Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

25 March 2015*

(State aid — Public health — Aid granted to finance screening of transmissible spongiform encephalopathies (TSE) screening tests in bovine animals — Decision declaring the aid compatible in part and incompatible in part with the internal market — Action for annulment — Acts adversely affecting the applicant — Admissibility — Concept of advantage — Concept of selectivity)

In Case T-538/11,

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

applicant,

v

European Commission, represented initially by H. van Vliet and S. Thomas, and subsequently by van Vliet and S. Noë, acting as Agents,

defendant,

APPLICATION 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 Belgian (State aid C 44/08 (ex NN 45/04)) (OJ 2011 L 274, p. 36),

THE GENERAL COURT (First Chamber),

composed of H. Kanninen, President, I. Pelikánová and E. Buttigieg (Rapporteur), Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 5 September 2014,

gives the following

* Language of the case: Dutch.

Judgment

Legal context

Regulation No 999/2001

1 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. As is apparent from recital 2 in the preamble thereto, the 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.

2 The first subparagraph of Article 6(1) of Regulation No 999/2001, entitled 'Monitoring system', provides:

'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.'

3 In the initial version of Regulation No 999/2001, Annex III, Chapter A, Part I set out the minimum requirements for a programme for monitoring BSE in bovine animals. It provided, 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.

4 Furthermore, in the initial version of Regulation No 999/2001, Annex III, Chapter A, Part IV, provided:

'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.'

5 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.

6 Commission Regulation (EC) No 1494/2002 of 21 August 2002 amending Annexes II, 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

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

8 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'.

9 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 Sate 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 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. In any event, 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.’

10 Last, as regards State aid towards the costs of TSE and BSE tests granted unlawfully before 1 January 2003, paragraph 45 of the TSE Guidelines states 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 ‘the Agricultural Guidelines 2000-2006’) and its practice since 2001 of accepting such aid of up to 100%.

Background to the dispute

Procedure before the Commission

11 In January and February 2004, the Commission received a number of complaints concerning a draft royal degree designed to introduce, in Belgium, a parafiscal charge to finance BSE screening tests.

12 By letter of 27 January 2004, the Commission asked the Kingdom of Belgium to provide information in that respect.

13 The Kingdom of Belgium replied to that request for information by letter of 6 February 2004. It informed the Commission, in particular, that since 1 January 2001 BSE screening tests had been compulsory in Belgium for bovine animals more than 30 months of age and for bovine animals more than 24 months of age undergoing emergency slaughter, on the basis of Regulation No 999/2001. Furthermore, the Kingdom of Belgium stated that, between 1 January and 31 December 2001, the costs of the compulsory BSE screening tests had been covered by the public purse and, from 1 January 2002, by the Belgian Intervention and Refund Bureau (BIRB).

14 At the same time, by letter of 23 January 2004, registered on 28 January, the Kingdom of Belgium notified a draft royal decree relating to the financing of screening for TSE in animals. That measure was registered under number N 54/04.

15 As the draft royal decree stated that aid had already been granted and taxes levied since 1 January 2002, the measure was registered as non-notified on 19 July 2004 under number NN 45/04.

16 By letter of 26 November 2008, the Commission informed the Kingdom of Belgium that it had decided to initiate the formal investigation procedure provided for in Article 88(2) EC in respect of the financing of the TSE screening tests carried out in Belgium between 1 January 2001 and 31 December 2005, and invited interested third parties to submit their comments. The decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union* on 16 January 2009 (OJ 2009 C 11, p. 8).

17 The interested third parties did not submit any comments.

18 The Kingdom of Belgium submitted its comments to the Commission by letter of 25 February 2009.

Contested decision

19 On 27 July 2011, the Commission adopted Decision 2011/678/EU concerning the State aid for financing screening of 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).

20 In the first place, the Commission examined the Belgian system of financing the compulsory BSE screening tests in order to ascertain whether it satisfied the four cumulative conditions for State aid, within the meaning of Article 107(1) TFEU.

21 In that regard, first, the Commission found that, between 1 January and 31 December 2001, the compulsory BSE screening tests had been financed entirely by the public purse and that, between 1 January 2002 and 30 June 2004, they had been financed by the BIRB, a federal public institution with legal personality, reporting to the Belgian Minister for Agriculture and the Middle Classes and having a government endowment entered in the budget for its supervisory role at federal level and some revenue of its own. In addition, it observed that, between 1 July and 30 November 2000, the compulsory BSE screening tests had been financed by the Federal Agency for the Safety of the Food Chain (AFSCA), that is to say, by a public institution with legal personality which, under the Law of 4 February 2000 on the creation of the AFSCA, was financed by various revenue sources such as fees, contributions (that is to say, parafiscal charges), the product of administrative fines, gifts and legacies, etc. Last, for the period between 1 December 2004 and 31 December 2005, the Commission found that the compulsory BSE screening tests had been financed, first, by a fee of EUR 10.70 per bovine tested, paid by the abattoirs and passed on to their customers, and, second, by financing by the AFSCA from its reserves and from the repayable advance made available to it by the public purse.

