Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

16 October 2014*

(State aid — Electricity — Preferential tariff — Decision declaring aid incompatible with the common market and ordering its recovery — Advantage — Obligation to state reasons — Amount of the aid — New aid)

In Case T-177/10,

Alcoa Trasformazioni Srl, established in Portoscuso (Italy), represented by M. Siragusa, T. Müller-Ibold, F. Salerno, G. Scassellati Sforzolini and G. Rizza, lawyers,

applicant,

supported by

Italian Republic, represented by G. Palmieri, acting as Agent, assisted by S. Fiorentino, avvocato dello Stato,

intervener,

v

European Commission, represented by V. Di Bucci and É. Gippini Fournier, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2010/460/EC of 19 November 2009 relating to State aid C 38/A/04 (ex NN 58/04) and C 36/B/06 (ex NN 38/06) implemented by Italy for Alcoa Trasformazioni (OJ 2010 L 227, p. 62),

THE GENERAL COURT (Eighth Chamber),

composed of D. Gratsias, President, M. Kancheva and C. Wetter (Rapporteur), Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 December 2013,

gives the following

* Language of the case: Italian.

Judgment

Background to the dispute

1 The applicant, Alcoa Trasformazioni Srl, is a company governed by Italian law which owns two plants producing primary aluminium, located in Portovesme in Sardinia (Italy) and Fusina in the Veneto region (Italy). The plants were transferred to the applicant by Alumix SpA as part of the latter's privatisation.

2 By its notice pursuant to Article [88](2) [EC] to other Member States and interested parties concerning Italian State aid to Alumix, notified to the Italian Republic and published on 1 October 1996 (OJ 1996 C 288, p. 4, 'the Alumix decision'), after examining various measures implemented for Alumix in the course of its privatisation, including the grant of a preferential electricity tariff by the Ente nazionale per l'energia elettrica (ENEL), the long-standing electricity supplier in Italy, to the plants acquired by the applicant, the Commission of the European Communities took the view that the tariff, which was applicable until 31 December 2005, did not constitute State aid within the meaning of Article 87(1) EC. In this respect, it considered in particular that, 'by charging a tariff for the production of primary aluminium [to the plants acquired by the applicant] that cover[ed] [its] marginal costs and ma[de] a contribution to its fixed costs, ENEL [was] behaving [as an operator acting under normal market conditions] since these tariffs permit[ted] the supply of electricity to its biggest industrial consumers in regions where there [was] serious over-capacity in terms of electricity production'.

3 By Decision No 204/99 of 29 December 1999, the Autorità per l'energia elettrica e il gas (Italian Electricity and Gas Authority, AEEG) transferred administration of the electricity tariff to local electricity distributors. The applicant was then charged by ENEL, its local electricity distributor, for the supply of electricity at the standard tariff and no longer at the tariff laid down in Article 2 of the Ministerial Decree of 19 December 1995 (GURI No 39 of 16 February 1996, p. 8, 'the 1995 Decree'), which was applicable, as was stated in the preceding paragraph, until 31 December 2005. In order to compensate for this difference in the tariff, ENEL granted the applicant a reimbursement, referred to on its electricity bill, which was financed by means of a parafiscal levy on all electricity consumers in Italy.

4 By Decision No 148/04 of 9 August 2004, the AEEG appointed the public body Cassa Conguaglio per il settore elettrico (Italian Equalisation Fund for the Electricity Sector, 'the Equalisation Fund') to administer the electricity tariff in place of local distributors. In that capacity, the Equalisation Fund itself reimbursed the applicant a sum equal to the difference between the tariff charged to it by ENEL and the tariff laid down by the 1995 Decree-Law, by means of the same parafiscal levy.

5 Subsequently, first the Prime Ministerial Decree of 6 February 2004 (GURI No 93 of 21 April 2004, p. 5, 'the 2004 Decree') and then Decree-Law No 35 of 14 March 2005 (GURI No 111 of 14 May 2005, p. 4), converted into law, after amendment, by Law No 80 of 14 May 2005 (ordinary supplement to GURI No 91 of 14 May 2005, 'the 2005 Law') were adopted. Article 1 of the 2004 Decree sought to extend eligibility for preferential electricity tariffs to, among others, Portovesme Srl and Eurallumina SpA. Although it could also be understood as seeking to extend until June 2007 the preferential tariff from which the applicant benefited, it was not actually applied to the applicant, which continued to be governed by the 1995 Decree until the entry into force of Article 11(11) of the 2005 Law, which extended until 31 December 2010 the preferential tariff applied to the applicant's two plants.

6 That tariff had to be reviewed annually by the AEEG, which, on 13 October 2005, adopted Decision No 217/05, under which, with effect from 1 January 2006, the preferential tariff would be increased by a maximum of 4% per year, in step with any increase in prices recorded on the stock exchanges of Frankfurt (Germany) and Amsterdam (Netherlands).

7 Neither the 2004 Decree nor Article 11(11) of the 2005 Law was notified to the Commission.

8 By decision notified to the Italian Republic by letter of 19 July 2006, the Commission initiated the procedure laid down in Article 88(2) EC concerning State aid C 36/06 (ex NN 38/06) — Preferential electricity tariff to energy-intensive industries in Italy (summary published in OJ 2006 C 214, p. 5, 'the decision of 19 July 2006').

9 On 29 November 2006, the applicant brought an action before the General Court for annulment of that decision in so far as it concerned the tariff for supplying electricity granted to its two primary aluminium plants or, in the alternative, for annulment of the decision in so far as in it the Commission classified the tariff as unlawful new aid.

10 By judgment of 25 March 2009 in *Alcoa Trasformazioni* v *Commission* (T-332/06, not published in the ECR), the Court dismissed that action. That judgment was upheld on appeal by judgment of the Court of Justice of 21 July 2011 in *Alcoa Trasformazioni* v *Commission* (C-194/09 P, [2011] ECR I-6311).

