Reports of Cases

ORDER OF THE GENERAL COURT (Ninth Chamber)

9 March 2016*

(State aid — Corporation tax — Aid in favour of Belgian ports granted by Belgium — Commission letter informing the Member State of its preliminary assessment of that aid as being incompatible with the internal market and of the likely adoption of appropriate measures — Measure not open to challenge — Inadmissibility)

In Case T-438/15,

Port autonome du Centre et de l'Ouest SCRL, established in La Louvière (Belgium),

Port autonome de Namur, established in Namur (Belgium),

Port autonome de Charleroi, established in Charleroi (Belgium),

and

Région wallonne (Belgium),

represented by J. Vanden Eynde, lawyer,

applicants,

v

European Commission, represented by S. Noë and B. Stromsky, acting as Agents,

defendant,

APPLICATION for annulment of the decision, ostensibly contained in the Commission's letter of 1 June 2015, finding that the corporation tax exemption for Belgian ports constitutes existing State aid that is incompatible with the internal market (State aid SA.38393 (2014/CP)),

THE GENERAL COURT (Ninth Chamber),

composed of G. Berardis (Rapporteur), President, O. Czúcz and A. Popescu, Judges,

Registrar: E. Coulon,

makes the following

* Language of the case: French.

Order

Background to the dispute

1 In 2013, the European Commission's services sent a questionnaire to all Member States regarding the functioning and tax treatment of their ports in order to obtain a general overview of the situation and to clarify the position of ports with regard to EU State-aid rules. Following this, the Commission's services exchanged a number of letters relating to that matter with the Belgian authorities.

2 By a letter of 9 July 2014, pursuant to Article 17 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), the Commission informed those authorities of its preliminary assessment of the Belgian rules on the tax treatment of ports, regarding the possible classification of those rules as State aid and their compatibility with the internal market. At the end of that letter, the Commission expressed the preliminary view that the corporation tax exemption for Belgian ports constituted incompatible State aid within the meaning of Article 107(1) TFEU and announced its intention to commence a cooperation procedure with the purpose of re-examining the scheme in question. It also informed the Belgian authorities that that re-examination might result in its proposing appropriate measures, pursuant to Article 18 of that regulation, with a view to abolishing the incompatible aid.

3 The Belgian authorities sent their comments to the Commission and, by a letter of 1 June 2015 ('the contested letter'), the Commission's services responded to that letter, stating as follows:

'… We have analysed the points that you raised. Taking these factors into account, I wish to inform you that the Commission's services continue to take the preliminary view that the fact that the economic activities of the ports are not made subject to corporation tax constitutes State aid that is incompatible with the internal market for the following reasons:

…

Taking account of the legal precedents, the Commission's services maintain the preliminary view expressed in their letter of 9 July 2014 … Consequently, I wish to inform Belgium that the Commission may be obliged to move to the next stage of the procedure and to submit to it formal proposals concerning appropriate measures to be taken by Belgium …'

Procedure and forms of order sought

4 By an application lodged at the Court Registry on 30 July 2015, the applicants, namely the Port autonome du Centre et de l'Ouest SCRL, the Port autonome de Namur, the Port autonome de Charleroi and the Région wallonne, brought the present action.

5 By a document lodged at the Court Registry on 3 November 2015, the Commission raised an objection of inadmissibility under Article 130(1) of the Court's Rules of Procedure.

6 The applicants have not submitted any observations on that objection.

7 By separate documents lodged at the Court Registry on 24 November 2015, the Port autonome de Liège and the Société régionale du port de Bruxelles applied for leave to intervene in support of the form of order sought by the applicants.

8 In the application, the applicants claim that the Court should:

— declare the action admissible;

— annul the contested letter;

— order the Commission to pay the costs.

9 The Commission contends that the Court should:

— dismiss the action as manifestly inadmissible;

— order the applicants to pay the costs.

Law

10 Under Article 130 of the Rules of Procedure, if a party applies, by a separate document, to the Court for a decision on inadmissibility or lack of competence, without going to the substance of the case, the Court may give a decision, by reasoned order, without taking further steps in the proceedings.

11 The Court considers in the present case that it has sufficient information from an examination of the documents before it and consequently finds that it is appropriate to rule without taking further steps in the proceedings.

12 First, it should be recalled that, unlike new aid, which is regulated by Article 108(2) and (3) TFEU, Article 108(1) TFEU provides that, in the case of existing aid, the Commission must, in cooperation with Member States, keep under constant review all existing systems of aid in those States and that it must propose to the latter any appropriate measures required by the progressive development of the functioning of the internal market.