22 The Commission therefore concluded, first, that between 1 January 2001 and 31 December 2005 the compulsory BSE screening tests had been financed by State resources and, second, that the part of the amount of those tests financed since 1 December 2004 by the fee of EUR 10.70 per bovine tested had not been financed from State resources.

23 Second, the Commission ascertained whether the Belgian system of financing the compulsory BSE screening tests had secured a selective economic advantage for certain undertakings or the production of certain goods.

24 As regards, first of all, the financing of compulsory BSE screening tests by State resources, including contributions, the Commission considered that the cost of the obligatory controls concerning the production or the marketing of products was a charge normally borne by the budget of an undertaking. Thus, according to the Commission, the covering of the costs of those tests by the Kingdom of Belgium since 1 January 2001 had conferred an advantage on the breeders, abattoirs and other undertakings which processed, handled, sold or traded in the products from bovine animals

subject to those tests. In that regard, the Commission observed that the price of those tests had been paid directly to the laboratories, which were responsible for performing the tests in question on request from the abattoirs and invoiced the costs of the AFSCA.

25 In addition, the Commission considered that the condition relating to selectivity was met, since the advantage described above was reserved solely for the sector involved in 'breeding animals subject to BSE [screening] tests'.

26 As regards, next, the financing of the compulsory BSE screening tests by fees, that is to say, by fees paid by the sector, the Commission observed that no advantage had thereby been conferred on the operators of the bovine production process, since the fees had been paid by the persons who benefited from the services provided by the AFSCA which they were meant to cover.

27 Third, the Commission found that the measure at issue had distorted or threatened to distort competition and had affected trade between Member States.

28 In the light of the foregoing, the Commission concluded that the financing of the compulsory BSE screening tests by State resources constituted State aid within the meaning of Article 107(1) TFEU.

29 In the second place, the Commission observed that the aid at issue was unlawful for the period between 1 January 2001 and 30 June 2004, as it had been granted in breach of Article 108(3) TFEU.

30 In that regard, the Commission pointed out that, from 1 January 2003, the aid at issue was covered by the exemption from the obligation to notify provided for in Council Regulation (EC) No 1/2004 of 23 December 2003 on the application of Articles [107 TFEU] and [108 TFEU] to State aid to small- and medium-sized enterprises active in the production, processing and marketing of agricultural products (OJ 2004 L 1, p. 1). However, it found that the conditions laid down by that regulation had not been complied with in this case and that, accordingly, the aid was unlawful.

31 In the third place, the Commission ascertained whether the revenue from the contributions participating in the financing of the AFSCA, which were charged from 1 July 2004, had to be hypothecated to the financing of the compulsory BSE screening tests. As no such compulsory hypothecation was found, the Commission concluded that the contributions were not an integral part of the aid at issue.

32 In the fourth place, the Commission examined the compatibility of the aid at issue with the internal market. It thus ascertained whether the conditions laid down in the TSE Guidelines had been complied with in this case.

33 As regards, first, the financing of the compulsory BSE screening tests granted unlawfully before 1 January 2003, that is to say, before the entry into force of the TSE Guidelines, the Commission found that the conditions laid down in point 11.4 of the 2000-2006 agriculture guidelines, to which paragraph 45 of the TSE Guidelines referred, were met. It therefore concluded that the aid granted during the period between 1 January 2001 and 31 December 2002 was compatible with the internal market.

34 As regards, second, the financing of the compulsory BSE screening tests granted between 1 January 2003 and 31 December 2005, the Commission considered that only the condition laid down in paragraph 24 of the TSE Guidelines, namely the condition that the national and Community aid must not be more than EUR 40 per test, had not been complied with during the period between 1 January 2003 and 30 June 2004. In that regard, it observed that the total amount of that excess payment came to EUR 6 619 810.74.

35 In the fifth and last place, the Commission found that the system proposed by the Kingdom of Belgium for the recovery of the aid in excess of the amount of EUR 40 per test did not comply with the rules on the recovery of unlawful and incompatible aid.

36 In conclusion, the Commission considered that, during the period between 1 January 2001 and 30 June 2004, the Kingdom of Belgium had unlawfully implemented aid to finance compulsory BSE screening tests, in breach of Article 108(3) TFEU.

37 In addition, the Commission considered that the aid was compatible with the internal market, with the exception of the amounts in excess of the maximum amount of EUR 40 per test granted during the period between 1 January 2003 and 30 June 2004.

38 Last, the Commission ordered recovery of the unlawful and incompatible aid, with the exception of aid granted to specific projects which, at the time when the aid was granted, met all the conditions set in the applicable *de minimis* regulation.

