Survey

Key Developments in State Aid Law

Jacques Derenne* and Mateo Domecq**

I. Introduction

The purpose of this survey is to provide an overview of developments in EU State aid law in 2015. In previous editions, we have typically looked at both legislative and case law developments. However, 2015 was a year marked of no legislative developments in the field of State aid law. This is not surprising given that the Commission had only just finalised implementing the State aid modernisation package in 2014.

In light of this, we will focus this year's edition of the survey on the most interesting State aid cases decided on by the General Court (GC) and the Court of Justice (CJEU) of the European Union over the last 12 months. Some of these judgments annul or confirm decisions taken by the European Commission in previous years, and others are responses to preliminary references formulated by national courts in the context of national disputes.

Throughout the last 12 months, the European courts have been called upon to provide guidance to national courts or rule on the legality of Commission decisions in the field of EU State aid control. In light of the high number of judgments issued in this period, we limit our analysis to those cases which we deem to be more interesting because of the issues covered or the types of national measures that came under the Courts' scrutiny.

To this end, the judgments covered in this section concern:

- the concept of 'State intervention or through State resources';
- the requirement of 'selectivity';
- the concept of advantage, specifically with respect to the private investor principle;
- issues pertaining to the compensation for SGEI or public service obligations;
- the concept of 'serious difficulties';
- issues pertaining to the recovery of State aid;
- the *res judicata* principle.

Key Points

- With respect to legislation, there has been, in the last 12 months, no significant development on State aid, following the adoption of the State aid modernisation package in 2014.
- The EU case law has clarified the general conditions for the application of the Treaty provisions on State aid – in particular, the conditions of State intervention and State resources, the private investor principle and the requirement of selectivity.
- New developments are also worthwhile to note with respect to the compensation of public service obligations, the *res judicata* principle and the recovery of unlawful aid.

II. State intervention or through State resources

A. Case C-242/13 *Commerz Nederland v Havenbedrijft Rotterdam*

On 17 September 2014, the CJEU issued a preliminary ruling concerning the interpretation of the condition of State imputability.[1] The director of a port authority, which operates as a service department of the municipality of Rotterdam, agreed to act as a guarantor for a EUR 25 million credit granted to RDM Vehicles by Commerz Nederland for manufacture of an armoured vehicle. This guarantee is at the centre of the national dispute that gave rise to the preliminary reference.

The national court observed that although the director had the power to grant the guarantee pursuant to civil law, he did so arbitrarily in this instance, he deliberately kept the provision of the guarantee secret, and he disregarded the statutes of the port authority by failing to seek approval of the grant from the supervisory board. In addition, the referring court assumed that the municipality of Rotterdam did not wish for the guarantee to

* Partner, Sheppard Mullin, Brussels; *maître de conférences*, Liège University and Brussels School of Competition.
** Associate, Hogan Lovells, Brussels.

1 Case C-242/13 *Commerz Nederland v Havenbedrijft Rotterdam*, EU:C:2014:2224.

be provided. Therefore, the national court sought to determine whether these circumstances were such as to exclude the condition of State imputability.

The CJEU observed that the provision of the guarantee involved a commitment of State resources, within the meaning of Article 107(1) TFEU, because it carries a '*sufficiently real economic risk*' capable of resulting in costs for the port authority and that the latter was wholly owned, at the material time, by the municipality of Rotterdam. The Court then reiterated its case law in *France v Commission, known as 'Stardust Marine'* (C-482/99, EU:C:2002:294), and noted that it was up to the national court to determine, on the basis of that case law, whether it could be inferred from the body evidence before it that the condition of State imputability had been satisfied (paras 30–34 of the judgment).

That being, it is worth noting that the Court expressed some scepticism regarding the referring court's assertion that the municipality of Rotterdam had not been involved in the provision of the guarantee. In this sense, the Court noted that the organisational links between the port authority and municipality of Rotterdam '*tend to demonstrate, in principle, that the public authorities were involved or that it was unlikely that they were not involved in the provision of such guarantees*'. Moreover, the CJEU went on to state that the fact that the sole director of the public undertaking acted improperly does not, of itself, exclude State involvement. To accept such a premise would, as noted by the AG and accepted by the Court, weaken the '*effectiveness of rules on state aid*' (paras 35–38 of the judgment).

B. Case C-275/13 *Elcogás SA v Administración del Estado and Iberdrola SA*

On 22 October 2014, the CJEU issued a ruling in response to a preliminary reference from the Spanish Supreme Court concerning the interpretation of the condition of a measure, which entails intervention by the State, and the use of State resources for the purposes of Article 107 (1) TFEU.[2]

Elcogás owned a thermal power plant, which operates by virtue of the carbonisation of coal and other alternative fuels. Given the extra costs generated by the use of this technology, Spain introduced a financing mechanism, which sought to compensate electricity companies that incurred in these extra costs. The funds used to compensate these extra costs originated from an electricity tariff charged to all end-consumers, and were to be distributed by a public entity in accordance with predetermined legal criteria. On 28 December 2010, by virtue of an administrative decision, Elcogás lost the benefit of this financing mechanism. Elcogás therefore appealed the decision up to the Supreme Court, and it is with this context in mind that the Supreme Court referred a question of interpretation to the CJEU.

In line with the case law, the Court concluded that given that the financing mechanism was established and regulated by law, the mechanism was imputable to the State. Similarly, the Court pointed out that a compensation mechanism for extra costs, whose funding is provided for by all end-consumers of electricity in the national territory and where the funds are distributed by a public entity, constitutes an intervention by the State or through State resources. The Court distinguished the mechanism in question from the measure under scrutiny in *Preussen Elektra* (C-379/98, EU: C: 2008:413). Firstly, in the latter case, the private undertakings only had a purchase obligation using their own financial resources. Secondly, the funds in question in that case were not State resources since they were not at any time under public control and there was no mechanism established and regulated by the Member State, for offsetting the additional costs arising from that obligation to purchase and through which the State offered those private operators the certain prospect that the additional costs would be covered in full (paras 23, 30, and 32 of the judgment).

This case, in the wake of previous cases such as *Vent de Colère!*[3] (where the Court confirmed the existence of aid) and *Doux Elevage*[4] (where the Court confirmed that there was no aid), shows how Member States have to pay the price of State aid control should they decide to control all the range of steps leading to the financing of certain policies (from the levy of contribution, to the distribution and allocation of benefits), instead of leaving private parties carrying out these steps.

C. Case C-518/13 *Eventech v Parking Adjudicator*

On 14 January 2015, the CJEU issued a ruling in response to the English Court of Appeals preliminary reference concerning the interpretation of Article 107 (1) TFEU.[5] The case focusses on the lawfulness of a policy implemented by Transport for London ('TfL') and by the majority of London Boroughs which consists in per-

2 Case C-275/13 *Elcogas SA v Administración del Estado and Iberdrola SA,* EU:C:2014:2314.

3 Case C-262/12 *Vent de Colère v Ministre de l'Écologie, du Développement durable, des Transports et du Logement, Ministre de l'Économie, des Finances et de l'Industrie,* EU:C:2013:851.