13 Regulation No 659/1999 specifies, in its Articles 17 to 19, the procedure applicable to existing aid schemes in the following terms:

'Article 17

Cooperation pursuant to Article [108](1) [TFEU]

1. The Commission shall obtain from the Member State concerned all necessary information for the review, in cooperation with the Member State, of existing aid schemes pursuant to Article [108](1) [TFEU].

2. Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the [internal] market, it shall inform the Member State concerned of its preliminary view and give the Member State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the Commission may extend the prescribed period.

Article 18

Proposal for appropriate measures

Where the Commission, in the light of the information submitted by the Member State pursuant to Article 17, concludes that the existing aid scheme is not, or is no longer, compatible with the [internal] market, it shall issue a recommendation proposing appropriate measures to the Member State concerned. The recommendation may propose, in particular:

(a) substantive amendment of the aid scheme, or

(b) introduction of procedural requirements, or

(c) abolition of the aid scheme.

Article 19

Legal consequences of a proposal for appropriate measures

1. Where the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding and inform the Member State thereof. The Member State shall be bound by its acceptance to implement the appropriate measures.

2. Where the Member State concerned does not accept the proposed measures and the Commission, having taken into account the arguments of the Member State concerned, still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4). Articles 6, 7 and 9 shall apply *mutatis mutandis*.'

14 Article 4(4) and Articles 6 and 7 of Regulation No 659/1999 concern the formal investigation procedure provided for in Article 108(2) TFEU, while Article 9 governs the revocation of a decision adopted under that procedure.

15 According to the case-law predating the adoption of Regulation No 659/1999, a significant portion of which was codified in that regulation, whether the Commission does or does not propose appropriate measures is a matter which does not produce any definitive legal effect since, in the absence of acceptance by the Member State of the appropriate measures proposed, that Member State is not obliged to adopt them (judgment of 22 October 1996 in *Salt Union* v *Commission*, T-330/94, ECR, EU:T:1996:154, paragraph 35).

16 It follows from Article 19(1) of Regulation No 659/1999 that, in a situation where the Member State accepts the appropriate measures proposed by the Commission, the Commission must record that finding and inform the Member State that it is bound by its acceptance to implement the appropriate measures. According to the case-law, the Commission's decision recording the proposals of the Member State and rendering those proposals binding, according to that article, constitutes a challengeable act (judgments of 27 February 2014 in *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, ECR, EU:C:2014:100, paragraph 72, and of 11 March 2009 in *TF1* v *Commission*, T-354/05, ECR, EU:T:2009:66, paragraphs 67 to 70).

17 In a situation where the Member State rejects the appropriate measures proposed by the Commission, the Commission is required, if it considers that such measures are still necessary for the proper functioning of the internal market, to initiate the procedure provided for in Article 108(2) TFEU. Once that procedure has been concluded, the Commission is required to adopt one of the decisions provided for under Article 7 of Regulation No 659/1999. The decision adopted as a result of that procedure produces binding legal effects which are capable of affecting the interests of the parties concerned and is therefore a challengeable act, since it concludes the procedure in question and decides definitively whether the measure under review is compatible with the rules applicable to State aid (judgments of 27 November 2003 in *Regione Siciliana* v *Commission*, T-190/00, ECR,

EU:T:2003:316, paragraph 45, and of 20 September 2011 in *Regione autonoma della Sardegna and Others* v *Commission*, T-394/08, T-408/08, T-453/08 and T-454/08, ECR, EU:T:2011:493, paragraph 77).

18 In the present case, unlike the two situations described above, the contested letter was adopted in the context of the stage of cooperation between the Member State concerned and the Commission, referred to in Article 17(1) of Regulation No 659/1999, which may give rise to a proposal for appropriate measures adopted pursuant to Article 18 of that regulation.

19 As the Commission correctly submits, given that the proposal for appropriate measures is not a challengeable act (paragraph 15 above), preparatory acts occurring prior to that proposal for appropriate measures, such as the contested letter, do not, *a fortiori*, constitute measures producing binding legal effects (see, to that effect, order of 14 May 2009 in *US Steel Košice* v *Commission*, T-22/07, EU:T:2009:158, paragraph 55).

20 It should be recalled in this regard that, according to settled case-law, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, a measure will be open to review only if it is a measure definitively laying down the position of the institution upon conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision (see order of 3 March 2015 in *Gemeente Nijmegen* v *Commission*, T-251/13, ECR, EU:T:2015:142, paragraph 28 and the case-law cited).

