Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

7 April 2022 *

(Appeal – State aid – Market for electricity generated from renewable energy sources – National legislation which allegedly has the effect of conferring an unlawful advantage on electricity suppliers – Complaint to the European Commission – Rejection decision without initiating the formal investigation procedure – Action for annulment – Regulation (EU) 2015/1589 – Article 1(h) – Concept of 'interested party' – Inadmissibility)

In Case C-429/20 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 11 September 2020,

Solar Ileias Bompaina AE, established in Athens (Greece), represented by A. Metaxas, dikigoros, and A. Bartosch, Rechtsanwalt,

appellant,

the other party to the proceedings being:

European Commission, represented by B. Stromsky and K. Herrmann, acting as Agents,

defendant at first instance,

THE COURT (Seventh Chamber),

composed of T. von Danwitz (Rapporteur), acting as President of the Chamber, P.G. Xuereb and A. Kumin, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: English.

Judgment

1 By its appeal, Solar Ileias Bompaina AE seeks to have set aside the order of the General Court of the European Union of 3 July 2020, *Solar Ileias Bompaina* v *Commission* (T-143/19, not published, 'the order under appeal', EU:T:2020:301), by which the General Court dismissed as inadmissible its action seeking, in essence, annulment in part of Commission Decision C(2018) 6777 final of 10 October 2018 on State aid SA.38967 (2014/NN-2) – Greece – National operating aid scheme in favour of installations using renewable energy sources and highly efficient combined power and heat installations ('the decision at issue').

Legal context

2 Article 1(h) 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) 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 Under Article 24(2) of Regulation 2015/1589:

'Any interested party may submit a complaint to inform the [European] Commission of any alleged unlawful aid or any alleged misuse of aid. To that effect, the interested party shall duly complete a form that has been set out in an implementing provision referred to in Article 33 and shall provide the mandatory information requested therein.

…'

Background to the dispute and the decision at issue

4 Solar Ileias Bompaina, a company incorporated under Greek law, is a producer of electricity using renewable energy sources, active on the electricity market in Greece.

5 On 31 December 2014, pursuant to Article 108(3) TFEU, the Hellenic Republic notified the Commission of the introduction of a legal operating aid scheme in favour of producers using renewable energy sources ('RES producers') and producers of high-efficiency combined heat and power ('CHP producers') provided for in Nomos 4254/2014, Metra stirixis kai anaptyxis tis ellinikis oikonomias sto plaisio efarmogis tou n. 4046/2012 kai alles diataxeis (Law 4254/2014, concerning the measures to support and develop the Greek economy, in the framework of the implementation of Law 4046/2012 and other provisions, FEK A 85/7.4.2014) ('the new RES Agreement') which entered into force in April 2014.

6 The Greek electricity market, as organised before and at the time of the entry into force of the new RES Agreement, included the following categories of market operators:

– generators and importers which feed energy into the network;

– the market and network operators, which form the non-competitive part of the market and which purchase the electricity produced by the generators and manage all financial transactions on the market; and

– suppliers which purchase electricity from market operators and resell it to end consumers.

7 In that context, RES producers and CHP producers were remunerated for the electricity produced at fixed prices in the form of feed-in tariffs. Supplier remuneration was not fixed and depended on market conditions.

8 In order to finance feed-in tariffs for RES and CHP producers, a 'special RES account' was set up in accordance with Nomos 2773/1999, Apeleftherosi tis agoras ilektrikis energeias – Rythmisi thematon energeiakis politikis kai loipes diataxeis (Law 2773/1999, concerning the liberalisation of the electricity market – Regulation of questions connected with the energy policy and other provisions) (FEK A 286/22.12.99). That account was financed mainly by way of a special contribution for greenhouse gas reduction, charged to consumers on each unit of electricity consumed, and by way of additional sources such as revenue from RES/CHP market operators.

9 The new RES Agreement modified the applicable feed-in tariffs for electricity produced by RES producers and CHP producers. Thus, for certain types of installation, specific technology ceilings have been introduced, which set the maximum amount of electricity produced by RES producers eligible for support in a given year. The purpose of those ceilings was to limit the total amounts of aid granted to certain RES technologies.