11 The formal investigation procedure resulted in the adoption, on 19 November 2009, of Commission Decision 2010/460/EC relating to State aid C 38/A/04 (ex NN 58/04) and C 36/B/06 (ex NN 38/06) implemented by Italy for Alcoa Trasformazioni (OJ 2010 L 227, p. 62, 'the contested decision'), Article 1 of which declares the State aid unlawfully granted by the Italian Republic to the applicant from 1 January 2006 to be incompatible with the common market.

12 In the contested decision, the Commission considered to be irrelevant both the analysis it had adopted in the Alumix decision and the calculations provided by the Italian authorities and by the applicant to demonstrate that the preferential tariff granted to it still fulfilled the criteria laid down in the Alumix decision. It stated that the amount of aid to be recovered corresponded to the sum of all compensatory components made by the Equalisation Fund to the applicant.

13 As far as the Veneto plant was concerned, the Commission stated, in Article 2 of the contested decision, that the period concerned by the recovery of the aid was from 1 January 2006 until 19 November 2009, the date of adoption of the contested decision. As for the plant located in Sardinia, the Commission ordered only partial recovery, the period concerned by the recovery being from 1 January 2006 to 18 January 2007.

14 According to Annex 1 A to the application, the contested decision was notified to the applicant on 12 February 2010.

Procedure and forms of order sought

15 By application lodged at the Registry of the Court on 19 April 2010, the applicant brought the present action.

16 By separate document lodged at the Registry of the Court on 22 May 2010, the applicant made an application for interim measures seeking suspension of operation of the contested decision in so far as it concerns aid C 36/B/2006 (ex NN 38/2006) and claiming that the Court should order the Commission to pay the costs.

17 By document lodged at the Registry of the Court on 8 July 2010, the Italian Republic applied for leave to intervene in the present case in support of the forms of order sought by the applicant.

18 By order of the President of the Court of 9 July 2010 in *Alcoa Trasformazioni* v *Commission* (T-177/10 R, not published in the ECR), the application for interim measures was dismissed and the costs reserved.

19 On 4 August 2010, the Commission lodged the defence with the Registry of the Court.

20 By order of 13 September 2010, the President of the First Chamber of the Court granted the Italian Republic leave to intervene.

21 On 26 November 2010, the Italian Republic lodged the statement in intervention with the Registry of the Court.

22 The reply, in its rectified version, was lodged with the Registry of the Court on 1 December 2010.

23 On 1 February 2011, the Registry of the Court received the applicant's observations on the statement in intervention.

24 The rejoinder and the Commission's observations on the statement in intervention were lodged at the Registry of the Court on 1 March 2011.

25 By order of the President of the Court of 14 December 2011 in *Alcoa Trasformazioni* v *Commission* (C-446/10 P(R), not published in the ECR), the appeal brought against the order of 9 July 2010 in *Alcoa Trasformazioni* v *Commission* was dismissed.

26 When the composition of the chambers of the Court was altered, the Judge-Rapporteur was appointed to the Sixth Chamber, to which the case was therefore assigned. Subsequently, the present case was assigned to a new Judge-Rapporteur sitting in the same Chamber.

27 Following the partial renewal of the membership of the Court, the Judge-Rapporteur was appointed to the Eighth Chamber, to which the present case was therefore reassigned.

28 Upon hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure.

29 The applicant and the Commission submitted oral argument and replied to the oral questions put by the Court at the hearing on 12 December 2013. Even though it did not notify the Court, the Italian Republic, which was duly invited to appear in its capacity as intervener, was not present at the hearing.

30 The applicant claims that the Court should:

— annul the contested decision in so far as it concerns aid C 36/B/06 (ex NN 38/06);

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

32 The Italian Republic claims that the Court should uphold the action.

Law

33 In support of its action, the applicant raises six pleas in law.

34 Those pleas in law essentially allege, first, unlawful classification as State aid in the absence of an advantage granted to the applicant, second, unlawfulness resulting from the miscalculation of the amount of the aid in the event that the Court accepted classification as State aid, third, further assuming that classification, erroneous classification as operating aid, as regards regional aid compatible with the common market, and, even recognising that it might constitute operating aid, the eligibility of such aid under the Guidelines on national regional aid (OJ 1998 C 74, p. 9), fourth, a breach of the principle of sound administration and an infringement of the provisions of the Treaty relating to regional aid compatible with the common market, fifth, a breach of the principle of the protection of legitimate expectations and, sixth, a breach of essential procedural requirements.

35 The Court considers that the sixth plea in law, alleging a breach of essential procedural requirements, should be examined first.

The sixth plea in law, alleging a breach of essential procedural requirements

36 It is necessary, in the first place, to rule on the admissibility of the sixth plea in law, which is disputed by the Commission.

37 According to the Commission, that plea in law is lacking in detail such that it does not fulfil the requirements laid down by Article 44(1) of the Rules of Procedure of the General Court. However, it is evident from examining the application and the reply that, even though its arguments are very succinct, the applicant puts forward a plea in law comprising two parts which are clearly identifiable, one relating to the consequences of the alleged invalidity of the decision of 19 July 2006 on the lawfulness of the contested decision (paragraph 271 of the application) and the other relating to the defective statement of reasons in that decision (paragraph 272 of the application and paragraphs 73 and 74 of the reply). This plea in law must therefore be held admissible.

38 Consequently, in the second place, the two parts of the sixth plea in law must therefore be examined in turn.

The first part of the sixth plea in law, concerning the procedural defect relating to the invalidity of the decision of 19 July 2006

39 The applicant claimed that '[a] final decision taken pursuant to Article 108(2) TFEU [could] be lawfully adopted only if the decision to open the *inter partes* formal investigation was valid' and that 'in the event that the decision to open the investigation were annulled, that annulment would also have effects on the contested decision, for which an essential procedural requirement would not be met'.