39 The operative part of the contested decision reads as follows:

'*Article 1*

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

2. For the period from 31 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 30 January 2003 to 40 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 30 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.

…

Article 3

Recovery of the aid referred to in Article 1(3) and (4) shall be immediate and effective.

Belgium shall ensure that this Decision is implemented within [four] months of the date of its notification.

Article 4

1. Within [two] months of notification of this Decision, Belgium shall submit the following information to the Commission:

(a) a list of beneficiaries who received the aid referred to in Article 1(3) and (4) and the total amount of aid received by each one;

(b) the total amount (principal and recovery interest) to be recovered from the beneficiaries;

…

Article 5

This Decision is addressed to the Kingdom of Belgium.'

Procedure and forms of order sought

40 By application lodged at the Court Registry on 10 October 2011, the Kingdom of Belgium brought the present action.

41 The Kingdom of Belgium claims that the Court should:

— annul the contested decision, with the exception of Article 1(1) of its operative part;

— order the Commission to pay the costs.

42 The Commission contends that the Court should:

— dismiss the action as inadmissible in part and unfounded in part;

— in the alternative, dismiss the action as unfounded;

— order the Kingdom of Belgium to pay the costs.

43 On hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of the General Court, requested the parties to answer certain questions in writing. The parties complied with those measures of organisation of procedure within the prescribed period.

44 The parties presented oral argument and answered the oral questions put by the Court at the hearing on 5 September 2014.

Law

Admissibility

45 Although it does not formally raise a plea of inadmissibility under Article 114 of the Rules of Procedure, the Commission asks the Court to declare the present action inadmissible in so far as it is directed against Article 1(2) and the first sentence of Article 1(3) of the contested decision, which characterises the measure at issue as State aid compatible with the internal market. In that regard, it

claims, in essence, that that part of the operative part is not a measure that is open to challenge under Article 263 TFEU, since it does not produce binding legal effects capable of affecting the interests of the Kingdom of Belgium.

46 In the reply, the Kingdom of Belgium submitted that the action is admissible, in particular in so far as it was directed against Article 1(2) and (3) of the contested decision.

47 According to consistent case-law, developed in the context of actions for annulment brought by Member States or institutions, any measures adopted by the institutions, whatever their form, which are intended to have binding legal effects are regarded as acts open to challenge, within the meaning of Article 263 TFEU (judgments of 31 March 1971 in *Commission* v *Council*, 22/70, ECR, EU:C:1971:32, paragraph 42; of 2 March 1994 in *Parliament* v *Council*, C-316/91, ECR, EU:C:1994:76, paragraph 8; and of 13 October 2011 in *Deutsche Post and Germany* v *Commission*, C-463/10 P and C-475/10 P, ECR, EU:C:2011:656, paragraph 36). The case-law further shows that a Member State may admissibly bring an action for annulment of a measure producing binding legal effects without having to demonstrate that it has an interest in bringing proceedings (judgments in *Deutsche Post and Germany* v *Commission*, EU:C:2011:656, paragraph 36, and of 20 September 2012 in *France* v *Commission*, T-154/10, ECR, EU:T:2012:452, paragraph 37).

48 Therefore, for the purposes of assessing whether the contested decision is open to challenge, it is necessary to examine whether it constitutes a measure which is intended to produce binding legal effects (see, to that effect, judgment in *Deutsche Post and Germany* v *Commission*, paragraph 47 above, EU:C:2011:656, paragraph 40), which must be determined by having regard to its substance (judgment in *France* v *Commission*, paragraph 47 above, EU:T:2012:452, paragraph 37).

49 In the present case, Article 1(2) and the first sentence of Article 1(3) of the contested decision, which characterise the aid at issue as State aid and declare it compatible in part with the internal market, is necessarily intended to produce binding legal effects and therefore constitutes a measure which can be challenged under Article 263 TFEU (see, to that effect, judgment of 8 September 2011 in *Commission* v *Netherlands*, C-279/08 P, ECR, EU:C:2011:551, paragraphs 35 to 42).

50 The case-law cited by the Commission cannot upset that conclusion.

51 As regards, first of all, the case that gave rise to the order of 28 January 2004 in *Netherlands* v *Commission* (C-164/02, ECR, EU:C:2004:54), it is sufficient to observe that the reason that had led the Court of Justice to declare inadmissible the action brought by the Kingdom of the Netherlands against a Commission decision finding that an aid measure was compatible with the internal market was that that Member State had sought the annulment of the decision in question 'in so far as the Commission [took] the view therein that the contributions paid to port authorities … constitute[d] State aid for the purposes of Article 87(1) EC', when that view was not stated in the operative part of that decision.