4 C-677/11, *Doux Élevage SNC & Others v CIDEF,* EU: C: 2013:348.

5 Case C-518/13 *Eventech v Parking Adjudicator,* EU: C: 2015:9.

mitting Black Cabs to use most London bus lanes during the hours when the bus lane restrictions are operational, while prohibiting private hire vehicles ('minicabs') from using those bus lanes, except for the purpose of picking up and setting down passengers who have pre-booked such a vehicle.

Concerning the condition of State resources, Eventech Ltd an operator of minicabs—argued that the bus lanes policy entailed budgetary burdens. Eventech based this conclusion on two factors: (i) the preferential access of Black Cabs to infrastructure belonging to the State, namely the London bus lanes, for the use of which those taxis are not charged; and (ii) Black Cabs are exempted from any liability to pay fines when they use those bus lanes.

The CJEU dismissed both of these arguments. Firstly, the fact that Black Cabs do not pay fines is a simple consequence of the legal system characterising their conduct as being lawful. Thus, unlike in *Commission v Netherlands* (C-279/08 P, EU: C: 2011:551), the fact that Black Cabs were not being fined for lawfully occupying the bus lanes did not constitute an additional burden for the public authorities. Secondly, the public authorities do not operate the bus lanes commercially given that their use is free of charge. It follows, therefore, that public authorities did not forgo revenue that they would have otherwise received in the absence of the bus lane policy (paras 38–43 of the judgment).

The CJEU noted in particular that 'where the State, in order to pursue the realisation of an objective laid down by that State's legislation, grants a right of privileged access to public infrastructure which is not operated commercially by the public authorities to users of that infrastructure, the State does not necessarily confer an economic advantage' (para 48 of the judgment). National public authorities alone are competent for identifying the objective pursued, and they must enjoy a margin of discretion in determining whether it is necessary, in order to achieve the objective pursued, to forgo possible revenue and also as regards how the appropriate criteria for the granting of the right, which must be determined in advance in a transparent and non-discriminatory manner, are to be identified.[6] The Court found that, given the characteristics of Black Cabs, the competent national authorities could reasonably take the view that the access of those taxis to bus lanes is liable to enhance the efficiency of the London road transport system and that, consequently, the criterion for the granting of the right at issue, namely the provision of taxi services in London, is liable to achieve the realisation of the objective concerned (paras 48–52 of the judgment).

III. Selectivity

A. Case T-219/10 *Autogrill SA v Commission* and Case T-399/11 *Banco Santander—Stantusa v Commission*

On 7 November 2014, the GC annulled the Commission's decisions declaring a provision in the Spanish Corporate Tax law as unlawful and incompatible State aid.[7] The Spanish provision established that if an undertaking that is taxable in Spain acquires a shareholding of at least 5 per cent in a 'foreign company' and holds it uninterruptedly for at least 1 year, the goodwill resulting from that shareholding, which is recorded in the undertaking's accounts as a separate intangible asset, may be deducted, in the form of an amortisation, from the basis of assessment for the corporate tax for which the undertaking is liable. The measure at issue states that to qualify as a 'foreign company', a company must be subject to a similar tax to the tax applicable in Spain and its income must derive mainly from business activities carried out abroad.

The GC found that the Commission had erred when finding that the condition of selectivity had been fulfilled. In this sense, the GC noted that the existence, even if it were established, of a derogation from or exception to the reference framework identified by the Commission cannot, in itself, establish that the measure at issue is selective, since that measure is available, *a priori*, to any undertaking. Indeed, the measure at issue was applicable to all shareholdings of at least 5 per cent in foreign companies, which were held for an uninterrupted period of at least 1 year. It was, therefore, not aimed at any particular category of undertakings or production, but at a category of economic transactions. In order to benefit from this measure, all an undertaking needed to do was to purchase shares in a foreign company, without having to change the nature of its activity. In this sense, the GC recalled that in *Adria-Wien Pipeline* (C-143/99, EU: C: 2001:598), the Court had already established that a measure that is applicable regardless of the nature of the activity of the undertakings would not be, in principle, selective (paras

6 In this case, the Court observed that the right of privileged access has an economic value, and it was granted by the competent traffic authority. Furthermore, it observed that it is stated in the relevant road traffic legislation that the objective pursued by the legislation at issue is that of ensuring a safe and efficient transport system; that neither the road network concerned nor the bus lanes are operated commercially; that the criterion for granting that right is that of providing taxi services in London; that that criterion was established in advance and in a transparent manner; and, last, that all the providers of such services are treated equally.

7 Case T-219/10 *Autogrill SA v Commission,* EU:T:2014:939; Case T-399/11 *Banco Santander—Stantusa v Commission*, EU:T:2014:938.

52–57 of the judgment in *Autogrill* and paras 56–61 of the judgment in *Banca Santander*).

In addition, unlike the measure at issue in *Diputacion Foral de Alava* (Joined cases T-227/01 to 229/01, T-265/01, T-266/01 and T-270/01, EU: T: 2009:315), the measure in this instance did not impose a requirement, which would restrict the benefit of the derogation only to undertakings that possess a predetermined sufficient amount of financial resources. Lastly, the GC recalled that in *Germany v Commission* (C-156/98, EU:C:2000:467), the CJEU found that tax concession in favour of taxpayers who sold certain financial assets and could offset the resulting profit in the case of shareholding acquisitions in capital companies having their registered office in certain regions conferred on those taxpayers an advantage which, as a general measure applicable without distinction to all economically active persons, did not constitute aid within the meaning of the relevant provisions of the Treaty (paras 59 and 60 of the judgment in *Autogrill* and paras 62–64 of the judgment in *Banca Santander*).

The Commission appealed these two judgments (C-20/15 P and C-21/15 P).

B. Case C-518/13 *Eventech v Parking Adjudicator*

In its judgment of 14 January 2015 mentioned above with respect to the condition of transfer of State resources, the CJEU also examined the issue of selectivity.

With regard to that condition, although it would be up to the referring Court to determine whether Black Cabs and minicabs are in a comparable situation, the Court nevertheless decided to issue some guidance. In this regard, the CJEU noted that:

> *the identification of the factual and legal situation of Black Cabs and minicabs cannot be confined to that prevailing in the market sector in which those two categories of conveyors of passengers are in direct competition, namely the pre-booking sector. It cannot seriously be doubted that all the journeys made by Black Cabs and minicabs are liable to affect the safety and efficiency of the transport system on all the road traffic routes in London* (para 59 of the judgment).

Secondly, the Court pointed out *'by virtue of their legal status, only Black Cabs can play for hire; they are subject to the rule of "compellability"; they must be recognisable and capable of conveying persons in wheelchairs, and their drivers must set the fares for their services by means of a taxi meter and have a particularly thorough knowledge of the city of London*' (para 60 of the judgment). On that basis, Black Cabs and minicabs are therefore in factual and legal situations, which are sufficiently distinct to permit the view that they are not comparable and that the bus lanes policy therefore does not confer a selective economic advantage on Black Cabs (paras 59–61 of the judgment).

C. Case 672/13 *OTP Bank Nyrt v Magyar Állam and Magyar Államkincstár*

On 19 March 2015, the CJEU adopted a judgment responding to the Hungarian court's preliminary reference seeking to ascertain whether a State guarantee intended to facilitate access to housing, granted exclusively to credit institutions constituted State aid within the meaning of Article 107(1) TFEU.[8]

The 2001 Hungarian decree regulated the aids intended to facilitate access to housing and granted to credit institutions the exclusive right to grant loans, to determine the forms of reimbursement and the aids. In exchange, the State would guarantee the loan. Prior to the 2011 amendment, the Hungarian State was, under certain conditions, also required to reimburse the credit institution 80 per cent of the amount of the loan paid by that institution and, which had become irrecoverable, together with interest and expenses on that loan.