40 However, when requested to take a view on the consequences to be drawn, in its view, from the judgment of 25 March 2009 in *Alcoa Trasformazioni* v *Commission* upheld by the judgment of 21 July 2011 in *Alcoa Trasformazioni* v *Commission* recognising the full lawfulness of the decision of 19 July 2006, the applicant stated at the hearing that it was not maintaining the first part of its sixth plea in law, of which note was taken in the minutes of hearing.

The second part of the sixth plea in law, concerning breach of the obligation to state reasons

41 By the second part of the sixth plea in law, the applicant alleges a breach of the obligation to state reasons. It claims in this regard that 'the [contested] decision is vitiated by many serious deficiencies in the statement of reasons on important points' (paragraph 272 of the application) and refers to 'arguments on the first four pleas in law' (same paragraph of the application).

42 The plea of inadmissibility raised by the Commission relating to the second part of the present plea in law, alleging that the applicant's arguments concern only the relevance of the reasons and not whether or not the statement of reasons is adequate, must be rejected from the outset. First, the matter of the obligation to state reasons is addressed in paragraphs 69 to 74 and 78 and 79 of the application, which concern the lack of an economic assessment demonstrating the existence of an advantage granted to the applicant.

43 Secondly and most importantly, the reply is more precise, which highlights, as far as a breach of the obligation to state reasons is concerned, the absence of an economic analysis to demonstrate the existence of an advantage granted to the applicant, the market price, consideration of regional development and the reasons leading to the rejection of the Virtual Power Plant ('the VPP programme'). Moreover, since a plea in law alleging a breach of the obligation to state reasons involves a matter of public policy (Case 185/85 *Usinor* v *Commission* [1986] ECR 2079, paragraph 19, and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67), it is admissible even though it is raised for the first time (Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraphs 21 and 25, and Case T-258/09 *i-content* v *OHIM (BETWIN)* [2011] ECR II-3797, paragraph 47). This is especially the case if a plea in law which is present in the application but does not have sufficient detail is fleshed out at the reply stage.

44 It is therefore necessary, on the one hand, to read the application in the light of the reply and, on the other, to bear in mind that in the sixth plea in law the applicant does not allege that the Commission failed to take those factors into consideration, but failed to mention them in the contested decision. The admissibility of the second part of the sixth plea in law is therefore, as such, established.

45 First of all, an examination must be conducted of the simple reference to substantive pleas in law made in connection with the second to fourth pleas followed by the complaints raised by the applicant in the application (in connection with the first plea in law, to which the sixth plea in law makes reference) and supplemented in the reply.

46 As regards the first case, it should be borne in mind that, according to case-law, the plea in law concerning infringement of Article 253 EC, the applicable provision at that time, and alleging absence of reasons or inadequacy of the reasons stated, goes to an issue of infringement of essential procedural requirements within the meaning of Article 230 EC (*Commission* v *Sytraval and Brink's France* paragraph 67, and Case T-158/99 *Thermenhotel Stoiser Franz and Others* v *Commission* [2004] ECR II-1, paragraph 97). The situation is different for complaints which, strictly speaking, do not refer to a failure to state reasons, or to a failure to state adequate reasons, but properly form part of the criticism of the merits of the contested decision, hence of its legality in terms of the substance (*Thermenhotel Stoiser Franz and Others* v *Commission*, paragraph 97, and Case T-162/06 *Kronoply* v *Commission* [2009] ECR II-1, paragraph 23). They can only be dismissed in connection with such a plea (*Thermenhotel Stoiser Franz and Others* v *Commission*, paragraphs 97 and 98, and Case T-257/10 *Italy* v *Commission* [2012] ECR, paragraph 53).

47 As regards the second case, according to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review.

48 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal

considerations having decisive importance in the context of the decision (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 16; Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-2717, paragraphs 59 and 60; and Case T-123/09 *Ryanair* v *Commission* [2012] ECR, paragraph 178).

49 In the light of the above considerations it must be ascertained whether the Commission gave an adequate statement of reasons in the contested decision as regards, first, the economic analysis which led it to establish the existence of an advantage granted to the applicant, second, the appropriate market price, third, the fact that it had examined whether the aid could be allowed for purposes of regional development and, fourth, the reasons which led it to reject the VPP programme.

50 Thus, with regard, first, to the economic analysis which led the Commission to establish the existence of an advantage granted to the applicant, it is clear from examining the contested decision that the Commission began by considering the economic background to the Alumix decision (recitals 33 to 38 of the contested decision) before emphasising the considerable changes that characterised the Italian electricity market (recitals 39 to 43 of the contested decision) and finally devoting an entire section (point 6.2.1 of the contested decision, entitled 'Existence of an advantage') to analysing the market in which the applicant was operating (recitals 145 to 158 of the contested decision). Pointing out, in particular, that the Alumix decision, which was adopted in a monopoly situation, could not be transposed to a liberalised electricity market (recital 150 of the contested decision), the Commission stated, in accordance with the judgment of 21 July 2011 in *Alcoa Trasformazioni* v *Commission* (paragraph 71), that consideration had to be given to the 'conditions prevailing on the actual market' (recital 146 of the contested decision). It also gave details of the particular features of the market in Sardinia (recitals 155 and 226 to 231 of the contested decision).

51 With regard, second, to the market price, the Commission stated that the price obtained by the applicant was lower than that which it could obtain in actual market conditions on account of the intervention of the Italian State, as, if it had been able to obtain it directly from one of the electricity suppliers in the regions concerned, there would have been no need for that intervention (recital 145 of the contested decision). It explained, in recitals 146 to 152 of the contested decision, the reasons why it considered that it had to disregard the calculation of the market price made by the applicant, further stating in recitals 153 and 154 of the contested decision that that calculation was incorrect as it corresponded to the marginal production costs of baseload plants, the cheapest plants. The Commission pointed out that such costs could be obtained on the market only during off-peak hours, while the applicant consumed electricity not only during those during off-peak hours but 24 hours a day. Lastly, it provided details concerning the market price in Sardinia (recital 230 of the contested decision), stating that the tariff from which the applicant benefitted did not comply with the criteria applied in the Alumix decision, supposing that they were relevant (recital 155 of the contested decision).