52 Next, contrary to the Commission's assertion, the Court of Justice did not consider in the judgment in *Commission* v *Netherlands*, paragraph 49 above (EU:C:2011:551), that a Member State's express objection to the classification of a measure as State aid, in particular at the time of notification, is a 'decisive' element for the purposes of the admissibility of the action brought by that State against a decision declaring the measure compatible with the internal market.

53 It should be pointed out that, in the judgment in *Commission* v *Netherlands*, paragraph 49 above (EU:C:2011:551), the Court of Justice held that a decision based on Article 107(1) and (3) TFEU which, while classifying the measure in question as State aid, declared it compatible with the common market, must be regarded as an act open to challenge under Article 263 TFEU, on the ground that the mistaken classification of a measure as State aid had legal consequences for the notifying Member State, since such a measure was subject to constant monitoring by the Commission and to periodic

checks by it, meaning that the Member State enjoyed restricted room for manoeuvre in implementing the notified measure (judgment in *Commission* v *Netherlands*, paragraph 49 above, EU:C:2011:551, paragraphs 41 and 42).

54 Last, the Commission's assertion that before the administrative procedure the Kingdom of Belgium had acknowledged, at least implicitly, that the measure at issue constituted State aid, cannot, on the assumption that it is correct, have any effect on the admissibility of the present action. In that regard, it should be observed that, in the rejoinder, the Commission itself recognised that, from a strictly legal viewpoint, the fact that the Kingdom of Belgium had previously acknowledged that the measure at issue constituted State aid did not deprive it of the right to contest that fact.

55 In the light of all of those considerations, the present action must be declared admissible.

Substance

56 The Kingdom of Belgium raises a single plea in support of the action, 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.

57 More particularly, the Kingdom of Belgium submits that one of the conditions of a finding of State aid is not satisfied in the present case, namely the condition that a selective advantage must be conferred by the measure at issue.

58 The single plea consists of five parts. The Kingdom of Belgium claims, first, that the measure at issue did not have the effect of mitigating a burden normally borne by the budget of an undertaking; second, that the financing of the compulsory BSE screening tests was not harmonised; third, that the measure at issue did not result in overcompensation; fourth, that the measure at issue was not selective; and, fifth, that the systems for the financing of those tests in force in the other Member States were irrelevant for the purposes of assessing the condition relating to selectivity.

59 The Court considers it appropriate to begin by examining the second part of the single plea, before going on to examine the first, fourth, fifth and third parts.

Second part of the single plea: the financing of the compulsory BSE screening tests was not harmonised

60 The Kingdom of Belgium claims, in essence, that, as the financing of the compulsory BSE screening tests in the European Union was not harmonised, it was free to cover the costs of those tests itself without the rules on State aid being called into play.

61 The Commission submits that this part of the plea should be rejected.

62 It follows from the case-law that the aim of Article 107 TFEU is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods (judgments of 2 July 1974 in *Italy* v *Commission*, 173/73, ECR, EU:C:1974:71, paragraph 26, and of 15 June 2006 in *Air Liquide Industries Belgium*, C-393/04 and C-41/05, ECR, EU:C:2006:403, paragraph 27).

63 In order to ensure the effectiveness of the prohibition of State aid that affects trade between Member States, in that it distorts or threatens to distort competition, Article 108 TFEU places on the Commission a specific duty to monitor aid and imposes on the Member States specific obligations to

facilitate the Commission's task and to prevent its being presented with *faits accomplis* (judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, ECR, EU:C:2001:598, paragraph 23).

64 As regards plans to grant or alter aid, Article 108(3) TFEU requires first of all that the Commission be informed in sufficient time to enable it to submit its comments. Article 108(3) TFEU then requires the Commission to initiate without delay the inter partes procedure provided for in Article 108(2) TFEU if it considers that the plan notified is not compatible with the common market. Last, the final sentence of Article 108(3) TFEU unequivocally prohibits the Member States from putting the proposed measure into effect until that procedure has resulted in a final decision (judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 63 above, EU:C:2001:598, paragraph 24).

65 It should be observed, moreover, that intervention by the Member States in areas which have not been harmonised in the European Union is not excluded from the scope of the rules on the monitoring of State aid. To accept the contrary would necessarily deprive Articles 107 TFEU and 108 TFEU of their practical effect.

66 Thus, for example, State intervention in areas which fall within the exclusive competence of the Member States, such as direct taxation, may be examined by reference to Articles 107 TFEU and 108 TFEU (see, to that effect, judgments of 15 November 2011 in *Commission* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, ECR, EU:C:2011:732 and of 29 March 2012 in *3M Italia*, C-417/10, ECR, EU:C:2012:184, paragraph 25, and order of 29 March 2012 in *Safilo*, C-529/10, EU:C:2012:188, paragraph 18).