The Court found that the measure constituted *prima facie* State aid within the meaning of Article 107(1) TFEU. However, it left to the referring court the task of ascertaining whether the measure was in fact selective following the amendment of the 2001 Decree. In particular, the referring court would need to determine whether the amendment may have enabled other economic operators other than credit institutions to benefit the guarantee and, in the affirmative, whether that fact may call into question the selective nature of the measure (para 79 of the judgment).

D. C-15/14 P *European Commission v MOL Magyar Olaj-és Gázipari Nyrt*

On 22 December 2005, MOL, a Hungarian mining company, and the Minister for mines concluded an agreement, which extended the deadline by 5 years for MOL to start exploiting the 12 hydrocarbon fields not yet exploited. In exchange, MOL would, as stipulated in the Hungarian law, pay a special fee to the State (1.2 times the regular fee). This regular mining fee was initially regulated at 12 per cent in 1993. In 2008, the new law set a mining fee of 30 per cent for the deposits exploited between 1998 and 2007. Thus, MOL would pay a fee slightly higher than 12 per cent and not the 30 per cent fee. Following an investigation, the Commission con-

8 Case 672/13 *OTP Bank Nyrt v Magyar Állam and Magyar Államkincstár*, EU:C:2015:185.

cluded that the 2005 agreement and the 2008 amendment constituted State aid. The Commission's decision was challenged, and the GC annulled the decision because the measure in question was not selective. On 4 June 2015, the CJEU confirmed the GC's judgment on appeal by the Commission.[9]

As regards selectivity, the CJEU observed that when it comes to a measure in the form of a general scheme of aid, which confers an advantage of general application, one must identify whether it does so to the exclusive benefit of certain undertakings or certain sectors of activity. Therefore, in order to determine whether the condition of selectivity is met, one must ascertain whether the procedure for concluding and setting the terms of condition of the extension agreement, distinguishes between operators that are '*in the light of the objective of the measure, in a comparable factual and legal situation*' (para 22 of the judgment) and whether that distinction is not justified by the nature and general scheme of the system at issue. The CJEU dismissed the Commission's arguments seeking to apply the case law relating to provisions of national law granting relief on taxes or other charges to the case at hand. The CJEU shared Advocate General Wahl's view according to which

> *there is a fundamental difference between, on the one hand, the assessment of the selectivity of general schemes for exemption or relief, which, by definition, confer an advantage, and, on the other, the assessment of the selectivity of optional provisions of national law prescribing the imposition of additional charges. In cases in which the national authorities impose such charges in order to maintain equal treatment between operators, the simple fact that those authorities enjoy discretion defined by law, and not unlimited, as the Commission claimed in its appeal, cannot be sufficient to establish that the corresponding scheme is selective* (para 64 of the Opinion).

Therefore, contrary to the Commission's assertions, the CJEU confirmed the GC's finding that the margin of assessment at issue in the present case allows the fixing of an additional charge imposed on economic operators in order to take account of the imperatives arising from the principle of equal treatment, and can be distinguished, by its very nature, from cases in which the exercise of such a margin is connected with the grant of an advantage in favour of a specific economic operator (paras 60–65 of the judgment).

Contrary to the Commission's view, the Court also found that the fact that rates to be paid by MOL were the result of a negotiation did not suffice to confer a selective character to the extension agreement. The agreement would only have a selective character '*if the Hungarian authorities had exercised their margin of assessment in such a way as to favour MOL by agreeing to a low fee level without any objective reason having regard to the rationale of increasing fees in the event of an extension of authorisation and to the detriment of any other operator having sought to extend its mining rights or, if there is no such operator, where there is concrete evidence that unjustified favourable treatment has been reserved to MOL*' (para 34 of the judgment). The CJEU observed that the GC had analysed rates stipulated under that agreement and found that there was no evidence of unjustified preferential treatment towards MOL and that therefore it could not be assumed that MOL was afforded favourable treatment in relation to any other undertaking that was potentially in a comparable situation (paras 66 and 67 of the judgment).

The CJEU then dismissed the Commission's plea according to which the GC had somehow suggested, contrary to the case law, that the reliance of a measure on objective criteria necessarily rules out selectivity. The Court agreed with MOL that the Commission had misread the GC judgment and that, therefore, the plea was unfounded. Indeed, when determining whether the mining was set on the basis of objective criteria, the GC had made the following observations (paras 76 and 77 of the judgment):

- the Mining Act was drafted in general terms as regards the undertakings eligible for the extension of mining rights;
- the fact that MOL was the only undertaking to have concluded an extension agreement in the hydrocarbons sector did not necessarily constitute evidence of selectivity, since the criteria for concluding such an agreement are objective and applicable to any potentially interested operator;
- the absence of other agreements may result from decisions by undertakings themselves not to apply for an extension of mining rights;
- the mining fees set for the term of the 2005 agreement stem simply from the application of the provisions of the Mining Act.

Finally, the CJEU dismissed the Commission's plea which essentially seeks to argue that the 2008 amendment which introduced higher rates should have been taken into consideration when assessing the selective nature of the measure. In other words, the 2005 agreement and the 2008 would constitute a single State aid

9 C-15/14 P *European Commission v MOL Magyar Olaj- és Gázipari Nyrt*, EU:C:2015:362.

measure. Here, the Court ratifies the GC's reasoning according to which '*where a Member State concludes with an economic operator an agreement which does not involve any element of State aid for the purposes of Article 107 TFEU, the fact that, subsequently, conditions external to such an agreement change in such a way that the operator in question is in an advantageous position vis-à-vis other operators that have not concluded a similar agreement is not a sufficient basis on which to conclude that, together, the agreement and the subsequent modification of the conditions external to that agreement can be regarded as constituting State aid*' (para 89 of the judgment).

Lastly, the Court confirmed that, according to settled case law, a single State aid measure can be comprised of several elements if having regard to their chronology, their purpose, and the circumstances of the undertaking at the time of their intervention, they are so closely linked to each other that they are inseparable from one another. Such links were not present in this instance.[10]

E. Case T-251/11 *Republic of Austria v European Commission*

Pursuant to Directive 2009/28/EC, Member States are required to achieve, between now and 2020, mandatory national targets for the overall share of energy from renewable sources in gross final consumption of energy. It is with this Directive in mind that Austria amended the Green Electricity Act ('OSG'). Green electricity is purchased by a centre for the regulation of green electricity. The performance of the tasks of this centre had been granted to a limited company, the ÖMAG. In accordance with the OSG, green electricity would be purchased at a guaranteed fixed price, which is higher than the market price of electricity, is fixed each year by regulation by the Austrian Federal Minister for the Economy and Employment.

