the period from 1 January 2001 to 30 June 2004.

Article 2

1. Belgium shall take all necessary measures to recover the unlawful and incompatible aid referred to in Article 1(3) and (4) from its beneficiaries.

...’

The proceedings before the General Court and the judgment under appeal

17 By application lodged at the Court Registry on 10 October 2011, the Kingdom of Belgium sought annulment of the contested decision other than Article 1(1) of the operative part.

18 In support of its action, the Kingdom of Belgium raised a single plea in law, alleging infringement of Article 107(1) TFEU, in that the Commission erred in law in classifying the financing of the compulsory BSE screening tests as State aid.

19 By the judgment under appeal, the General Court dismissed the action.

Forms of order sought

20 The Kingdom of Belgium contends that the Court should:

— set aside the judgment under appeal and annul the contested decision; and

— order the Commission to pay the costs.

21 The Commission contends that the Court should:

— dismiss the appeal; and

— order the Kingdom of Belgium to pay the costs.

The appeal

22 The Kingdom of Belgium has put forward four grounds in support of its appeal.

The first ground of appeal

Arguments of the parties

23 By its first ground of appeal, the Kingdom of Belgium claims that the General Court erred in law and failed to comply with the obligation to state reasons incumbent on it as to the existence of a selective advantage for the purposes of Article 107(1) TFEU.

24 As regards the question whether the financing of tests constituted an advantage by freeing the undertakings from a charge which would normally be borne by their budget, the Kingdom of Belgium claims that the General Court was wrong to find, in paragraph 76 of the judgment under appeal, that such charges include additional costs which undertakings normally must bear by virtue of obligations imposed by law, regulation or agreement which apply to an economic activity. It could not in fact be required that the financial consequences of such obligations are always borne by the undertakings. Furthermore, to the extent that, in the present case, there are no harmonisation rules on financing BSE tests, the Member States remain free to assume the costs relating to the tests themselves.

25 The Kingdom of Belgium also criticises the General Court for having considered, in paragraph 81 of the judgment under appeal, that the objective of protecting public health pursued by the mandatory tests which are the subject of the financing at issue is not sufficient to rule out the classification as State aid. In fact, that objective was relied on solely to argue that the aid was of a non-economic nature, a relevant factor to justify that the cost of the tests did not have automatically to be charged to the undertakings' budgets.

26 The Kingdom of Belgium also argues that the General Court erred, in paragraph 89 of the judgment under appeal, in finding that the case-law of the Court of Justice on the financing of certain health inspections by reference to the rules on the free movement of goods was irrelevant to the application of Article 107(1) TFEU, whereas, as with aid, those inspections of the Member States also affect the internal market.

27 According to the appellant Member State, the General Court — in order to reject its argument that compulsory BSE screening tests could be taken on by the State since they relate to the exercise of public powers and are not economic in nature — could not simply state that the operators concerned do not themselves exercise public powers.

28 The appellant also claims that the General Court could not, without erring in law, dismiss as ineffective, in paragraph 67 of the judgment under appeal, the argument that the EU legislature has not harmonised conditions for financing the BSE tests, contrary to what the EU has done for inspections in other areas which affect food safety, whereas that factor was relevant in order to assess whether such charges should or should not normally be supported by the undertakings.

29 Finally, the Kingdom of Belgium, having claimed at first instance that the financing of the BSE tests by the public authority always remained below the actual costs of the tests and that the absence of 'overcompensation' therefore precluded the recognition of the existence of an economic advantage, submits that the General Court was wrong (i) to consider that argument to be distinct from the plea relating to that advantage and (ii) to suggest, in paragraph 133 of the judgment under appeal, in order to reject that argument as inadmissible, that it had not been sufficiently explained.

30 The Commission contends that all of those arguments should be rejected.

Findings of the Court

31 For the purposes of the present appeal, it should be borne in mind that, for a national measure to be categorised as State aid within the meaning of Article 107(1) TFEU, there must, first, be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on the recipient and, fourth, it must distort or threaten to distort competition (see judgment of 2 September 2010 in *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 39 and the case-law cited).

