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The EU Court of Justice rules that the extension of existing State aid must be considered as the alteration of that aid and is therefore subject to the obligation of prior notification as new aid *(DEI / Alouminion tis Ellados)*

State Aids, Energy, European Union, Existing State aid, State aid modification, New State aid, Electricity

EU Court of Justice, DEI v Alouminion tis Ellados and Commission, Case C-590/14 P, 26 October 2016

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The CJEU's Judgment provides additional clarification on the effects of the extension of the duration of an existing aid measure. The CJEU - annulling a Judgment of the EU General Court (GC) - rules that the extension of the duration of existing aid measure by a national court must be qualified as an alteration of that aid. Consequently, the aid should be treated as new aid subject to the obligation of prior notification. In the scenario, where a national court plans to extend the duration of an existing aid, the national court thus has the obligation to notify the measures it plans to adopt to the European Commission (Commission).

I. The Parties

Dimosia Epicheirisi Ilektrismou AE (DEI) is the incumbent electricity producer in Greece, controlled by the Greek government (owning a majority of the issued shares - 37 %). DEI is the major operator on Greece's power energy market, being the owner of a large number of mainland and autonomous thermal and hydroelectric power plants as well as several wind farms.

Alouminion tis Ellados AE (AtE) - Alouminion AE from 2007-2015 and **Alouminion tis Ellados VEAE (Alouminion)** from May 2015 -, is a large producer of aluminium, located in the region of Viotia, Greece.

II. The Facts

DEI entered into a contract with AtE, in 1960, to purchase electricity at a preferential electricity tariff. Article 2(3) thereof provided that the agreement could be renewed automatically every five years, unless terminated by one of the parties, giving a two years notice. By decision of 23 January 1992, the Commission held that the preferential tariff granted to Alouminion under this agreement constituted a State aid scheme compatible with the internal market.

The agreement, and the application of the preferential tariff, was due to end on 31 March 2006. In compliance with article 2(3), in February 2004, DEI notified Aluminion that as of 1 April 2006 their agreement should be deemed terminated, and consequently that it ceased applying the preferential tariff as of this date. Alouminion challenged that termination of the preferential electricity tariffs before the national court and asked for an interim measure until a final judgment was adopted.

By order of 5 January 2007, a Greek national court suspended, in interlocutory proceedings, the effects of the termination. Alouminion regained its right to a preferential tariff with retroactive effect. DEI appealed this interim order and the national appeal court annulled it *ex nunc* by order of 6 March 2008 and consequently terminated the 1960 agreement.

In January 2010, following complaints that Aluminion was still benefiting from preferential electricity tariffs, the Commission opened formal proceedings pursuant to Article 108 paragraph (3) TFEU. In its final decision of 13 July 2011, the Commission concluded that in the period between 5 January 2007 - when the first instance court suspended the effects of the termination - until 6 March 2008 - when the national appellate court terminated the contract-, Greece had unlawfully granted Alouminion State aid amounting to €17.4 million through DEI. The Commission subsequently held that the aid should be classified as new aid and that, since it had been granted without prior notification to the Commission, it was unlawful and incompatible with the internal market, and therefore should be recovered.

On 6 October 2011, Alouminion appealed the decision of the Commission before the GC. In its Judgment of 8 October 2014, the GC annulled the decision, holding that, as the first court order did not alter the aid in question in any way, the latter cannot be considered a new aid and must therefore be classified as an existing aid.

Following the Judgment of the GC, DEI, supported by the Commission, brought an appeal before the CJEU arguing that the GC had erred in law.

The question the CJEU has to answer is whether the first order of the Greek court must be regarded as an alteration of an existing aid measure (and therefore as new aid) or not. In the first hypothesis only, it should have been notified to the Commission before being implemented.

III. The Decision

With its judgment, the CJEU annuls the Judgment of the GC and refers the case back to the GC for further consideration.

After recalling that according to the previous procedural regulation [**1**], new aid was defined as "*all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid*" and that according to Regulation 794/2004 "*an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the [internal] market*", the CJEU judged the following.

First, the CJEU held that the GC had misinterpreted the case-law of the CJEU and erred in law by finding that the first order of the Greek court was not to be regarded as the grant or alteration of existing aid. In that respect, the CJEU noted that "*the evaluation, by the Commission, of the compatibility of aid with the internal market is based on the assessment of the economic data and of the circumstances on the market at issue at the date on which the Commission makes its decision and takes into account, **in particular, the period over which the grant of that aid is provided for**. Consequently, the period of validity of existing aid is a factor likely to influence the evaluation, by the Commission, of the compatibility of that aid with the internal market"*. (emphasis added)

The **period of validity of existing aid is thus a determining factor in the evaluation, by the Commission, of the compatibility of that aid with the internal market. This means that whenever an aid is extended and the duration of that aid is prolonged, the Commission should have the possibility to re-evaluate the compatibility of that aid with the internal market**. Consequently, the CJEU concluded that the extension of the duration of existing aid must be regarded as an alteration of existing aid and constitutes, therefore, new aid.

In this case, this means that the **first order of the Greek court - altering the time limits of application of the preferential electricity tariff, as authorised by the Commission - constitutes an alteration of existing aid and, therefore, new aid**.

Second, the CJEU stated that national courts are responsible for ensuring compliance with EU State aid law and are subject to a duty of sincere cooperation with the institutions of the EU. According to the CJEU the GC had erred in law by finding that, on the ground that when national courts are ruling in interlocutory proceedings, these national courts may escape the obligations incumbent upon them in the context of the State aid control.

The CJEU concluded that **a national court seized - e.g. in the context of a contractual dispute - has to notify to the Commission all measures it plans to adopt that may affect the interpretation and implementation of an aid** and that may consequently have an effect on the functioning of the internal market.

IV. Comments

Consistency and coherence on the qualification of aid as existing or new aid is highly important because the state aid control system procedure differs depending on whether the aid is qualified as existing or new aid. Whereas existing aid may, in accordance with Article 108(1) TFEU, be lawfully implemented as long as the Commission has made no finding of incompatibility, Article 108(3) TFEU provides that plans to grant or alter existing aid must be notified and may not be implemented until the procedure has led to a final decision.

The CJEU's judgment is consistent with its preceding case-law. The CJEU reiterates its consistent interpretation of the differentiation between existing and new aid. **The Judgment stresses once again the fact that the "existing aid" concept must be interpreted restrictively in order not to prejudice the obligation - imposed by Article 108 (3) TFEU - to notify aid measures to the Commission**. The "new aid" concept respectively must be interpreted widely.

In addition, in its Judgement the CJEU recognises that a decision of a national court – such as the order of the Greek national court – can create effects modifying an existing aid regime. **The CJEU does not differ between modifications made by legislative acts or any other measure accountable to the State. The CJEU indicates that the only determining criterion to analyse whether an aid regime must be considered as altered, and consequently as new aid, is the effect of the modification (in casu the extension of the aid regime) on the aid regime**.

The approach of the CJUE emphasises the duty of national courts to cooperate with the Commission and properly fulfil the competences granted to them within the State aid field. By its Judgment the CJEU clarifies the content of these competences and stresses the importance of the role of national courts in preventing distortion of competition stemming from state aid.

All national judges should carefully examine the modalities of an aid regime, and if one should find that the

measure(s) he plans to adopt will have the effect - e.g. by extension of the regime - of broadening the scope of the regime, one should consider the aid as new aid and notify the measures he plans to adopt to the Commission. In practice, this means that national judges should act within the limits of their designated competences and refrain from unilaterally adopting measures altering an aid regime without prior notification to the Commission.

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[**1**] Regulation 659/1999