The OSG provides that the costs incurred would be transferred to electricity consumers. First, each final consumer connected to the public grid was to pay an annual contribution, irrespective of consumption. Second, electricity suppliers are required to buy from the ÖMAG all the green electricity in its possession, also at a fixed price set by regulation ('the transfer price'). Those suppliers are authorised then to pass on to their customers, in the invoice price, the additional costs which they thereby incur. However, under Article 22c of the amended ÖSG, Austria proposed to establish a scheme of specific compensation for energy-intensive businesses, limiting the amounts payable by them to a specific amount, calculated, for each undertaking benefiting from the scheme, according to the value of their net annual production. The Commission found this particular mechanism to amount to incompatible State aid, whereas the rest of the measures were compatible with the Guidelines on State aid for environmental protection. The GC rejected Austria's action for annulment and thereby confirmed the Commission's decision.[11]

With regard to the State imputability of the measure, the Court observed that the *Preussen Elektra* case law is not applicable because the measure in this case was not comparable with that in Preussen Elektra. In fact, just like *Essent Netwerk Noord* (C-206/06, EU: C: 2008:413), the ÖMAG had been entrusted with administering the system of aid to the production of electricity from renewable resources. Moreover, the Court observed that the additional charge linked to purchase of green electricity '*can be assimilated to a parafiscal levy on electricity in Austria, which is set by a public authority, for purposes in the public interest and according to an objective criterion*' (para 68 of the judgment). Lastly, the Court observed that although the ÖMAG was an entity separate from the State, it performed its tasks within a framework clearly defined by the Austrian legislature and it was strictly controlled by the Austrian authorities (paras 70–75 of the judgment).

As regards the condition of selectivity, the Court confirmed that there was no unity of object and purpose between the general system of the Act and the special provision in Article 22c of that Act, which would enable that provision to be regarded as constituting an integral part of the general scheme and not as a special exemption in the context of such a scheme. The general scheme had an ecological objective, whereas '*the measure placing a cap on the contribution of energy-intensive businesses was intended to "make the charges which [the system of aid for green electricity] entail*[ed] *bearable from an* (. . .) *economic* and *industrial viewpoint*" and *to protect the undertakings particularly affected by the system put in place*' (paras 105 and 106 of the judgment). Finally, the Court noted that although any undertaking can become an energy-intensive business, the available data showed that in reality only a small proportion of undertakings seemed to be able to benefit from the exemption (para 120 of the judgment).

IV. Private investor principle

A. Case T-1/12 *French Republic v European Commission*

On 15 January 2015, the GC upheld the Commission's decision finding that the restructuring and rescue aid

10 Paras 93–98 of the judgment.

11 Case T-251/11 *Republic of Austria v European Commission,* EU: T: 2014:1060.

granted to SeaFrance was incompatible with the internal market and ordering its recovery.[12] The restructuring aid consisted in a capital increase and two loans implemented through SNCF. The rescue aid, for its part, consisted in a loan granted to SeaFrance through SNCF.

The Court held that, contrary to the applicants' assertions, the Commission was right to apply the private investor test jointly to the recapitalisation and the rescue aid. While the Commission reasoning was brief in the Court's eyes, the Court found that the Commission's findings regarding the chronology and the purpose of the measures, and regarding SeaFrance's situation, contained no errors of assessment (para 41 of the judgment). The loans at issue coincided with the recapitalisation and that those three measures were set out in the same restructuring plan submitted for consideration by the Commission 6 months after the implementation of the rescue aid (para 42 of the judgment). SeaFrance's major financial difficulties existed both when it received the rescue aid and when the SNCF planned to grant it the three other aid measures set out in the restructuring plan (para 43 of the judgment). Similarly, the loan had the same purpose as the recapitalisation insofar as it '*came under the logic of restructuring SeaFrance, since it served to refinance and to exercise the purchase option under the leasing contract for the vessel Molière earlier than scheduled, and was thus designed to reduce the operating costs linked to financing the means of production*' (para 44 of the judgment).

Lastly, it is worth mentioning that the Court upheld the Commission's view that the economic crisis and tightening of financial markets do not constitute 'exceptional circumstances' for the purposes of triggering the exceptional circumstances clause of the guidelines. Similarly, the Court found that Commission precedents cannot demonstrate the concurrence of exceptional circumstances.

B. Case T-305/13 *Servizi assicurativi del commercio estero SpA (SACE) and Sace BT SpA v European Commission*

In February 2011, the Commission initiated a formal investigation procedure with regard to four measures taken by SACE (the Italian export-credit agency), a joint stock company wholly owned by the Italian State, in favour of its subsidiary SACE BT. The measures comprised the following: an initial capital injection into SACE BT of EUR 100 million and a capital contribution of EUR 5.8 million to BT's reserve fund; the reinsurance coverage of SACE BT; and two recapitalisations of SACE BT in June and August 2009. In March 2013, the Commission found that the reinsurance coverage and the two recapitalisations amounted to State aid. SACE and SACE BT challenged the Commission's decision alleging that the measures were not imputable to the Italian State and that the Commission had breached the private investor principle and its duty to state reasons. The GC upheld the Commission decision on 25 June 2015.[13]

Regarding State imputability, the GC—in line with the *Stardust Marine* case law—dismissed the applicants' arguments and confirmed that the indicators relied on by the Commission were sufficient to conclude that the measures were imputable to the State. The Commission relied on the following factors. First, the initial appointment of the members of the board of SACE required the agreement of several important Ministries and two members of the board also occupied simultaneously executive positions in a Ministry. Second, SACE activities are not those exercised by a commercial company of export-credit insurance in normal market conditions but rather of a public insurance undertaking benefiting from a derogatory statute and pursuing defined public policy objectives of supporting the economy. Third, the annual accounts of SACE are controlled by Italian Court of auditors, and the Italian Ministry of Economy & Finance had to submit a report of SACE's activities on an annual basis to the Italian Parliament. Fourth, SACE's forecasts were approved by the Comitato interministeriale per la programmazione economica ('CIPE'). Fifth, the Italian State's 30 per cent interest in SACE BT through SACE (paras 57–81 of the judgment).

With regard to the breach of the private investor principle, the GC dismissed the applicants' arguments that the Commission's finding that the reinsurance coverage granted to SACE BT had been granted under preferential pricing terms. Here, the Court made some interesting observations regarding the principal of mutual cooperation. Pursuant to this principle, a Member State is required to provide to the Commission the information that will allow the Commission to take a decision on whether the measure at issue contains State aid. The Commission, for its part, is under an obligation to conduct a diligent and impartial examination of the information submitted by the Member State (para 112 of the judgment). In this particular case, the GC acknowledged that the Commission had not taken into consideration a note that had been prepared by SACE's risk management department to determine whether the estimated rate of return of reinsurance agreement was in line with the

12 Case T-1/12 *French Republic v European Commission,* EU:T:2015:17.

13 Case T-305/13 *Servizi assicurativi del commercio estero SpA (SACE) and Sace BT SpA v European Commission*, EU:T:2015:435.

assumed risks. However, the Court argued that the Commission could not be criticised for this since the applicants had not argued during the administrative procedure that SACE had performed an *ex ante* analysis of the profitability of the reinsurance coverage measure. Moreover, the Court suggested that the note contained information that was not necessarily up to date since it failed to refer to the financial crisis. Also, the note did not contain an analysis of SACE's risk exposure as a result of its 74.15 per cent stake in the reinsurance agreement. Lastly, the Court noted that the fact that SACE had not demonstrated that it had performed an *ex ante* economic assessment of the reinsurance coverage measure was not sufficient in itself to conclude that SACE had not acted like private reinsurer in a comparable situation (paras 117–123 of the judgment).