52 With regard, third, to the eligibility of the aid for the purposes of regional development, it is apparent from reading recitals 60 to 67 of the contested decision that, contrary to the claim made by the applicant, the Commission did examine that possibility in the light of the Guidelines on national regional aid (recital 60 of the contested decision), noting that Veneto was not one of the eligible regions (recital 61 of the contested decision), which ruled out one of the applicant's plants. As for the second plant, located in Sardinia, the Commission pointed out that that region was eligible until 31 December 2006 (recital 62 of the contested decision) but would no longer be eligible on the basis of the Guidelines on national regional aid for 2007-2013 (OJ 2006 C 54, p. 13), except for the applicant benefitting from the two-year transitional period 'for the linear phasing-out of existing operating aid schemes' (recital 66 of the contested decision). It therefore examined whether the aid was necessary (recital 63 of the contested decision) and proportional to the regional handicaps (recital 64 of the contested decision), concluding that this was not the case. It also noted that the aid was not degressive in real terms (recital 65 of the contested decision), considering it by and large inappropriate 'to allow new operating aid to be introduced for a few months' with a 'programmed phasing-out', also

bearing in mind in addition 'the doubts expressed and the distortive nature of the aid' (recital 66 of the contested decision). Lastly, it 'expressed doubts' as to the possibility of granting the tariff accorded to the applicant, 'either as regional aid, or on any other grounds' (recital 67 of the contested decision).

53 Furthermore, the contested decision contains an entire passage (point 6.5.1, entitled 'Compatibility with the Guidelines on national regional aid (Sardinia)') summarising the Commission's position on the subject in twenty recitals (recitals 220 to 240 of the contested decision), in particular regarding the '[c]ontribution to regional development' (point 6.5.1.2 and recitals 232 to 237 of the contested decision).

54 With regard, fourth, to the VPP programme, the contested decision also mentions that programme several times. The Commission makes reference to it in the chronology of the dispute, stating that it had considered 'the idea' of adopting that programme (recital 18 of the contested decision) and exchanged correspondence with the Italian Republic on the subject (recitals 18 to 20 of the contested decision). Mention is also made of meetings held with that Member State (the same recitals of the contested decision). In particular, the contested decision includes a passage on this subject (point 6.5.3, entitled 'The virtual power plant proposal (Sardinia)'), subdivided into two sections, dealing with the '[d]escription of the Italian VPP' (point 6.5.3.1 of the contested decision) and the '[c]ompatibility of the tariff on the basis of the VPP' (point 6.5.3.2 of the contested decision). That passage (recitals 246 to 259 of the contested decision) gives a detailed description of the VPP programme and the reasons why the Commission came to 'the conclusion that, in this instance, the VPP [could not] constitute sufficient basis to render the aid compatible for a transitional period following the establishment of the VPP and much less so for the period before the VPP is set up' (recital 253 of the contested decision).

55 Consequently, with regard to the four points specifically raised by the applicant, far from being incomplete, the contested decision provides a detailed reasoned statement of reasons in such a way as to enable both the applicant to ascertain the reasons for the measure and to enable the European Union court to exercise its power of review.

56 Accordingly, the second part of the sixth plea in law must be rejected, which means, in view of the withdrawal of the first part of that plea, that the plea in law must be rejected.

57 It is now necessary to examine the applicant's fifth plea in law, since that examination will lead the Court to clarify the precise scope of the Alumix decision.

The fifth plea in law, alleging breach of the principle of the protection of legitimate expectations

58 The applicant claims that, in adopting the contested decision, the Commission breached the principle of the protection of legitimate expectations. It should be stated, as the applicant acknowledges, moreover, that some of the arguments it puts forward in connection with this plea in law 'have already been submitted to the General Court in the action for annulment of the decision [of 19 July 2006]' (paragraph 225 of the application) and that '[i]t did not uphold them' (the same paragraph of the application). The applicant requests that those arguments be re-examined, in particular because of the broader scope of those arguments and the fact that the contested decision was not the same in nature as the decision of 19 July 2006. Consequently, it is in the light of the judicial solution adopted by the General Court, and then by the Court of Justice, but without being confined to it, that it is necessary to respond to the five parts of the fifth plea in law, which concern, first, the legitimate expectations that the Italian Republic and the applicant could have in the existing, and not new, character of the aid in question, by reason of the consistency of its effects for the applicant, the contested decision thus constituting an infringement of Article 88 EC (as Article 108 TFEU, which is invoked by the applicant, is inapplicable *ratione temporis*), second, the legitimate expectations created by the fact that, according to the applicant, when the Commission was informed of the change in the legal

situation from the end of the period provided for by the 1995 Decree, it had not reacted to the adoption of the new Italian legislation, leading the applicant to assume that the aid in question had to be regarded as existing, third, the indefinite temporal application of the Alumix decision, fourth, the specific legitimate expectations stemming from the fact that the tariff based on the 1995 decree had been regarded as not constituting State aid and, fifth, the reinforcement of the applicant's legitimate expectations as a result of the Commission's attitude in the formal investigation procedure, as expressed in particular in a letter of 19 January 2007.

59 Before examining the various parts of this plea in law, it should be noted what is covered by the principle of the protection of legitimate expectations and the conditions to be observed for it to be applicable.