67 In the light of the foregoing, the Kingdom of Belgium was therefore required to ensure that, in covering the full cost of the compulsory BSE screening tests, it did not infringe Articles 107 TFEU and 108 TFEU, irrespective of whether or not the financing of those tests had been harmonised in the European Union.

68 The second part of the single plea must therefore be rejected on that ground alone, without there being any need to examine the additional arguments put forward by the Kingdom of Belgium with the aim of establishing that the financing of the compulsory BSE screening tests is not harmonised.

First part of the single plea: the measure at issue did not have the effect of mitigating a burden normally borne by the budget of an undertaking

69 The Kingdom of Belgium claims, in essence, that the Commission was wrong to conclude that an economic advantage was conferred by the measure at issue.

70 The Commission submits that this part of the plea must be rejected.

71 Article 107(1) TFEU defines State aid as aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States. The concept of State aid within the meaning of that provision is wider than that of a subsidy because it embraces not only positive benefits, such as the subsidies themselves, but also measures which, in various forms, mitigate the normal burdens on the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect. The supply of goods or services on preferential terms is one of the indirect advantages which have the same effect (see judgment in *Commission* v *Netherlands*, paragraph 49 above, EU:C:2011:551, paragraph 86 and the case-law cited).

72 Also, according to the case-law, measures which, whatever their form, are likely to directly or indirectly 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 aid (see judgment in *Commission* v *Netherlands*, paragraph 49 above, EU:C:2011:551, paragraph 87 and the case-law cited).

73 The Kingdom of Belgium does not dispute that, during the period between 1 January 2001 and 31 December 2005, the compulsory BSE screening tests were financed by public resources. The Court must therefore determine whether, in taking the view that that financing released the undertakings in the bovine sector from a burden normally borne by their budget, the Commission vitiated the contested decision with an error of law.

74 It should be borne in mind, as a preliminary point, that the Commission considered, at recital 90 to the contested decision, that the cost of the obligatory controls that concerned the production or the marketing of products, such as the compulsory BSE screening tests, was normally borne by the budget of an undertaking.

75 In the first place, the Kingdom of Belgium maintains that the obligation to perform BSE screening tests is the result not of normal market conditions, but of intervention by the public authorities. In that regard, it relies on the Opinion of Advocate General Jacobs in *GEMO* (C-126/01, ECR, EU:C:2002:273), where the Advocate General explains that the word 'normally' means '[u]nder normal conditions, i.e. under the conditions of a market without State intervention or market failures' (Opinion of Advocate General Jacobs in *GEMO*, EU:C:2002:273, point 77). Thus, in the present case, the Kingdom of Belgium claims that, without the intervention of the public authorities, those compulsory tests would not constitute a burden normally borne by the budget of operators in the bovine sector.

76 However, the concept of a charge which is normally borne by the budget of an undertaking covers, in particular, the additional costs which undertakings must bear by virtue of obligations imposed by law, regulation or agreement which apply to an economic activity (see, by analogy, judgments in *Italy* v *Commission*, paragraph 62 above, EU:C:1974:71, paragraph 33; of 5 October 1999 in *France* v *Commission*, C-251/97, ECR, EU:C:1999:480, paragraph 40; and of 3 March 2005 in *Heiser*, C-172/03, ECR, EU:C:2005:130, paragraph 38).

77 Thus, the Commission did not err in taking the view that the cost of the controls relating to the production or marketing of the products, made obligatory by a provision originating in law or regulation, such as the compulsory BSE screening tests, constituted a charge normally borne by the budget of an undertaking.

78 The Kingdom of Belgium's argument must therefore be rejected.

79 In the second place, the Kingdom of Belgium maintains, in essence, that the financing of the compulsory BSE screening tests by State resources does not confer any advantage on operators in the bovine sector, since the obligation to perform those tests pursues a general interest, namely the protection of public health.

80 In that regard, it must be pointed out that the Court of Justice has repeatedly held that Article 107(1) TFEU does not distinguish by reference to the causes or aims of the measures in question, but defines them in relation to their effects (judgments in *Italy* v *Commission*, paragraph 62 above, EU:C:1974:71, paragraph 27; of 12 December 2002 in *Belgium* v *Commission*, C-5/01, ECR, EU:C:2002:754, paragraph 45; and in *Commission* v *Government of Gibraltar and United Kingdom*, paragraph 66 above, EU:C:2011:732, paragraph 87).

81 Thus, the objective of protecting public health pursued by the measure at issue, on the assumption that it is correct, is not sufficient to reject the classification as State aid applied by the Commission in the contested decision.

82 The Kingdom of Belgium's argument must therefore be rejected.

83 In the third place, the Kingdom of Belgium claims that the present case must be distinguished from the case that gave rise to the judgment of 20 November 2003 in *GEMO* (C-126/01, ECR, EU:C:2003:622), in which the Court of Justice ruled that the assumption by the French Republic of the costs of the collection and disposal of animal carcasses and waste conferred an advantage on farmers and slaughterhouses, since those costs were inherent charges of their economic activities.