10 According to the Explanatory Report on Law 4254/2014, the new RES Agreement sought to eliminate the deficit on the special RES account and to make that account sustainable. In the period before the entry into force of that law, that special account had become in deficit, which was due to a combination of, on the one hand, a sharp increase in expenditure relating to the development of power plants using renewable energy sources and combined heat and power plants and, on the other, the concomitant decrease in revenue resulting from the reduction in the special contribution previously imposed on consumers due to the economic crisis, and from a decrease in income from the sale of electricity.

11 For the purposes of eliminating that deficit, the mechanism established by the new RES Agreement consisted in, on the one hand, a reduction of feed-in tariffs to be provided for in electricity sales contracts and, on the other, the introduction of rebates on the total value of electricity fed into the grid by RES producers and CHP producers in 2013, in order to offset the overcompensation previously granted to those producers.

12 On 6 May 2015, Solar Ileias Bompaina and another company lodged a complaint with the Commission under Article 24(2) of Regulation 2015/1589 concerning the measures of the new RES Agreement, claiming that those measures included illegal aid benefiting suppliers. That complaint was registered under case number SA.41794.

13 In its complaint, Solar Ileias Bompaina submitted that suppliers enjoyed a selective advantage because, under Law 4254/2014, RES producers alone would bear the costs related to the reduction of the deficit on the special RES account in the context of the new RES Agreement. However, suppliers also contributed to the deficit on that special account since the market rules and electricity pricing allow them to purchase it at reduced cost on the wholesale market, and that such reduced cost, being lower, brings less revenue to that special account. In other words, producers and suppliers are, in reality, in a comparable situation as regards the objective of eliminating the deficit on the special RES account. Thus, that agreement is selective in so far as its scope does not include suppliers, on which there is no obligation to participate in making up the deficit on the special RES account.

14 On 10 December 2015, the Commission received a second complaint lodged on behalf of solar energy producers and a third complaint, on 22 December 2017, lodged on behalf of the Pan-Hellenic Rooftop Photovoltaic Association.

15 On 10 March 2016, the Commission communicated the first two complaints to the Greek authorities and requested them to submit their observations in that regard. Those observations were submitted on 27 July 2016. The third complaint was not forwarded to the Greek authorities, because the Commission found that the issues raised were already covered by the first two complaints.

16 By the decision at issue, the Commission decided not to raise any objection to the scheme established by Law 4254/2014 as regards the new RES Agreement, providing for a readjustment of feed-in tariffs for RES producers and CHP producers.

17 In recitals 111 to 121 of the decision at issue, the Commission examined the allegations made in the complaints, including that of Solar Ileias Bompaina, and concluded that:

– the complainants had not provided any arguments to support the claim that the suppliers had partially caused the deficit on the RES special account;

– RES producers and suppliers were not in a comparable legal and factual situation;

– the objective of the new RES agreement was to reduce the deficit on the special RES account by offsetting the overcompensation previously granted by the readjustment of feed-in tariffs for RES producers; and that

– accordingly, the notified scheme did not provide any selective advantage via State resources to suppliers and no aid had been granted to them.

18 A summary notification of that decision was published in the *Official Journal of the European Union* of 7 December 2018.

19 On 18 December 2018, Solar Ileias Bompaina sent a letter to the Commission asking whether the latter considered the decision at issue to be a formal rejection of the complaint lodged in Case SA.41794 or whether, on the contrary, that case was still regarded as pending.

20 By letter dated 8 February 2019, the Commission replied to Solar Ileias Bompaina that the decision at issue covered its complaint and that, on that basis, the Commission was closing that complaint.

The proceedings before the General Court and the order under appeal

21 By application lodged at the Registry of the General Court on 2 March 2019, Solar Ileias Bompaina brought an action under Article 263 TFEU seeking, inter alia, annulment of recitals 111 to 121 of the decision at issue.

22 The General Court held, for the reasons set out in paragraphs 31 to 48 of the order under appeal, that Solar Ileias Bompaina had failed to establish that it was an 'interested party', within the meaning of Article 108(2) TFEU and Article 1(h) of Regulation 2015/1589, which is a prerequisite for its being able to plead infringement of its procedural rights, in so far as the Commission had found in the decision at issue, without initiating the formal investigation procedure, that no aid had been granted to the suppliers by Law 4254/2014.

23 Consequently, the General Court dismissed the action as inadmissible.

Forms of order sought by the parties

24 By its appeal, Solar Ileias Bompaina claims that the Court should:

– set aside the order under appeal;

– declare the action in Case T-143/19 admissible and refer the case back to the General Court; and

– order the Commission to pay all of the costs.