60 As one of the fundamental principles of Union law (Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 52), the principle of the protection of legitimate expectations allows any trader in regard to whom an institution has given rise to justified hopes to rely on those hopes (Case 265/85 *Van den Bergh en Jurgens and Van Dijk Foods Products (Lopik)* v *EEC* [1987] ECR 1155, paragraph 44; Case C-369/09 P *ISD Polska and Others* v *Commission* [2011] ECR I-2011, paragraph 123; Case T-328/09 *Producteurs de légumes de France* v *Commission* [2012] ECR, paragraph 18). However, if a prudent and discriminating trader could have foreseen the adoption of a Union measure likely to affect his interests, he cannot plead that principle if the measure is adopted (Case 78/77 *Lührs* [1978] ECR 169, paragraph 6, and judgment of 25 March 2009 in *Alcoa Trasformazioni* v *Commission*, paragraph 102). The right to rely on legitimate expectations assumes that three conditions are satisfied. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Union administration. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must be consistent with the applicable rules (see *Producteurs de légumes de France* v *Commission*, paragraph 19, and the cited case-law).

61 With regard specifically to the applicability of that principle in the field of State aid, it should be stated that, in view of the fundamental role played by the notification obligation to render effective the review of State aid by the Commission, which is mandatory in nature, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure provided for in Article 88 EC and a diligent business operator must normally be in a position to confirm that that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission, with the result that it is unlawful under Article 88(3) EC, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful (see, to this effect, *Producteurs de légumes de France* v *Commission*, paragraphs 20 and 21, and the cited case-law), except where there are exceptional circumstances (Joined Cases T-427/04 and T-17/05 *France and France Télécom* v *Commission* [2009] ECR II-4315, paragraph 263).

62 In the light of the foregoing considerations, it is necessary to examine in turn the third, second, fourth, first and fifth parts of the present plea in law.

The third part of the fifth plea in law, concerning the indefinite temporal application of the Alumix decision

63 Since in the Alumix decision the Commission ruled on the conformity with Community law of the aid introduced by the 1995 Decree, whose validity expressly expired on 31 December 2005, its decision could not have longer temporal effect than that of the measure to which it relates. As the Commission rightly points out in the defence, the judgment of 25 March 2009 in *Alcoa Trasformazioni* v *Commission* (paragraphs 105 and 106) already sets out that reasoning. This was

confirmed by the Court of Justice which ruled that the Commission's findings in the Alumix decision could not have led the applicant legitimately to believe that the conclusions of that decision could be extended to the tariff examined in the decision of 19 July 2006 (judgment of 21 July 2011 in *Alcoa Trasformazioni* v *Commission*, paragraph 134) and that the General Court was therefore entitled to find that the Alumix decision could not have given rise to any legitimate expectation on the part of the applicant that the conclusions in the Alumix decision would continue to be valid (judgment of 21 July 2011 in *Alcoa Trasformazioni* v *Commission*, paragraph 135).

64 On those grounds, the third part of the fifth plea in law must therefore be rejected.

The second part of the fifth plea in law, concerning the legitimate expectations created by the failure by the Commission to react since the adoption of the new Italian legislation

65 It should be stated that whilst, on the one hand, the Alumix decision was valid only for the duration of the aid introduced by the 1995 Decree, it is not possible, on the other, to interpret the failure by the Commission to react as being able to give rise to a legitimate expectation on the part of the applicant.

66 First, it should be pointed out that the applicant's reasoning is based on a false premise since it argues that the Commission was aware of the provisions at issue, whereas it must be determined here whether they were notified to the Commission by the Italian Republic. As far as the 2004 Decree is concerned, according to the contested decision (recitals 1 to 3 of that decision), it was on the initiative of the Commission, alerted by a series of articles published in the press, that information was provided by that Member State. As far as the 2005 Law is concerned, it is also apparent from the documents in the file, as was confirmed at the hearing, that Article 11(11) of that law, unlike Article 11(12) thereof, was not notified to the Commission, as had, moreover, already been held by the Court of Justice (judgment of 21 July 2011 in *Alcoa Trasformazioni* v *Commission*, paragraph 16). It is therefore necessary to apply the case-law cited in paragraph 61 above, according to which the recipient of aid cannot have at that time a legitimate expectation that its grant is lawful where the aid is implemented without prior notification to the Commission.

67 Nor can it be claimed that there was inaction on the part of the Commission, as the information in question was provided to it in procedures conducted by it. Accordingly, no legitimate expectation could be created by inertia on the part of the Commission after notification as neither inertia nor notification has been established.

68 Second, there are in any event undoubtedly no precise, unconditional and consistent assurances in the present case.

69 The second part of the fifth plea in law must also therefore be rejected.

The fourth part of the fifth plea in law, concerning the legitimate expectations stemming from the fact that the tariff based on the 1995 Decree had been regarded as not constituting State aid

70 It follows from the statements made in connection with the examination of the third part of the fifth plea in law that, as it was limited in time, expiring on 31 December 2005, the 1995 Decree, which was the subject of the Alumix decision, could be regarded as not constituting State aid solely for the period at issue. As the Court of Justice ruled with regard to the analysis of this point by the General Court (judgment of 21 July 2011 in *Alcoa Trasformazioni* v *Commission*, paragraph 135), the applicant could not have any legitimate expectation that the conclusions in the Alumix decision would continue to be valid.

71 Consequently, the fourth part of the fifth plea in law must be rejected.

The first part of the fifth plea in law, concerning the legitimate expectations created by the existing character of the aid in question by reason of the consistency of its effects for the applicant

72 According to the case-law cited in paragraphs 60 and 61 above, a trader may rely upon the breach of the principle of the protection of legitimate expectations only if he has been reasonably prudent, discriminating and diligent. In those circumstances, the applicant had to, on the one hand, bear in mind that the preferential tariff from which it benefited under the 1995 Decree, which was by definition a derogation from the normal tariff, was envisaged for a period of ten years and that it was not at all certain to be renewed. On the other hand, it could not be unaware of the mechanism for determining the preferential tariff it enjoyed initially nor, consequently, fail to recognise the fact that it had been subject to various changes on which the Commission had not yet taken position. Furthermore, precisely in view of these changes, it is wrong to refer to the consistent effects of the preferential tariff based on the 1995 Decree, as the tariff had been subject to several adjustments, in particular the adjustment resulting from the annual update of the tariff — capped at 4% — based on the 2005 Law, as interpreted by the AEEG (see paragraph 6 above and recitals 49 and 50 of the contested decision).