84 First, the Kingdom of Belgium maintains that the 'polluter pays' principle, applied by the Court of Justice in the judgment in *GEMO*, paragraph 83 above (EU:C:2003:622), is not applicable in the present case. In that regard, it claims that animal carcasses and waste are an externality inherent in the activities of farmers and slaughterhouses, unlike BSE, which is a disease not resulting directly from the activities of farmers and slaughterhouses and therefore not displaying a clear and direct link with a specific producer or a particular undertaking. In its submission, that argument is confirmed by the TSE Guidelines, Parts IV and V of which, dealing, respectively, with fallen stock and slaughterhouse waste, refer expressly to the 'polluter pays' principle, whereas there is no reference to that principle in Part III of those Guidelines, devoted to TSE screening tests.

85 However, the concept of charges normally borne by the budget of an undertaking is not limited to costs arising from the application of the 'polluter pays' principle. Thus, the fact that that principle is not applicable in the present case, even on the assumption that it is made out, cannot invalidate the finding set out at paragraph 76 above.

86 The Kingdom of Belgium's argument must therefore be rejected.

87 Second, the Kingdom of Belgium claims, in reliance on the judgments of 5 February 1976 in *Conceria Bresciani* (87/75, ECR, EU:C:1976:18) and of 15 December 1993 in *Ligur Carni and Others* (C-277/91, C-318/91 and C-319/91, ECR, EU:C:1993:927), that a system of compulsory checks which, as in the present case, is designed to protect public health is not a service afforded to undertakings for which they should normally pay.

88 In that regard, it should be noted that, in the judgments cited at paragraph 87 above, the Court of Justice considered that the charges under consideration, payable for health inspections carried out in the general interest on imported products which had already been subject to comparable inspections in the country of origin, could not be regarded as the consideration for a service and that it was for the general public to meet the cost of those inspections.

89 However, it should be observed that, in the judgments cited at paragraph 87 above, the Court of Justice was required to rule only on the question of the compatibility of the financing of certain health inspections by reference to the rules on the free movement of goods and, accordingly, did not rule on the legality of the financing of those inspections by reference to Article 107(1) TFEU.

90 Consequently, the case-law on which the Kingdom of Belgium relies is not relevant in the present case.

91 The Kingdom of Belgium's argument must therefore be rejected.

92 In the fourth and last place, the Kingdom of Belgium asserts, in essence, that the compulsory BSE screening tests are connected with the exercise of its powers as a public authority and, accordingly, do not have an economic character that would justify the application of the competition rules in the FEU Treaty. Consequently, it submits that it was entitled to bear the total cost of those tests itself without the measure in question constituting State aid.

93 In its answer to a written question put by the Court, the Kingdom of Belgium expanded on the argument set out at paragraph 92 above and stated that the organisation of the BSE screening tests, including the organisation of the financing of those tests, come within the powers of a public authority.

94 In that regard, it is sufficient to state that, as the Commission correctly observes — without being challenged by the Kingdom of Belgium –, that operators in the bovine sector are required, under the national legislation, only to have BSE screening tests performed on bovine animals presented for slaughter before their meat, fat and offal can be sold, which does not entail the exercise by them of powers of a public authority.

95 Consequently, the argument set out at paragraph 92 above is not such as to upset the finding that the cost of the compulsory BSE screening tests is a charge which operators in the bovine sector are required to bear in the exercise of their economic activities (see paragraphs 69 to 86 above).

96 Last, and in any event, it should be observed that, as is apparent from the case-law cited at paragraph 76 above, the fact that charges are imposed on undertakings by the national legislation, and therefore necessarily relate to the exercise by the State of its powers as a public authority, does not preclude those charges being classified as 'charges normally borne by the budget of an undertaking'.

97 The Kingdom of Belgium's argument must therefore be rejected.

98 In the light of the foregoing, the first part of the single plea must be rejected as unfounded.

Fourth part of the single plea: the measure at issue was not selective

99 The Kingdom of Belgium asserts, in essence, that the Commission erred in law in regarding the measure at issue as selective.

100 The Commission submits that this part of the plea must be rejected.

101 It has consistently been held that classification as aid requires that all the conditions set out in Article 107(1) TFEU be fulfilled (judgment in *Commission* v *Netherlands*, paragraph 49 above, EU:C:2011:551, paragraph 61). In particular, as stated at paragraph 71 above, an economic advantage granted by a Member State constitutes an aid only if it is such as to favour certain undertakings or the production of certain goods (judgment in *Commission* v *Netherlands*, paragraph 49 above, EU:C:2011:551, paragraph 61).