Concerning the method used by the Commission to determine the amount of aid that needed to be recovered, the Court observed that the Commission had simply indicated that in line with its prior decisional practice, the commission had to be at least 10% by private reinsurers (para 144 of the judgment). The applicants argued that the Commission had failed to reason why the commission to be paid by SACE BT needed to be 10% higher than the commission applied by private reinsurers. Here, the Commission had simply relied on the methodology it had used in a previous decision with regard to an aid granted by Portugal. The Court recalled that according to established case law the characterisation a measure as State aid has to be determined independently of any prior decision taken by the Commission. Therefore, the Commission could not simply refer to its decisional practice, but had to outline the reasons as to why the methodology was pertinent and clearly establish the reasoning followed to apply it to the circumstances of the case at hand. The Court then went on to observe that there were clear differences between this case and the Portuguese case and that the Commission decision lacked reasoning as regards the possibility of transposing the methodology used in the Portuguese to the case at hand (paras 152–159 of the judgment).

Concerning the application of the private investor principle to the two recapitalisation measures, the GC confirmed that the Commission had not committed an error of law when applying this principle. In this sense, the GC noted that, in a context of economic crisis, when applying this principle, account must be given to the fact that it may not be possible to foresee in a reliable and detailed way the evolution of the economic situation and the results of the different operators. In these circumstances, therefore, the lack of detailed business plan containing precise and complete forecasts of the future profitability and a detailed analysis of the costs and benefits does not in and of itself suffice to conclude that the public investor did not act like a private investor. Similarly, the Court did not exclude the possibility that a rational private investor might consider that the difficulties of its subsidiary might be the result of the economic difficulties of the market. However, even if this were the case, a rational investor whose subsidiary had suffered important losses would conduct some form of prior economic assessment and would look at other alternatives such as sale or liquidation before deciding to inject more capital (paras 179 and 180 of the judgment).

Lastly, the Court recalled that the margin of manoeuvre that the public investor enjoys in estimating the possible profitability of a given project does not exonerate it from conducting an appropriate economic assessment based on the available data and of the foreseeable evolution (para 188 of the judgment).

This judgment is being appealed: Case C-472/15P.

C. Joined Cases T-425/04 RENV, T-444/04 RENV: *France and Orange v Commission*

On 31 July 2015, the GC adopted yet another judgment in the France Telecom saga.[14] This judgment follows the CJEU's annulment of the GC's initial judgment and the referral of the case to the GC, so that it would be judged in first instance once again. This time the GC annuls the Commission's decision on the grounds that it had failed to correctly apply the private investor principle.

The measures at issue concerned a series of declarations made by the French public officials in the early 2000s when FT was going through some financial difficulties. In this sense, the French Minister of Economy, Finance and Industry had declared on 12 July 2002 that the State would support FT if the financial difficulties persisted. Similar declarations were made, subsequently, on 13 September and 2 October 2002. In December 2002, the French State published a shareholder loan proposal that consisted in the opening of a credit line. The offer was neither accepted nor executed.

In substance, the Commission decided in 2004 that there was an incompatible aid but that it could not be recovered owing to the principle of legal certainty and the protection of legitimate expectations. The GC ruled that there was no aid owing to the lack of transfer of State resources (lack of specific link between State resources

14 Joined Cases T-425/04 RENV, T-444/04 RENV, *France and Orange v Commission,* EU:T:2015:450.

and each measure) and the CJEU eventually annulled that judgment (too strict concept of State resources) and referred the case back to the GC, having not ruled on several pleas.

The GC observed that the Commission had limited the application of the private investor principle to the declarations made by the public officials. The Court noted that this was an erroneous application because as the Commission itself acknowledged, it did not possess the necessary information enabling it to take a position on whether the declarations on their own amounted to State aid. Since the Commission had found that the declarations and the shareholder loan proposal constituted a State aid, the principle should have also been applied to the shareholder loan proposal (paras 205–207 and 212 of the judgment). When applying this principle, the Court observed that the Commission needed to place itself at the time when the measure was adopted, in this case, December 2002. The Commission, on the other hand, had placed itself in July 2002 (para 222 of the judgment).

Moreover, the Court noted that the comparison of the State's behaviour with a private investor has to be done taking into consideration the '*available information*' and the '*foreseeable evolution*' at the time when the decisions were taken. Although the Court recognises that the available information can cover events and objective elements of the past, that does not mean that these elements and events constitute, on their own, in a determining way, the reference framework for the application of the private investor principle. On the contrary, the Court notes that given the need to perform a prospective analysis, one cannot exclude taking into consideration more recent elements in so far as these elements are decisive for the prospective analysis. The Court found that the Commission had thus failed to take into account elements that decisively influenced the French State decision (paras 227–230 of the judgment).

Lastly, the Court dismissed the Commission's allegation according to which the declarations made by the French State were detrimental from a legal and economic perspective. In this sense, the Court noted that in order for those declarations to amount to a firm commitment, they would need to be sufficiently precise, clear, and firm. It is not sufficient that the market perceives such declarations as a firm commitment. Similarly, the Court found that from the nature of those declarations, one could not infer such a firm commitment (paras 234–236 of the judgment).

V. Compensation for public service obligations or a service of general economic interest (SGEI)

A. Case C-690/13 *Trapeza Eurobank Ergasias AE v Agrotiki Trapeza tis Ellados AE (ATE) and Pavlos Sidiropoulos*

In order to compensate the elevated risks of granting loans in the agricultural sector, the Greek bank *ATE* was granted, by virtue of a law, certain privileges. These privileges comprised the following: (i) the right to register a mortgage over immovable property of the debtor without having to conclude a loan agreement, (ii) the right to seek enforcement with an ordinary private document, and (iii) an exemption from fees and duties during the registration of the mortgage and the enforcement. ATE had concluded a loan agreement with a farmer, which gave it a privileged status as a creditor. In the context of a dispute with another creditor of that same farmer, the national court referred questions to the CJEU as to whether the granting of these privileges amount to State aid, and if they do, whether the procedure of Article 108 (3) must be followed.[15]

The CJEU indicated that it is up to the national court to determine whether the privileges granted to ATE amounted to State aid on the basis of the State aid case law outlined by the Court in its ruling. The Court observed that it could not be excluded that those privileges fell within the scope of Article 107 (1) TFEU. In particular, the CJEU noted that the exemption from fees is capable of depriving the treasury of certain sources liquidity, and, therefore to reduce the latter's budget. The exemption, therefore, reduces the burden normally imposed on the budget of a bank, thereby conferring and economic advantage over its competitors. On the basis of the file submitted to the Court, it would seem that only ATE benefits from this advantage, which would mean that the measure is selective. Lastly, the Court noted that it could not be excluded that the exemption had the effect of strengthening ATE's position in relation to competing banks active in intra-European trade making it more difficult for banks established in other Member States from penetrating the market (paras 26–28 of the judgment).