73 In the light of all these factors, as a reasonably prudent, discriminating and diligent trader, the applicant could not entertain a legitimate expectation that the initial tariff would be continued and regarded as existing aid when, above all, it had changed significantly since the Alumix decision, and even though it still benefited from a preferential tariff.

74 The first part of the fifth plea in law must therefore be rejected.

The fifth part of the fifth plea in law, alleging reinforcement of the applicant's legitimate expectations as a result of the Commission's attitude in the formal investigation procedure, as expressed in particular in the letter of 19 January 2007

75 The fact that, by the letter of 19 January 2007, the Commission initiated discussions on the VPP programme with the Italian Republic (and not with the applicant) (recitals 18 to 20 of the contested decision) could not have any bearing on the character of existing aid which the applicant wished to attribute to the measures implemented by the contested Italian legislation and thus on the legitimate expectations to which it wrongly considered that it was entitled to have in the Commission's findings in the Alumix decision and, above all, as that letter represented the start of discussions on the possibility of adopting transitional measures, it could not, by definition, contain precise, unconditional and consistent assurances.

76 Accordingly, the fifth part of the fifth plea in law and therefore that plea in its entirety must be rejected.

77 The other four pleas in law in the action will be examined in the order presented in the applicant's written submissions.

The first plea in law, alleging unlawful classification as State aid in the absence of an advantage granted to the applicant

78 The first plea in law, by which the applicant claims an infringement of Article 107 TFEU (in reality, Article 87 EC, which is applicable *ratione temporis*), is subdivided into different parts, the first relating to the intensity of judicial review in the field of State aid and the Commission's obligation to state reasons in that area. As far as this latter point is concerned, it has been ruled in connection with the examination of the second part of the sixth plea in law that the contested decision complied with the requirements under Article 253 EC. As regards general considerations relating to the review by the

European Union judicature in the field of State aid, they are not accompanied by any specific complaint alleging the unlawfulness of the contested decision and they must therefore be rejected as irrelevant.

79 The first plea in law actually consists of three arguments: the Commission should have taken the view that the criteria laid down in the Alumix decision were applicable, which would then have led it to the same conclusion as in that decision, namely the absence of State aid (points D and E of the first plea in law); it should have conducted an economic analysis in order to ascertain the possible existence of an advantage granted to the applicant (point B of the first plea in law); in any event, this would have meant that the Commission took normal market conditions as the framework for its reasoning (point C of the first plea in law).

80 These three points should be examined in turn.

81 As for the criticism of the fact that the Commission decided that the criteria laid down in the Alumix decision did not apply in the present case, it should be made clear that this is not a question of the temporal scope of that decision, which was addressed in the examination of the fifth plea in law, but a question of economic and legal changes occurring since then which make it impossible to repeat a similar decision. As the Commission rightly explains, 'it is difficult to imagine a more substantial change than switching from a price applied by a supplier to a tariff subsidised by the State' (paragraph 54 of the defence).

82 Whilst in the first case the tariff granted to the applicant could be equivalent to the discount granted by a supplier, even with a monopoly (in this case ENEL), to one of its biggest clients (see, in this regard, recitals 36 and 37 of the contested decision), the measures which are the subject of the contested decision consist in a price reduction fixed by the Italian authorities, financed by a parafiscal levy which enables the applicant to be reimbursed the difference between the tariff normally charged to undertakings and the preferential tariff which it had been granted. However, as it is apparent from the very nature of the preferential tariff introduced at that time that the applicant was reimbursed by the Equalisation Fund, using public funds, the difference between the electricity tariff charged to the plants by ENEL and the tariff laid down by the 1995 Decree, this is in itself a sufficient basis for the finding that the applicant's plants did not pay all the costs which their budgets would normally have had to bear (see, to this effect, judgment of 25 March 2009 in *Alcoa Trasformazioni* v *Commission*, paragraph 68, and judgment of 21 July 2011 in *Alcoa Trasformazioni* v *Commission*, paragraph 83).

83 The Commission did not therefore err in law in considering that the criteria laid down in the Alumix decision could not be applied in the present case.

84 As for the second point, it should be stated that, as was explained in connection with the examination of the second part of the sixth plea in law, the Commission provided much economic information relating both to market developments (end of the monopoly) and to the specific characteristics of the applicants' plants (analysis of the electricity market in Sardinia, for example). It thus complied with Article 87 EC, which requires the Commission to establish that an economic advantage has been granted to the beneficiary undertaking (see, to this effect, Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraphs 251 and 257, and Case T-163/05 *Bundesverband deutscher Banken* v *Commission* [2010] ECR II-387, paragraph 98). In contrast, there was no need for the Commission to present other arguments, as the existence of an advantage granted to the applicant was evident merely from the description of the mechanism in place. The complex economic evaluations required, for example, in order to apply the private investor in a market economy test could not be of any use in the case of a compensatory mechanism financed by a parafiscal levy intended to release a company from paying some of the electricity charges required for the production of products which it markets within the European Union. The Commission was certainly not therefore required to conduct a more detailed economic analysis than that contained in the contested decision.

85 As regards the applicant's third argument, which concerns the fact that the Commission should have based its reasoning on a normal market and not the existing market, it is sufficient to recall that, according to settled case-law, State aid must be assessed in itself and not having regard to objectives relating, for example, to rectifying imperfect competition on a market (see, to this effect, Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 67, and the cited case-law).