25 The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

The appeal

Arguments of the parties

26 In support of its appeal, the appellant relies on two grounds of appeal, which it is appropriate to examine together, and by which it claims, in essence, that the General Court erred in law in refusing to recognise it as an 'interested party' within the meaning of Article 1(h) of Regulation 2015/1589, the admissibility of its action being subject to acknowledgement of that status.

27 Although the appellant acknowledges that, in the order under appeal, the General Court correctly reflected the content of the complaint which it had lodged with the Commission and fully understood the content of its complaints, in particular as regards the fact that only RES producers were required to bear the financial burden associated with the elimination of the deficit on the RES special account, it nevertheless submits that the General Court should have recognised it as an 'interested party'. In particular, it submits that, although the General Court correctly summarised the subject matter of its complaints in paragraph 10 of the order under appeal, it nevertheless failed to draw the necessary conclusions from this in paragraph 44 of that order, by failing to take account of the fact that suppliers and RES producers are in a comparable situation in the context of the reference system constituted by the special RES account and of the

objective pursued by the new RES Agreement, namely the elimination of the deficit on that special account. In addition, the appellant submits that the General Court should have taken account of the fact that suppliers could also have been held partly responsible for the existence of that deficit.

28 According to the appellant, if suppliers had also been forced to contribute to the elimination of that deficit, its financial situation would have been better. There is a correlation between, on the one hand, the alleged aid which suppliers obtained by being exempt from contributing to the elimination of that deficit and, on the other hand, the reduction in the feed-in tariffs paid to RES producers such as the appellant in such a way that its interests and market position were affected by this.

29 In that regard, in its examination, the General Court infringed the rules relating to proof of the status of 'interested party' within the meaning of Article 1(h) of Regulation 2015/1589.

30 In particular, the General Court wrongly held that the appellant should, for the purposes of being accorded that status, have demonstrated the effects of the alleged aid on its market position or its economic interests. Thus, according to the appellant, in the judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex* (C-83/09 P, EU:C:2011:341), the Court of Justice accorded the appellants that status solely on the basis of their arguments that it could not be ruled out that the aid at issue in that case had an effect on their interests, without requiring them to actually demonstrate the existence of that possibility.

31 Consequently, according to the appellant, it cannot be required to prove what the actual effects of the revision of feed-in tariffs for RES producers would have been if the burden of eliminating the deficit on the RES special account had been allocated to those producers and the suppliers. It is sufficient to state that it cannot be ruled out that those feed-in tariffs could have been more favourable for RES producers if suppliers had also been asked to contribute to refinancing the special RES account.

32 The Commission contends that that line of argument must be rejected as unfounded.

Findings of the Court

33 As a preliminary point, it should be borne in mind that Article 1(h) of Regulation 2015/1589 defines the concept of 'interested party' as referring to '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'. It should be noted that that provision replaced Article 1(h) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), which was worded in identical terms. Thus, the principles identified in the case-law relating to the latter provision, recalled by the General Court, in particular in paragraph 31 of the order under appeal, are applicable for the purposes of interpreting Article 1(h) of Regulation 2015/1589.

34 Under that provision, 'interested party' means inter alia any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, that is to say, in particular competing undertakings of the beneficiary of that aid. In other words, that term covers an indeterminate group of persons (judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraph 63 and the case-law cited).

35 As a consequence, that provision does not rule out the possibility that an undertaking which is not a direct competitor of the beneficiary of the aid can be categorised as an interested party, provided that that undertaking demonstrates that its interests could be adversely affected by the grant of the aid. For that purpose, it is necessary for that undertaking to establish, to the requisite legal standard, that the aid is likely to have a specific effect on its situation (see, to that effect, judgment of 24 May 2011, *Commission* v *Kronoply and Kronotex*, C-83/09 P, EU:C:2011:341, paragraphs 64 and 65 and the case-law cited). Thus, although the adverse effect on the interests of that undertaking may be only potential, a risk of a specific effect on those interests must be capable of being demonstrated to the requisite legal standard.

36 In the present case, it is apparent from the findings of fact made by the General Court in paragraphs 6 to 8 of the order under appeal, which are not disputed by the appellant, that the new RES Agreement, approved by the Greek legislature, has the effect of reducing the feed-in tariffs paid to the appellant, in its capacity as an RES producer. That agreement is intended to make good the deficit on the special RES account, the purpose of which is to finance the activities of RES producers.