The Court, however, noted that these privileges will not amount to State aid if they constitute a compensation for the performance by ATE of its public service obligations. The Court, then, left it to the national court to determine whether this is the case in line with *Altmark*

15 Case C-690/13 *Trapeza Eurobank Ergasias AE v Agrotiki Trapeza tis Ellados AE (ATE) and Pavlos Sidiropoulos*, EU:C:2015:235.

criteria (para 34 of the judgment). As regards the consequences of finding that the privileges amount to aid, the CJEU observed that these will vary depending on whether the aid is new or existing. Lastly, the Court noted that if the national court found that the aid was new and that the Greek authorities had failed to notify the aid, the national court would have to exclude the application of the relevant national provisions insofar as they are incompatible with the Treaty (paras 37 and 53 of the judgment).

B. Case T-57/11 *Castelnou Energía, SL v European Commission*

On 29 September 2010, the Commission authorised the State aid measure notified by Spain in favour of electrical energy production from indigenous coal. Under this measure, the ten electricity power plants identified in an annex to a Royal Decree were required to source coal of Spanish origin ('indigenous coal'), the price of which is higher than that of other fuels, and to produce certain volumes of electricity from that coal.

In order to overcome the difficulties in accessing the daily market for the sale of electricity faced by these power plants, given the high price of the coal which they are required to use, the contested measure introduced a 'preferential dispatch mechanism'. The preferential dispatch mechanism provided, in essence, that the electricity produced by those power plants must be bought in preference to the electricity produced by power plants using other fuels and by those operating on a combined cycle, which is withdrawn from the daily energy market in order to ensure the sale on that market of electricity volumes produced from indigenous coal by the beneficiary power plants. The Commission found that although the requirements imposed on the owners of the power plants were in accordance with the operation of a SGEI justified on the ground of security of electricity supply, the measure in question did not satisfy the *Altmark* criteria. Although constituting State aid, the aid was authorised pursuant to Article 106(2) TFEU. On 3 December 2014, the GC adopted a judgment confirming the Commission's decision.[16]

In this regard, the GC dismissed the applicants plea that the Commission infringed its procedural rights by failing to initiate the formal investigation procedure provided for in Article 108(2) TFEU. In this regard, the Court observed that, contrary to the applicants' assertions, the length of the preliminary procedure was not excessive and therefore was not an indicator that the Commission experienced 'serious difficulties' in establishing whether the aid was compatible. Since Spain's initial notification was subsequently supplemented with additional information, the relevant starting date for the preliminary assessment is the date when the Commission received the response to its last information request. Therefore, contrary to what the applicant claimed, the Commission had adopted its decision within the 2-month period (paras 62–68 of the judgment). Similarly, the subsequent information exchanges between the Commission and Spain were also not an indicator that the Commission was having 'serious difficulties'. Indeed, through its information requests, the Commission was simply seeking information that would enable it to understand whether the contested measure satisfied the conditions of Article 106(2) TFEU. That request for information cannot, therefore, be regarded, in itself, as being indicative of the existence of serious difficulties (paras 71–73 of the judgment).

Moreover, the fact that the Commission had asked Spain to amend the contested measure does not constitute an indicator that the Commission had serious difficulties. To suggest the opposite is to ignore the objective of Article 108(2) and the preliminary procedure. In fact, the Court observed that in accordance with the objective of this provision and the Commission's duty of good administration, the Commission may, during the preliminary procedure, engage in a dialogue with the notifying Member State to amend the measure if necessary, without it being necessary to initiate the formal investigation procedure (para 75 of the judgment). The GC also dismissed the applicants' argument according to which the Commission had carried out an incomplete assessment of the contested measure. In this sense, the Court noted that the Commission was not required to perform a separate analysis of each of the components of the measure (the financial compensation paid to the electricity producers, the preferential dispatch mechanism, and the obligation to purchase indigenous coal—para 99 of the judgment).

Regarding the definition of a SGEI, the Court recalled that Member States enjoy a wide discretion in defining SGEI and that the Commission's control is limited to identifying manifest errors. This limited review may include a prospective assessment, particularly where it is the existence of a risk which is subject to review. Moreover, the Court's review of the Commission's assessment is also limited, and when conducting its review, the Court must determine the Commission's assessment is 'sufficiently plausible' (para 136 of the judgment). In order to

16 Case T-57/11 *Castelnou Energía, SL v European Commission*, EU:T:2014:1021.

conclude that Spain had not committed a manifest error of assessment in claiming that the power plant running on indigenous coal risked being closed, the Commission took into account various elements. It considered the combined effects of the economic recession and other structural aspects of the electricity market in Spain, such as the increasing proportion of electricity produced from renewable energy sources and the isolation of the Spanish electricity market from other European markets. Following an analysis of the Commission's assessment, the GC concluded that it was sufficiently plausible and that the Commission had, therefore, not committed a manifest error (paras 138–146 of the judgment).

Concerning the Commission's review of the proportionality of a SGEI, the Court recalled, that this review was also restricted. For its part, the Court's review of the Commission's assessment regarding the proportionality of the measure is even more limited given that the Commission's assessment relates to complex economic facts. Therefore, the Court noted that in order to render 'implausible' the Commission's acknowledgement that the measure is appropriate '*the arguments and evidence put forward by the applicant must be particularly detailed and based on any specific features of the present case*'. The Court concluded that this was not so in the present case and that the Commission was not required, in the context of its restricted review, to carry out a comparative analysis of all the measures which could be capable of attaining the general interest objective pursued (paras 150–156 and 171 of the judgment).

Another aspect of the judgment that is worth mentioning is the Court's analysis of plea according to which the Commission breached Treaty provisions and secondary legislation other than State aid rules. The Court recalled the case law according to which, the Commission is required to assess the compatibility of an aid with other provisions only where the aspects of aid are so inextricably linked to the object of the aid that it is impossible to evaluate them separately. The Court found that such inextricable links existed in this instance and that therefore the Commission was required to assess the compatibility of the measure with other provisions (paras 181 and 182 of the judgment). However, the Court observed that such an obligation only applied, in this instance, with regard to the free movement of goods provisions. No such obligation exists with regard to EU environmental protection rules. Unlike the free movement of goods, the protection of the environment does not '*constitute, per se, one of the components of that internal market*' (paras 186–189 of the judgment). The GC therefore rejected the application for annulment.

VI. The concept of 'serious difficulties'

A. Case T-500/12 *Ryanair v European Commission*

On 25 November 2014, the GC annulled the Commission's decision not to open a formal procedure regarding an Irish tax exemption in the aviation sector.[17] Ireland had introduced a tax to be paid by on-line operators in respect of '*every departure of a passenger on an aircraft from an airport*' located in Ireland. Initially, there were two different tax rates applied, depending on the distance travelled (300 km) but following the Commission investigation the Ireland modified the legislation and introduced a single tax rate. Transfer and transit passengers were exempt from paying this tax.

Ryanair brought a complaint before the European Commission alleging that these exemptions constituted an aid for the airline companies Air Lingus and Aer Aran, who had a lot of passengers and flights that were exempted. Moreover, it argued that the flat-rate amount of the tax accounted for a higher proportion of the ticket price for low-cost carriers than for traditional airlines. Lastly, Ryanair alleged that the initial lower tax rate applied to shorter travel distances benefitted Aer Aran since more than 50% of its passengers travelled less than 300 km from Dublin airport.