32 In the present case, it is only the interpretation and application of the third condition, according to which, to be categorised as aid, the measure at issue must confer a selective advantage on the recipient, which are called into question.

33 In fact, by its first ground of appeal, the Kingdom of Belgium claims that it is on grounds which are incorrect in law or insufficiently justified that the General Court, by the judgment under appeal, rejected its arguments that the financing of the BSE screening tests does not constitute an advantage for the purposes of Article 107(1) TFEU.

34 In that regard, it should be noted that, as the General Court pointed out in paragraph 72 of the judgment under appeal, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (see, inter alia, judgment of 16 April 2015 in *Trapeza Eurobank Ergasias*, C-690/13, EU:C:2015:235, paragraph 20 and the case-law cited).

35 The General Court held, in paragraph 76 of the judgment under appeal, that the charges which are normally borne by the budget of an undertaking include, in particular, the additional costs which undertakings normally must bear by virtue of obligations imposed by law, regulation or agreement which apply to an economic activity.

36 That assessment, for which sufficient reasons are stated and which is unambiguous, is not vitiated by any error of law. Indeed, such additional costs resulting from obligations imposed, as in the present case, by law or regulation inherent in the exercise of a regulated economic activity are, in essence, charges which must normally be borne by the undertakings. The fact that such obligations derive from the public authorities cannot therefore, by itself, have effects on the assessment of the nature of other measures by those same authorities, in order to determine whether they favour undertakings outside of normal market conditions.

37 Accordingly, the Kingdom of Belgium misreads the judgment under appeal when it claims that the General Court asserted, in paragraph 76 of the judgment under appeal, that each time a public authority imposes an obligation, the costs which result from it must automatically be borne by the undertakings concerned.

38 Accordingly, all of the arguments relied on by the Kingdom of Belgium to criticise that supposed assertion are ineffective. In particular, the facts that those charges arise from measures of the public authorities in the exercise of their public powers or that the Member States are free to take on those costs in the absence of harmonisation in the area of financing BSE screening tests have no effect on the categorisation of charges which the undertakings must normally bear.

39 Moreover, and in any event, the fact that there is no harmonisation on the financing of measures which have become mandatory in the fight against BSE has no bearing on the categorisation of an economic advantage which such financing is likely to constitute. Indeed, it should be borne in mind that, as the General Court stated in paragraph 65 of the judgment under appeal, even in areas where the Member States have jurisdiction, they must comply with EU law and in particular the requirements of Articles 107 TFEU and 108 TFEU (see, to that effect, judgment of 29 March 2012 in *3M Italia*, C-417/10, EU:C:2012:184, paragraphs 25 et seq.).

40 Nor can the Kingdom of Belgium successfully argue that the General Court also erred in law in finding, in paragraph 81 of the judgment under appeal, that the public health objective of the obligation to carry out BSE screening tests is not sufficient to rule out the categorisation of the State funding of those tests as State aid. It is settled case-law that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (see, inter alia, judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, EU:C:2011:732, paragraph 87).

41 Finally, the argument relating to 'overcompensation' is ineffective in so far as it could not, in any event, be successfully relied on in the context of Article 106(2) TFEU. Therefore, that argument relied on by the Kingdom of Belgium before the General Court should have been dismissed by that court, without it being criticised for having rejected that argument as inadmissible.

42 In the light of the foregoing considerations, the first ground of appeal must be rejected.

The second ground of appeal

Arguments of the parties

43 By its second ground of appeal, the Kingdom of Belgium claims that the General Court erred in law and failed to comply with its obligation to state reasons as regards the condition of the selectivity of the aid for the purposes of Article 107(1) TFEU.

44 The Kingdom of Belgium submits in that regard that in considering, in paragraphs 109 and 110 of the judgment under appeal, that operators in the bovine sector subject to BSE screening tests were, as regards the categorisation of State aid, in a legal and factual situation comparable to that of all other economic operators legally obliged to carry out checks prior to marketing their products, the General Court erred in law.