21 That is manifestly not the position in the present case with regard to the contested letter, given that it is clear from the content of that letter that it concerns a 'preliminary view' of the Commission and that the latter may be obliged, as a result of that view, to move to the next stage of the procedure, which involves the submission of formal proposals concerning appropriate measures to be taken by the Kingdom of Belgium.

22 The applicants nevertheless rely on a line of case-law according to which a decision to initiate the formal investigation procedure can constitute a measure open to review under Article 263 TFEU (judgment of 23 October 2002 in *Diputación Foral de Guipúzcoa and Others* v *Commission*, T-269/99, T-271/99 and T-272/99, ECR, EU:T:2002:258, paragraphs 38 to 40). They also submit that, according to the case-law, when the Commission adopts a decision confirming its preliminary assessment, that decision, if it is not contested within the period for bringing an action, becomes final (judgment of 10 May 2005 in *Italy* v *Commission*, C-400/99, ECR, EU:C:2005:275, paragraph 17).

23 However, the fact remains that, unlike the decisions at issue in the cases relied on by the applicants, in the present case the contested letter constitutes neither a decision to initiate the formal investigation procedure, within the meaning of Article 108(2) TFEU and Article 4(4) of Regulation No 659/1999, nor a decision closing that procedure within the meaning of Article 7 of that regulation.

24 It is true that the case-law has established that, in certain cases, a decision to initiate the formal investigation procedure was liable to entail independent legal effects, in particular where it concerns new aid measures which have not been notified and which are still in the course of implementation (see order in *Gemeente Nijmegen* v *Commission*, paragraph 20 above, EU:T:2015:142, paragraph 30 and the case-law cited) or where, by that decision, the Commission classifies measures as being new aid but which, according to the Member State concerned, do not constitute aid or constitute existing aid (judgments of 9 October 2001 in *Italy* v *Commission*, C-400/99, ECR, EU:C:2001:528, paragraphs 62 and 69, and of 23 October 2002 in *Diputación Foral de Álava and Others* v *Commission*, T-346/99 to T-348/99, ECR, EU:T:2002:259, paragraph 33) based on the standstill clause applicable to new aid under Article 108(3) TFEU.

25 However, in the present case, it is sufficient to note that the contested letter does not, even implicitly, constitute such a decision but is rather a letter adopted prior to a potential proposal of appropriate measures by the Commission in the context of the procedure for cooperation between the Member State and the Commission, as provided for by Article 17 of Regulation No 659/1999 in regard to an existing aid scheme.

26 It must be borne in mind that, in the context of such a procedure, the Member State remains free to apply the aid scheme concerned and to grant individual aid under that scheme so long as it does not decide to terminate or modify that scheme following the acceptance of appropriate measures proposed by the Commission (see, to that effect, judgment in *Stichting Woonpunt and Others* v *Commission*, paragraph 16 above, EU:C:2014:100, paragraphs 71 to 74), or so long as the Commission does not adopt a final negative decision under Article 7(5) of Regulation No 659/1999 declaring that aid scheme to be incompatible with the internal market (see judgment in *Italy* v *Commission*, paragraph 24 above, EU:C:2001:528, paragraph 48 and the case-law cited).

27 In the light of all those considerations, it must be concluded that the contested letter does not constitute an act producing binding legal effects and capable of being the subject of an action for annulment on the basis of Article 263 TFEU.

28 Consequently, it is necessary to uphold the objection of inadmissibility raised by the Commission and to dismiss the action as inadmissible.

Costs

29 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

30 Under Article 144(10) of the Rules of Procedure, if the proceedings in the main case are concluded before the application for leave to intervene has been decided upon, the applicant for leave to intervene and the main parties must each bear their own costs relating to the application to intervene. In the present case, the Court had not yet given a ruling on the applications for leave to intervene submitted by the Port autonome de Liège and the Société régionale du port de Bruxelles at the at the time of ruling on the admissibility of the main action by way of the present order. The Port autonome de Liège and the Société régionale du port de Bruxelles must for that reason bear their own costs, in accordance with that provision.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby orders:

1. **The action is dismissed as inadmissible.**

2. **The Port autonome du Centre et de l'Ouest SCRL, the Port autonome de Namur, the Port autonome de Charleroi and the Région wallonne shall bear their own respective costs and pay those incurred by the European Commission.**

3. **The Port autonome de Liège and the Société régionale du port de Bruxelles shall bear their own costs.**

Luxembourg, 9 March 2016.

E. Coulon
Registrar

G. Berardis
President