Following a preliminary investigation initiated in response to a complaint from Ryanair, the Commission decided not to open a formal investigation with regard to the tax exemption. It did so on the ground that the measure did not constitute State aid because it formed an integral part of the nature and logic of the system of reference, since it resulted in passengers being taxed in the same way independently of the route travelled and thus ensured that the tax was not levied twice on a journey to a final destination. The Commission did, however, decide to initiate a formal investigation with regard to the lower tax rate. Ryanair challenged the Commission's decision to not initiate a formal investigation before the GC. Ryanair maintained that indicia concerning the preliminary procedure and the content of the decision evidence that the Commission entertained serious doubts as to the compatibility of the measure and should have therefore opened a formal investigation.

With regard to the alleged excessive length of the preliminary procedure, the Court recalls that when a pre-

17 Case T-512/11 *Ryanair v European Commission,* EU:T:2014:989.

liminary investigation is born from a complaint, the Commission cannot prolong that investigation indefinitely because the purpose of that investigation is simply to allow the Commission to form an initial opinion on the classification of the measures and their compatibility with the internal market. The Court found that the period of 24 months between the reception of complaint and the adoption the contested decision exceeded the period normally required for a preliminary investigation. The fact that several measures had to be analysed by the Commission and that a formal investigation had been opened in respect of one of those measures does not undermine that conclusion. Indeed, the Court observed that the Commission had not explained the 'specific usefulness' of carrying out an overall analysis of the five measures. In particular, it had not explained what was the usefulness of not separating the investigation of the measure which led to the initiation of the formal investigation procedure from the other measures, if those measures, including the disputed one, raised no doubts. Furthermore, it is not apparent from the file that there had been exchanges which contributed to extending the length of the preliminary investigation (paras 68–74 of the judgment).

The Court observed that the Commission accepted Ireland's explanation according to which the exemption from the tax applies to the first leg of the journey in the case transit or transfer passengers (para 83 of the judgment). The Court pointed out that this form of exemption was neither coherent with the other information provided to the Commission, nor was it coherent with the nature and logic of the system. The examples contained in the table provided by the Irish authorities, and reproduced in the Commission's decision do not support the interpretation of the exemption endorsed by the Commission. In this regard, while the exemption seems to apply to journey from Dublin to New York via Ireland, it does not apply to the journey from New York to Dublin via Shannon. The Commission should have asked the Irish authorities for further information asking for further examples of how the exemption is to be applied (para 88 of the judgment). Second, there are clear differences between the Irish and UK exemptions, so the Commission cannot rely on the legality of the UK exemption (para 90 of the judgment). Third, the invocation of the intention to avoid double taxation does no support the example provided by the Irish authorities, according to which it is the first flight which is not taxed (para 93 of the judgment). Lastly, the Irish authorities acknowledged that passengers taking two flights to arrive to final destination (without using a single reservation or with a 6 h interval) would not benefit from the tax exemption (para 99 of the judgment).

VII. The recovery of State aid

A. Case C-674/13 *European Commission v Federal Republic of Germany*

On January 2012, the Commission adopted a decision finding that Deutsche Post ('DP') had benefited from State aid linked to the financing of pensions of civil servants working for DP. The Commission thus ordered the recovery of the aid and a reform of the regime going forward, without stipulating specific amounts in the decision. In its decision, the Commission distinguished between the aid granted to DP for civil servants working in services with regulated tariffs and aid granted to DP for civil servants working in non-regulated tariffs. The aid granted for civil servants working in regulated services was compatible, whereas the aid granted for civil servants working in non-regulated services was not. Regulated services are defined as those where DP holds a dominant position and where tariffs are regulated. When it came to executing the Commission's recovery decision, Germany refused to carry out an autonomous assessment to determine whether the B2B parcel service constituted, within the relevant period, a distinct product market from the B2C parcel service. The Commission brought an action against Germany for failing to fulfil its obligations.[18]

In its judgment of 6 May 2015, the Court recalled that according to the case law, the Commission is not required to fix the exact amount of aid that needs to be recovered and can simply limit itself to giving indications that enable Germany to determine the amount itself (para 40 of the judgment). Since the character of a regulated service is linked to the beneficiary holding a dominant position in the relevant market, it is only logical that one would need to carry out an autonomous assessment to determine the relevant market. Therefore, the Court confirmed that Germany should have performed an autonomous assessment to determine whether the B2B and B2C services belonged to different product markets and should have communicated the outcome of that assessment to the Commission (paras 48 and 60 of the judgment).

B. Case C-63/14 *European Commission v French Republic*

On 8 July 2015, the CJEU found that the French Republic had failed to fulfil its obligations by failing, in the prescribed

18 Case C-674/13 *European Commission v Federal Republic of Germany*, EU:C:2015:302.

periods, to take all the necessary measures to recover from Société National Corse-Mediteranee ('SNCM') the State aid declared unlawful and incompatible by the Commission Decision 2013/435/EU, to cancel all the payments of aid, and to inform the Commission of the measures taken to comply with that decision.[19]

The facts that gave rise to this judgment were as follows. SNCM and Compagnie méridionale de navigation SA ('CMN') were awarded the public service delegation for ferry services between the port of Marseille and the Corsican ports. The delegation covered, on the one hand, a 'basic service' that consisted in a permanent 'passenger and freight' service to be provided by SNCM and CMN throughout the year; and on the other, an 'additional service' to be provided by SNCM during peak periods. SNCM and CMN would receive an annual compensation for performing these services. The Commission found that the compensation received for the basic service constituted an unlawful aid, whereas the compensation for the additional service was both unlawful and incompatible. Therefore, on 3 May 2013, the Commission ordered France to recover the sums granted to SNCM for the purposes of compensating the additional service.

Both SNCM and France challenged the Commission decision to the General Court. In parallel, France lodged an application for interim measures to suspend the operation decision. Both the application for interim measures before the GC and the subsequent appeal before the CJEU were dismissed. On 29 November 2013, the French Republic informed the Commission that the Corsican Regional authorities had suspended payments for the additional service with effect from the end of July 2013. Regarding the amount of compensation be recovered, France expressed difficulties in calculating the amount, since the distinction between basic and additional services was an artificial one since these two services were inseparable and helped achieve the objective of territorial continuity. In light of these circumstances, the Commission decided to bring an action against France for failing to fulfil its obligations under Article 108 (2) TFEU.

Regarding the recovery, the Court observed that France had simply issued recovery orders over 2 months after the prescribed period for an amount that was less than that indicated by the Commission and that no actual recover had been made. Thus, in line with prior case law, the Court stated that simply issuing recovery order does not amount to recovering illegal aid. Furthermore, the fact that actions for annulment had been lodged against the decision was of no consequence and did not have the effect of suspending the decision, absent a decision from the GC to that effect (paras 46 and 47 of the judgment).

The CJEU recalled the case law according to which the exception of absolute impossibility exception is not applicable, where '*the defendant Member State merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real step to recover the aid form the undertakings concerned, and without proposing to the Commission any alternative arrangements for implementing the decision which could have enabled those difficulties to be overcome*' (para 49 of the judgment). The Court dismissed the arguments put forward by France as to why this exception should apply. Regarding the argument that the recovery would lead to liquidation of SNCM, which would in turn cause social unrest and undermine the territorial continuity, the Court observed that France had failed to show that action taken by it to put an end to any alleged social unrest would have consequences that France would not be able to cope with using the means at its disposal. In this sense, even if long-term blockades were to take place, France had not provided evidence that would support the conclusion that France would not be able to supply Corsica with the basic necessities through other maritime routes or by air. Moreover, both the recovery order and the statement of liability presented by the French Government in the collective proceedings of which SNCM is the subject, did not give rise to any particular unrest (paras 51–54 of the judgment).