45 According to the Kingdom of Belgium, the General Court does not specify which those undertakings in other sectors are. In addition, there are essential differences between the temporary tests carried out in order to eradicate a disease in animals such as BSE, and mandatory quality inspections required, for example, of lift and truck manufacturers. Even taking the mandatory tests of agricultural products as a reference framework, all of those tests are not necessarily comparable to those aimed at eradicating BSE, as is apparent from the EU legislation which, for some tests, imposes a particular system of financing, whereas for others the definition of that system is left to the Member States.

46 Since the same scheme applied to all undertakings subject to the mandatory BSE screening tests, that is to say to all undertakings in the same factual and legal situation, the condition relating to selectivity set out in Article 107(1) TFEU has not, in the present case, been satisfied.

47 The Commission contends that those arguments should be rejected.

Findings of the Court

48 The requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage, in that, where the Commission has identified an advantage, understood in a broad sense, as arising directly or indirectly from a particular measure, it is also required to establish that that advantage specifically benefits one or more undertakings. It falls to the Commission to show that the measure, in particular, creates differences between undertakings which, with regard to the objective of the measure, are in a comparable situation. It is necessary therefore that the advantage be granted selectively and that it be liable to place certain undertakings in a more favourable situation than that of others (see judgment of 4 June 2015 in *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 59).

49 However, a distinction must be made according to whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective. By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity (see judgment of 4 June 2015 in *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 60).

50 It is not in dispute that, in the present case, the financing of the BSE screening tests by the Kingdom of Belgium must, since it benefits all of the operators in the bovine sector which bear the cost of those tests, be regarded as a general scheme, and, consequently, it is for the Commission to identify whether that measure, notwithstanding the finding that it conferred an advantage of general application, was for the exclusive benefit of certain undertakings or certain sectors of activity.

51 As is apparent from paragraphs 108 and 110 of the judgment under appeal, the General Court concluded that that was the case of the financing of the tests at issue, and held that the Commission was correct to take the view 'that operators in the bovine sector benefited from an advantage which was not available for undertakings in other sectors, since the tests which they were required to perform before placing their products on the market or trading in them were provided free of charge, whereas undertakings in other sectors were unable to avail themselves of that possibility, which the Kingdom of Belgium does not dispute'.

52 Although the Kingdom of Belgium criticises the General Court for not having specified which 'other sectors' it was referring to, it must be noted that the General Court, in paragraph 110 of the judgment under appeal, merely reproduced, in that regard, a statement made by the Commission. The Kingdom of Belgium does not claim that the General Court, in this respect, failed to respond to an argument that the Commission itself had not specified which other sectors it referred to.

53 In any event, it is clear from the finding reiterated in paragraph 110 of the judgment under appeal that the situation of operators in the bovine sector was implicitly but necessarily compared to that of all the undertakings which, like them, are subject to inspections which they are required to perform before placing their products on the market.

54 Although the Kingdom of Belgium maintains that those different sectors are not in a comparable situation since the tests intended to control the quality of products, even food products, vary from one sector to another, in their nature, purpose, cost and timing, such an argument is ineffective in the context of the categorisation of State aid, which relates not to the tests themselves but to their financing by State resources having the effect of alleviating the burden of costs on its beneficiaries. It is undisputed that, as stated by the General Court in paragraph 110 of the judgment under appeal, the Kingdom of Belgium did not dispute before it that the operators in the bovine sector benefited, by the financing of the screening tests, from an advantage which was not available to undertakings in other sectors.

55 In those circumstances, the General Court held, without erring in law, that the Commission had properly found that the measure at issue was selective for the purposes of Article 107(1) TFEU.

56 The second ground of appeal must therefore be rejected.

57 In the light of all of the foregoing considerations, the appeal must be dismissed.

Costs

58 In accordance with the first paragraph of Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs.

59 Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) of those rules, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.

60 Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the Commission relating to the present proceedings.

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

1. **Dismisses the appeal;**

2. **Orders the Kingdom of Belgium to bear its own costs and to pay those incurred by the European Commission.**

[Signatures]