102 Thus, in order to prove that the measure at issue applies selectively to certain undertakings or to the production of certain goods, it is for the Commission to prove that it creates differences between undertakings which, with regard to the objective of the measure at issue, are in a comparable factual and legal situation (judgment in *Commission* v *Netherlands*, paragraph 49 above, EU:C:2011:551, paragraph 62).

103 However, it should also be pointed out that the concept of aid does not cover measures creating different treatment of undertakings in relation to charges where that difference is attributable to the nature and general scheme of the system of charges. It is for the Member State which has introduced

such a differentiation between undertakings in relation to charges to show that it is actually justified by the nature and general scheme of the system in question (judgment in *Commission* v *Netherlands*, paragraph 49 above, EU:C:2011:551, paragraph 62).

104 In the present case, it should be borne in mind that the Commission correctly considered, at recital 90 to the contested decision, that the cost of obligatory controls relating to the production or marketing of the products constituted a charge normally borne by the budget of an undertaking (see paragraph 77 above).

105 By means of the measure at issue, the Kingdom of Belgium therefore mitigated the costs normally borne by the budget of an undertaking.

106 Furthermore, at recital 92 to the contested decision, the Commission considered that, in Belgium, the advantage at issue was reserved for a specific sector, namely 'the sector involved in breeding animals subject to BSE [screening] tests'.

107 In that regard, it should be pointed out that, in answer to a written question put by the Court, the Commission explained that 'the sector involved in breeding animals subject to BSE [screening] tests' must be taken to mean all operators in the bovine sector whom the contested decision had identified as being beneficiaries of the measure at issue, that is to say, farmers, slaughterhouses and other entities that processed, handled, sold or traded in bovine animal products that were subject to compulsory BSE screening tests.

108 Therefore, in the light of the case-law cited at paragraph 101 above, the Commission was correct to take the view, at recital 92 to the contested decision, that the measure at issue was selective.

109 In the first place, the Kingdom of Belgium contends that the Commission, which bears the burden of proving that the financing of the compulsory BSE screening tests was selective, has not shown that the financing of those tests had created differences between undertakings which, in relation to the objective of the measure at issue, were in a comparable factual and legal situation.

110 However, the Commission found 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.

111 Thus, the Commission was able to prove that the Kingdom of Belgium introduced a difference between undertakings in relation to charges, within the meaning of the case-law cited at paragraph 101 above.

112 The Kingdom of Belgium's argument must therefore be rejected.

113 In the second place, the Kingdom of Belgium claims that the selective nature of the measure at issue can be assessed only by reference to the undertakings that produce, market or process the products subject to the compulsory BSE screening tests, as the other undertakings are not in a comparable factual and legal situation.

114 In that regard, it should be borne in mind that the selective nature of a measure must be assessed by reference to all undertakings and not by reference to the undertakings which benefit from the same advantage within the same group (judgments of 11 June 2009 in *Italy* v *Commission*, T-222/04, ECR, EU:T:2009:194, paragraph 66, and of 13 September 2012 in *Italy* v *Commission*, T-379/09, EU:T:2012:422, paragraph 47).

115 Furthermore, if by its argument that only the undertakings that produce, market or process the products subject to compulsory BSE screening tests are in a comparable factual and legal situation, the Kingdom of Belgium maintains that those undertakings must bear a specific charge which undertakings in other sectors are not required to bear, namely the cost of those tests, it does not seek to dispute the selective nature of the measure at issue, but to justify it.

116 If that is the case, such an argument would have to be rejected, as it is manifestly insufficient to prove that the differentiation between undertakings introduced by the measure at issue is justified by the nature and general structure of the system of charges in question.

117 In the light of the foregoing, the Commission did not err in taking the view that the measure at issue was selective within the meaning of Article 107(1) TFEU.

118 The fourth part of the single plea must therefore be rejected as unfounded.

Fifth part of the single plea: the systems for the financing of the compulsory BSE screening tests in force in the other Member States were irrelevant for the purposes of assessing the condition relating to selectivity

119 The Kingdom of Belgium claims that, at recitals 91 and 92 to the contested decision, the Commission found that there was a selective advantage, after stating that the measure at issue could lead to a distortion of competition in relation to undertakings in Member States where the compulsory BSE screening tests were financed differently. The Kingdom of Belgian maintains that the condition relating to selectivity can be assessed only by reference to undertakings subject to the legislation of the Member State that introduced the measure at issue.

120 In the defence, the Commission acknowledged that, for the purpose of assessing the existence of a selective advantage, it is not relevant to take account of the differences between Member States as regards the extent of their participation in the financing of the compulsory BSE screening tests. In that context, it stated that the sentence in recital 92 to the contested decision to which the Kingdom of Belgium takes exception concerns the assessment of distortions of competition and not the assessment of a selective advantage.