37 According to the appellant, since the Greek legislature failed to impose a contribution on suppliers, even though they could, in its view, have been held partly responsible for that deficit, it is unjustly disadvantaged financially. The appellant maintains that if suppliers had been asked to contribute by the Greek legislature in order to make good that deficit, its financial situation might have been more favourable, since it would not have been necessary to reduce the feed-in tariffs from which it benefited. Thus, it submits, in essence, that that failure by the Greek legislature had an impact on its interests and that there is therefore a link between the exemption enjoyed by suppliers and the reduction of those feed-in tariffs.

38 In the light of those factual elements, the General Court correctly applied the criteria set out in the case-law referred to in paragraphs 34 and 35 of this judgment by stating, in paragraph 37 of the order under appeal, that, in order to be able to be classified as an 'interested party', the appellant had to establish either that it was in direct or indirect competition with the beneficiaries of the alleged aid or show that that aid was likely to have a practical impact on its situation.

39 In paragraphs 39 to 41 of the order under appeal, the General Court first of all found that suppliers and RES producers were not in competition, since they operated at different levels of the electricity market in Greece.

40 Next, the General Court determined whether the alleged aid could have had a practical impact on the appellant's situation and whether the appellant had demonstrated, to the requisite legal standard, such a potential impact.

41 In that regard, it is apparent from the order under appeal that Law 4254/2014 merely reduced the support previously provided to RES producers, that being the solution chosen by the Greek legislature in order to remedy the fact that the aid scheme for RES producers had become too costly and had to be refinanced. It is in that context that the General Court found, in paragraph 44 of the order under appeal, that, although there was no doubt that Law 4254/2014, which provides for reduced tariffs for electricity produced from renewable energy sources, adopted in order to reduce the deficit on the special RES account, had had an effect on RES producers, the appellant had nevertheless failed to demonstrate that there is a correlation between the reduced tariffs for the renewable energy sources and the non-payment of a contribution to the special RES account by the electricity suppliers, or that the alleged aid to the

electricity suppliers could have affected its market position or its interests. In particular, the appellant had not explained how the alleged exemption of electricity suppliers by Law 4254/2014 could have influenced the setting of the new feed-in tariffs and rebates applicable to RES producers, given that the adjustments thus made were intended principally to offset the overcompensation previously granted to those producers.

42 Lastly, having regard, in particular, to those latter findings of fact, the General Court held, in paragraph 48 of the order under appeal, that the appellant had not established that it was an 'interested party', within the meaning of Article 1(h) of Regulation 2015/1589.

43 Since the General Court thus correctly applied the criteria established by the relevant case-law, referred to in paragraphs 34 and 35 above, there was no error of law on its part. Having regard to the factual considerations at issue, which, moreover, fall within the exclusive jurisdiction of the General Court, the relevant criterion which it had to take into account is whether there is a potential causal link, established to the requisite legal standard, between the alleged aid and the actual prejudice to the interests or market position of the undertaking concerned. By contrast, the question whether another category of economic operators may have contributed to the occurrence of the deficit at the level of the abovementioned aid scheme is irrelevant. Similarly, the possibility that RES producers and the suppliers were in a comparable situation, in the light of the objective of reducing the deficit on the special RES account, is irrelevant for the purposes of assessing the status of 'interested party', within the meaning of Article 1(h) of Regulation 2015/1589.

44 Consequently, the General Court did not err in law in refusing to accord the appellant the status of 'interested party', within the meaning of Article 1(h) of Regulation 2015/1589, and in therefore dismissing its action as inadmissible.

45 Since the two grounds of appeal put forward in support of the appeal are unfounded, the appeal must be dismissed in its entirety.

Costs

46 Under Article 138(1) of the Rules of Procedure of the Court of Justice, which applies to appeal proceedings by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

47 Since the Commission has applied for costs to be awarded against the appellant and the latter has been unsuccessful, the appellant must be ordered to bear its own costs and to pay those incurred by the Commission.

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

1. Dismisses the appeal;

2. Orders Solar Ileias Bompaina AE to pay the costs.

von Danwitz Xuereb Kumin

Delivered in open court in Luxembourg on 7 April 2022.

A. Calot Escobar
Registrar

K. Lenaerts
President