86 The first plea in law must therefore be dismissed as unfounded.

The second plea in law, alleging unlawfulness resulting from the failure to calculate the amount of the aid

87 It should be recalled in this connection that in the contested decision the Commission, first, declares the aid in question incompatible with the common market and, second, orders its partial recovery. It is with regard to this latter aspect that the question of the calculation of the amount of the aid arises.

88 According to settled case-law, no provision of EU law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient to work out that amount itself, without overmuch difficulty (Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 25; Case C-441/06 *Commission* v *France* [2007] ECR I-8887, paragraph 29; Case T-177/07 *Mediaset* v *Commission* [2010] ECR II-2341, paragraph 181).

89 The contested decision satisfies these requirements since, as is stated, moreover, in the order of 9 July 2010 in *Alcoa Trasformazioni* v *Commission*, cited above (paragraph 11), without specifying the exact amount of the aid to be recovered, the decision sets out the method by which that amount should be calculated. That amount equals the difference between the contractual price and the preferential price, which coincides with the compensatory contribution received by the applicant over the period concerned (recital 285 of the contested decision). Article 1 of the contested decision makes express reference to that recital. Article 2 of that decision provides that that amount bears interest and establishes the procedure for calculating that interest. Lastly, it is clear from examining that article that, as far as the plant in Sardinia is concerned, the Commission waived recovery of the aid for the period between 19 January 2007 and 19 November 2009.

90 The second plea in law must therefore be dismissed as unfounded.

The third plea in law, concerning, as the principal plea, erroneous classification as operating aid and, in the alternative, the eligibility of such aid under the Guidelines on State aid for regional purposes

91 It is important to note, at this juncture, the limited scope of the applicant's third plea in law as it concerns only the plant in Sardinia, since Veneto is not an eligible region for the grant of national regional aid on the basis of Article 87(3)(a) EC. In the contested decision (recital 240 of the decision) and the defence, the Commission states that Sardinia ceased being an eligible region at the end of 2006. Consequently, it is necessary to examine the two parts of the third plea in law only in so far as that plea concerns the unlawfulness of the aid in relation to the period prior to that date in the case of the plant in Sardinia.

Erroneous classification of the aid in question as operating aid

92 In challenging the Commission's assessment that the aid in question was incompatible with the common market, the applicant argues that it did not constitute operating aid, which is, in principle, precluded as such from the scope of the Guidelines on national regional aid (points 4.15 to 4.17 of those Guidelines). It relies in particular on the temporary nature of the measure in question and the

mainly regional purpose of that aid. However, that argument is not convincing. First of all, the applicant benefited from a preferential tariff for fifteen years (from the entry into force of the 1995 Decree until the notification of the contested decision, and in particular Article [2(4)] thereof, under which the Italian Republic had to cancel all future payments of the aid in question). Second, the preferential tariff did not just apply to Sardinia, but also to Veneto. In any event, it is settled case-law that operating aid is aid which is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities (Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 30; judgment of 21 July 2011 in Case C-459/10 P *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, not published in the ECR, paragraph 34; *Kronoply* v *Commission*, cited above, paragraph 75). Consequently, the aid in question, which permitted the applicant to reduce the costs connected with its electricity consumption, which is by definition part of day-to-day management, was indeed operating aid, *a fortiori* because, the aluminium smelting process being particularly energy intensive (recital 74 of the contested decision), the purchase of electricity is of key importance to the applicant's operations.

93 The first part of the third plea in law must therefore be rejected.

In the alternative, the eligibility of the aid in question under the Guidelines on State aid for regional purposes

94 Even in the case of operating aid, it was possible, exceptionally, to authorise aid earmarked for eligible regions on the basis of Article 87(3)(a) EC, provided it was justified by its contribution to regional development and its nature and provided its level was proportional to the handicaps it sought to alleviate. That aid had to be limited in time and degressive. The applicant considers, in the alternative, that the Commission should have recognised, with regard to its plant in Sardinia, the eligibility of the aid in that respect. That argument does not hold.

95 First of all, and this point is sufficient basis in itself for the Commission to reject consideration of the aid as eligible under the Guidelines on national regional aid, the aid in question was not degressive (recitals 65 and 239 of the contested decision), despite the fact that the tariff could not increase by more than 4%. It should be pointed out that the capped increase of the amount of the preferential tariff does not, *ipso facto*, entail a reduction in the compensatory amount paid to the beneficiary of that tariff, as the real cost of electricity for the operator may still be higher than it charges the beneficiary under the preferential tariff, even when increased by 4%. Consequently, as the Commission rightly argued, without being contradicted, the preferential tariff was degressive only in the case of a net reduction of average prices within the Union and progressive in all other cases.

96 Second, the Commission showed convincingly why the aid in question did not make a sustainable contribution to regional development. For example, in recitals 235 and 236 of the contested decision, it stated that the applicant itself had recognised the lack of viability of the Sardinian site if it did not benefit from the preferential tariff and showed that, even taking into account the future impact of the creation of new infrastructure (a pipeline and a marine cable) on the market price, the price obtained would be comparable to the price applied in the rest of Italy, but could not in any event reach the price of EUR 30/MWh which was 'required to make its smelter profitable' (recital 235 of the contested decision). Thus, far from becoming the motor for the future development of the island as a result of the aid in question, the applicant's plant was itself fully dependent on the preferential tariff.

97 Lastly, as the Guidelines on national regional aid require that in order to be eligible, the aid must be proportional to the handicaps it seeks to alleviate, the Commission examined whether the preferential tariff corresponded to the differential that could be observed for other clients between Sardinia and mainland Italy. It pointed out that the repayment made to the applicant was much higher than

whatever differential could be observed elsewhere (recital 238 of the contested decision). Accordingly, the applicant cannot legitimately claim that the aid in question was proportional and therefore eligible.

98 Because these criteria are not satisfied, the Commission was correct to take the view that this precluded the eligibility of the preferential tariff in Sardinia under the Guidelines on State aid for regional purposes.