121 In that regard, it should be observed, first of all, that recital 92 to the contested decision is in section 5.1.2 of the contested decision, entitled 'Selective advantage for an undertaking', and not in section 5.1.3 of that decision, entitled 'Distortion of competition and effect on trade within the [European Union]'.

122 Next, it follows from the unequivocal wording of recital 92 to the contested decision that the Commission considered whether the condition relating to selectivity was satisfied in the following terms:

'In this case, at national level, the financing of the BSE [screening] tests by the State only benefited one given sector, namely the sector involved in breeding animals subject to [those tests]. At Community level, the fact that [those tests] were financed by the State or through State resources favoured Belgian enterprises and gave those enterprises an advantage over their foreign competitors for whom [those tests] were not financed by the State or through State resources.'

123 Thus, the Commission is wrong to maintain that the comparison between the situation of the beneficiaries of the measure at issue and the situation of the undertakings of the other Member States which do not benefit from the measure, carried out at recital 92 to the contested decision, concerns the assessment of distortion of competition.

124 In that regard, it is settled case-law that the assessment of the condition, set out in Article 107(1) TFEU and relating to the effect on trade between Member States, consists in examining whether the undertakings or the production of goods in one Member State are placed at an advantage by comparison with undertakings or the production of goods in other Member States, whereas the condition relating to selectivity, set out in the same paragraph of that article, can be assessed only in the context of a single Member State and results only from an analysis of the difference in treatment of undertakings or the production of goods in that particular State (see, to that effect, judgment of 11 November 2004 in *Spain* v *Commission*, C-73/03, EU:C:2004:711, paragraph 28).

125 In the present case, by not relying solely on a difference in treatment between undertakings covered by the legislation of a single Member State, but by also relying on a difference in treatment between the undertakings of one Member State and those of other Member States (see paragraphs 121 and 122 above), the Commission erred in its assessment of the condition relating to selectivity.

126 However, as is clear from paragraphs 104 to 117 above, even in the absence of that flawed consideration, the remaining grounds of the contested decision and, in particular, the first sentence of recital 92, support the finding that the measure at issue is selective. In those circumstances, the error on the Commission's part cannot call into question the lawfulness of the contested decision.

127 In the light of the foregoing, the fifth part of the single plea must be rejected as ineffective.

Third part of the single plea: the measure at issue did not result in overcompensation

128 The Kingdom of Belgium claims that the financing of the compulsory BSE screening tests through State resources never exceeded the actual costs of those tests, thus excluding any overcompensation of the beneficiaries identified in the contested decision.

129 The Kingdom of Belgium states, moreover, that the laboratories which performed the compulsory BSE screening tests 'received' a price consistent with the market price for their services and were selected in an open and non-discriminatory tendering procedure.

130 The Commission submits that this claim must be rejected.

131 It should be borne in mind that, under Article 44(1) of the Rules of Procedure, the application initiating proceedings must contain a summary of the pleas in law on which it is based. That summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. The application must, accordingly, specify the nature of the grounds on which it is based, with the result that a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure (judgment of 12 January 1995 in *Viho* v *Commission*, T-102/92, ECR, EU:T:1995:3, paragraph 68). Similar requirements are called for where a submission is made in support of a plea in law (judgment of 14 May 1998 in *Mo och Domsjö* v *Commission*, T-352/94, ECR, EU:T:1998:103, paragraph 333).

132 Furthermore, in order to guarantee legal certainty and the sound administration of justice it is necessary, if an argument is to be admissible, for the basic legal and factual particulars relied upon to be stated, at least in summary form, but coherently and intelligibly in the application itself (see, to that effect, order of 20 October 2000 in *RJB Mining* v *Commission*, T-110/98 REC, EU:T:2000:239, paragraph 23 and the case-law cited, and judgment of 10 April 2003 in *Travelex Global and Financial Services and Interpayment Services* v *Commission*, T-195/00, ECR, EU:T:2003:111, paragraph 26).

133 In the present case, the Kingdom of Belgium did not sufficiently explain in the application its complaint alleging absence of overcompensation. In addition, the arguments which it set out in the application in support of that complaint do not satisfy the requirements of clarity and precision laid

down in Article 44(1)(c) of the Rules of Procedure. The Kingdom of Belgium did not explain to what extent the allege absence of overcompensation would permit the conclusion that the measure at issue had not conferred a selective economic advantage within the meaning of Article 107(1) TFEU.

134 In the light of the foregoing, the third part of the plea must be declared inadmissible.

135 In the light of all of the foregoing considerations, the action must be dismissed in its entirety.

Costs

136 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Kingdom of Belgium has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. Dismisses the action;

2. Orders the Kingdom of Belgium to pay the costs.

Kanninen Pelikánová Buttigieg

Delivered in open court in Luxembourg on 25 March 2015.

[Signatures]

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