As regards the argument that the break in territorial continuity which might occur between the cessation of activities of SNCM and the conclusion of a new public service delegation contract, the Court recognised that the cessation of SNCM activities would likely reduce ferry services in the short term. However, France had not put forward any facts that would support the conclusion that the reduction would have consequences on a scale which could be regarded as making it absolutely impossible to implement the decision at issue (para 56 of the judgment).

VIII. The *res judicata* principle and State aid control

This most recent case (ruled on 11 November 2015)[20] concerns a preliminary ruling on the interpretation of

19 Case C-63/14 *European Commission v French Republic,* EU: C:2015:458.

20 Case C-505/14 *Klausner Holz/Land Nordrhein-Westfalen*, 11 November 2015.

State aid rules and the principle of effectiveness. It is the second case ever since 1958 where the Court decides that the principle of *res judicata* should be set aside for the primacy of EU law, in the present case the principle of effectiveness read in combination with State aid rules. The other case was also a State aid case, the *Lucchini* case.[21]

Indeed, under the EU case law, State aid rules contain such institutional competence rules that, in some circumstances, any national rule, even the principle of *res judicata*, should be set aside if the application of that national rule amounts to encroaching the exclusive competence of the Commission to rule on the compatibility of State aid.

The national proceedings leading to the reference to the CJEU are between Klausner Holz (a purchaser of wood) and the Land Nordrhein-Westfalen following a failure by the Land to execute agreements to supply wood concluded with Klausner Holz. In substance, the dispute led to a definitive judgment declaring the contracts at issue remained in force. This is now *res judicata*. It should also be noted, as to the introductory factual and legal backgrounds to this case, that, under German law, '*Judgments are able to become res judicata only in so far as a ruling has been given on the complaint or the claims asserted in counterclaims*'.

The State aid issues only occurred at a later stage when, in defence to an action for damages brought by Klausner Holz, the Land raised, for the first time, the argument that the execution of the contracts at issue is precluded since they constitute unlawful State aid. To confirm this position, the Federal Republic of Germany informed the European Commission of the existence of that non-notified aid, which, in the opinion of that Member State, is even incompatible with the internal market. The Commission also received complaints from a number of the competitors of Klausner Holz making the same allegations of incompatibility.

The referring court requested clarification from the Commission [relying on the Commission Notice on the enforcement of State aid law by national courts (OJ 2009 C 85, p. 1)], but the Commission said it was unable to state its definitive position on the application in view of current proceedings opened following the German's information and the complaints. The referring court took the view, for its part, that contracts at issue constitute State aid and that that aid was implemented in breach of the third sentence of Article 108(3) TFEU. Therefore, for the national court, the private law contract granting unlawful State aid must be regarded as null and void.

However, the referring court considers it was prevented from drawing the consequences of that violation of the third sentence of Article 108(3) TFEU because of the declaratory (and definitive) judgment mentioned above, which held that the contracts at issue remained in force.

The CJEU was therefore asked to rule on the question whether '*EU law precludes, in circumstances such as those at issue in the main proceedings, the application of a rule of national law enshrining the principle of res judicata from preventing a national court which has held that contracts forming the subject-matter of the dispute before it constitute State aid, within the meaning of Article 107(1) TFEU, implemented in breach of the third sentence of Article 108(3) TFEU, from drawing all the consequences of that breach because of a national judicial decision which has become definitive, which court, without examining whether those contracts constitute State aid, has held that the contracts remain in force*' (para 17 of the judgment).

The Court recalls first the well-known respective roles, complementary but separate, of the Commission (which has the exclusive competence to assess the compatibility of aid with the internal market) and national courts (which safeguard, until the final decision of the Commission, the rights of individuals faced with a possible violation of Article 108(3) TFEU).

The Court then notes that the dispute initially did not concern, either principally or incidentally, the State aid characteristics, within the meaning of Article 107(1) TFEU, of the contracts at issue. Hence, that question was not examined by the courts which it ruled at first instance in the same dispute. It also notes the aims of the disputes were to obtain a ruling that the contracts at issue remained in force, despite the fact that the Land had rescinded them and, then, to obtain (i) payment of damages in respect of the non-execution of part of those contracts, (ii) execution of another part thereof, and (iii) certain information concerning in particular the prices applied in the sector. It also notes that, under German law, the principle of res judicata precludes '*not only re-examination, in a second action, of the pleas already expressly settled definitively, but also the raising of questions which could have been raised in an earlier action and which were not so raised*' (para 30 of the judgment).

The Court follows by examining the possibility of a measure (such as the temporary suspension of the contracts at issue until the adoption of the Commission decision closing the procedure, which would enable that court to satisfy its obligations under the third sentence of Article 108(3) TFEU without actually ruling on the

21 Case C-119/05, *Lucchini*, EU:C:2007:434.

validity of the contracts at issue) or the application of the principle of interpretation in conformity with EU law.

In the event that these possibilities were not open to the referring national court, the Court eventually examines the central question of opposition between the principle of *res judicata* and the application of EU State aid law.

It recalls that '*EU law does not always require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a breach of EU law by the decision at issue*' (para 39 of the judgment).

It also recalls the well-known principles of equivalence and effectiveness: '*In the absence of EU legislation in this area, the rules implementing the principle of res judicata are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, such procedural rules must not be less favourable than those governing similar domestic situations (principle of equivalence) and must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness)*' (para 40 of the judgment).

The Court follows by stating that '*both the State authorities and the recipients of State aid would be able to circumvent the prohibition laid down in the third sentence of Article 108(3) TFEU by obtaining, without relying on EU law on State aid, a declaratory judgment whose effect would enable them, definitively, to continue to implement the aid in question over a number of years. Thus, in a case such as that at issue in the main proceedings, a breach of EU law would recur in respect of each new supply of wood, without it being possible to remedy it*' (para 43 of the judgment).

This situation is likely '*to deprive of any useful effect the exclusive power of the Commission* (. . .) *to assess* (. . .) *the compatibility of aid measures with the internal market*' (para 44 of the judgment). The Court notes that '*If the Commission, to which the Federal Republic of Germany has in the meantime notified the aid measure constituted by the contracts at issue, should conclude that it is incompatible with the internal market and order its recovery, execution of its decision must fail if a decision of the national court could be raised against it declaring the contracts forming that aid to be "in force"*' (*ibid*).

On those grounds, the Court of Justice rules as follows: '*EU law precludes, in circumstances such as those at issue in the main proceedings, the application of a rule of national law enshrining the principle of res judicata from preventing a national court which has held that contracts forming the subject-matter of the dispute before it constitute State aid, within the meaning of Article 107(1) TFEU, implemented in breach of the third sentence of Article 108(3) TFEU, from drawing all the consequences of that breach because of a national judicial decision which has become definitive, which court, without examining whether those contracts constitute State aid, has held that the contracts remain in force*' (operative part of the judgment).

This is the second judgment, after *Lucchini*, where the Court limits the *res judicata* principle as far as the application of State aid rules are concerned, and in particular when the exclusive competence of the Commission is put into question by the application of that rule of national law.

doi:10.1093/jeclap/lpv096