99 Consequently, the second part of the third plea in law must also be rejected and therefore the third plea in law in its entirety.

The fourth plea in law, alleging a breach of the principle of sound administration and an infringement of Article 107(3) TFEU in respect of the VPP programme

100 The applicant considers that, by the letter of 19 January 2007 and, more broadly, by its attitude to the assessment of the VPP programme, the Commission seriously and manifestly breached the principle of sound administration and infringed Article 107(3) TFEU (in reality, in view of the date of adoption of the contested decision, Article 87(3) EC).

101 It should be noted, first of all, that the guarantees conferred by the Union legal order in administrative proceedings include, in particular, the duty to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14, and Case T-263/07 *Estonia* v *Commission* [2009] ECR II-3463, paragraph 99).

102 It must be pointed out, second, that in recital 281 of the contested decision the Commission recognised that the length of the discussions begun in 2007 on the VPP programme, although in large part due to the Italian Republic's belated reply, was 'not conducive to the principle of sound administration, and affected the behaviour of the beneficiary over the subsequent course of the investigation'.

103 Although the Court is not in any way bound by any assessment by the Commission of its own conduct and must carry out its own review of the lawfulness of the contested decision, it is, on the other hand, bound in that review, both by the claim and by the precise subject-matter of the contested decision.

104 Thus, in so far as the breach of the principle of sound administration consisted in the Commission's wavering and its lack of promptness in investigating the VPP programme in relation to the applicant's plant in Sardinia, it should be noted that the Commission found that it is appropriate 'not to impose the recovery of the aid for the Sardinian plant for the period from the date of sending the letter, 19 January 2007, until that of [the contested decision]' (recital 282 of the contested decision). Article 2(1) of the contested decision reflects this position. Consequently, since it cannot affect the lawfulness of the contested decision as regards the compatibility of the aid in question with the common market and has no bearing on the amount of the aid whose recovery was ordered by the Commission for the period after 18 January 2007 in respect of the plant in Sardinia, the plea in law alleging a breach of the principle of sound administration must be rejected as being, in part, irrelevant.

105 Nevertheless, it is evident from that plea in law that the applicant places it in a broader context under the section entitled 'Conduct of the administrative procedure by the Commission', relying in particular on procrastination which, in its view, led to the juxtaposition of the following factors:

— the content of the Alumix decision, in which the Commission considered that the measures implemented by the 1995 Decree did not constitute State aid;

— inertia on the part of the Commission after having been informed of the changes to the initial aid;

— the fact that, in respect of the 2004 Decree, it opened an investigation regarding new beneficiaries of the preferential tariff, but not regarding the applicant;

— the adoption of the decision of 19 July 2006;

— the adoption of the contested decision after abandoning the possibility of the VPP programme.

106 These various factors, whether seen in isolation or taken together, cannot constitute a breach of the principle of sound administration. First, as has been mentioned, the Alumix decision could not allow the applicant to take the view that its scope would go beyond the ten years laid down by the 1995 Decree for the grant of the preferential tariff from which it had benefitted. Second, it cannot be alleged that the Commission failed to respect the principle of sound administration if that institution was not given the opportunity for sound administration on account of conduct that could be attributed exclusively to a third party. It is common ground that in the present case the reason why the Commission was not able to take position as it should have done if the notification procedure for State aid had been respected was the failure by the Italian Republic to give notification of the 2004 Decree and of Article 11(11) of the 2005 Law, conduct which is unlawful. Furthermore, as was stated in paragraphs 65 to 67 above, the Commission did not demonstrate inertia after the adoption of new provisions by the Italian authorities, but requested from those authorities the information which it considered necessary. Third, the decision of 19 July 2006 was ruled to be lawful both by the General Court and by the Court of Justice, including in so far as it entailed splitting the part concerning the applicant from the part concerning new beneficiaries of a preferential tariff designated by the 2004 Decree. Fourth, it was stated in paragraph 104 above that, with regard to the delay caused by the initiation of discussions on the VPP programme, then the abandonment of that possibility, the Commission considered that it was required to take this into account itself by waiving recovery of the relevant amount of aid, which can certainly not constitute maladministration.

107 Lastly, as regards the alleged infringement of Article 87(3) EC arising from the failure by the Commission to evaluate the effects of the VPP programme in Sardinia, it should be stated that in the contested decision the Commission was correct in its view that programme could not constitute sufficient basis to render the aid compatible for a transitional period following the establishment of the VPP and much less so for the period before the VPP was set up (recital 253 of the contested decision). As Sardinia had ceased being an eligible region at the end of 2006 under the abovementioned provision and the discussions between the Commission and the Italian Republic had begun at the beginning of 2007, Article 87(3) EC could not be infringed by reason of the fact that the Commission decided not to consider that programme, especially since the general principle laid down in Article 87(1) EC is the prohibition of State aid and exceptions to that principle must be interpreted narrowly (Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 20; Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraph 79; judgment of 2 December 2008 in Joined Cases T-362/05 and T-363/05 *Nuova Agricast and Cofra* v *Commission*, not published in the ECR, paragraph 80).

108 In the light of the foregoing, the fourth plea in law can only be rejected.

109 Consequently, as none of the six pleas in law has been upheld, the action must be dismissed in its entirety.

Costs

110 Since the Commission has applied for the applicant to be ordered to pay the costs and the applicant has been unsuccessful, the applicant must be ordered, pursuant to Article 87(2) of the Rules of Procedure, to pay the costs, including those relating to the application for interim measures. In accordance with Article 87(4) of the Rules of Procedure, the Italian Republic, which is an intervener in the present case, must bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Alcoa Trasformazioni Srl to bear its own costs and to pay those incurred by the European Commission, including those relating to the application for interim measures;**

3. **Orders the Italian Republic to bear its own costs.**

Gratsias Kancheva Wetter

Delivered in open court in Luxembourg on 16 October 2014.

[Signatures]