

Case T-150/2012 – or - in a nutshell: What not to invoke in State Aid Cases

Annotation on the Judgment of the General Court (Seventh Chamber) of 9th of April 2014 in Case T-150/12 *Greece v Commission*

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I. Introduction

In its judgment of 9th April 2014 in Case T-150/12 *Greece v Commission* ('the judgment')¹ the General Court (GC) upheld the Commission's Decision ('the Decision') ordering Greece to recover aid granted to associations of agricultural cooperatives and cereal producers in 2008.² The aid consisted of a series of measures which provided for interest-rate subsidies and 100% State-guaranteed loans granted to 57 Unions of Agricultural Cooperatives (UACs). The intended final recipients of the loans, amounting to €150 million, were the cereal producers for the quantities purchased or received by the UACs in 2008. In other words, in the context of the abovementioned aid scheme, cereal-producing farmers received State subsidised loans with zero guarantee premium fees. These measures were not notified to the European Commission. By decision of 25th January 2012, the Commission found that the measures constituted state aid incompatible with the internal market ordering the termination of the existing scheme and the recovery of the illegally granted aid.³ Greece then filed an action for annulment of the Commission's decision with the GC. The GC dismissed the action

in its entirety confirming the validity of the Commission's decision.

The GC's dismissal does not contain any great surprises; it is nevertheless interesting for several reasons. The Court's response to the pleas invoked challenging the recovery decision renders the judgment indicative, as correctly pointed out by Phedon Nicolaidis, of what a Member State should *not* invoke in recovery constellations or state aid cases in general.⁴ The present annotation focuses on the main arguments put forward by the Greek authorities against the decision and the reasons why they were rejected. After describing the Court's reasoning, the annotation comments on certain findings pertaining particularly to the notion of 'economic advantage' within the meaning of Article 107(1) TFEU as well as to the methodology for the assessment of the 'compatibility' of an aid measure according to Article 107(3) TFEU.

II. Background of the case

On the 14th of December 2010, the Commission notified Greece its decision to initiate a formal investigation procedure pursuant to Article 108(2) TFEU concerning interest-free and fully State guaranteed loans granted by the Hellenic Republic.

According to the Greek authorities, the aid was intended to secure a minimum income for cereal-producing farmers amid a considerable surplus in maize and wheat production which had led to a significant drop in cereal prices in 2008. As the Greek government noted, the UACs had no access to the necessary funds to support farmers' incomes, nor access to financial markets in order to arrange loans because of the financial crisis. The Greek authorities further argued that if, during the winter of 2008, the Cooperatives had sold the amounts of cereals collected, prices would have fallen significantly and producers would

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1 Case T-150/12 *Hellenic Republic v European Commission*, judgment of 09.04.2014, not yet reported.

2 European Commission, Decision of 25 January 2012 concerning aid granted by Greece to cereal-producing farmers and cereal-collecting cooperatives, [2012] OJ L 164/10.

3 *ibid.*

4 P Nicolaidis, 'A Textbook Case of False Arguments: T-150/12, *Greece v Commission*' (Lexxion State Aid Blog) <<http://www.lexxion.eu/training/state-aid-blog-mobile/2014/04/25/131-a-textbook-case-of-false-arguments-t-15012-greece-v-commission>> accessed on 28.07.2014.

have suffered considerable losses. Therefore, the Greek government decided to grant directly to UACs - and indirectly to farmers (who delivered their production to the Cooperatives in 2008) - aid in the form of the above described loans. Due to the then ongoing crisis in the cereals market, the Greek authorities extended the deadline for the loans' repayment to 30th of September 2010.

In assessing the contested measures, the Commission - after examining 1) the interest-rate subsidy and 2) the State guarantee as two separate aspects of the same series of measures - concluded that they both constitute state aid as all the conditions laid out in Article 107 (1) TFEU are met.

1. The interest-rate subsidy

As the Commission pointed out, the interest-rate subsidy confers a clear advantage to the recipients of the loans as it covers the full rate of the interest, practically rendering the loan completely interest-free. Moreover, it was found that the advantage is selectively conferred as the only beneficiaries of the loans are the cooperatives and, in the final instance, farmers who purchased or produced cereals in Greece in 2008. These farmers constitute the indirect beneficiaries of the aid, given the intention of the State to increase the income of Greek farmers by artificially increasing the price of cereals sold by the producers to the cooperatives. As the Commission noted, the aid in the form of interest-free loans was granted only until the loans' restructuring according to a Ministerial Decision of October 2010 which stipulated that the interest-rates applicable to the restructured loans would be the rate applied by each financial institution for any loan in the same category.

With regard to the additional necessary precondition for the activation of the basic prohibition rule laid down in Article 107(1) TFEU, namely a 'distortion of competition', the Commission found that this precondition was met since the producers concerned received an economic benefit which would not have been granted to them in the normal course of their business thus strengthening their competitive position as compared to other competing undertakings. In addition, there is substantial intra-Community trade in the cereals sector rendering the measure in question capable of affecting trade between Member States.

2. The State guarantee scheme

The Commission reached the conclusion that the Greek guarantee scheme also falls within the scope of Article 107(1) TFEU. According to the Commission's analysis, the State guarantee under review confers an advantage to the recipients of the loans since the risk associated with the loan is borne by the State. The Commission supported its conclusion by referring to the Commission's Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ('Notice on Guarantees').⁵ According to this Notice, normally, in such cases, such a risk should be remunerated by an appropriate premium. In this case, however, the farmers did not have to pay, at least until the 30th of March 2011, the appropriate premium that would correspond to the guarantee granted by the State. Therefore, there is a clear benefit conferred upon the farmers resulting in a transfer of State resources. The Commission further pointed out that the criteria, as laid down in the section 3.4 of the Notice for a guarantee scheme to be exempted from the state aid prohibition do not appear to be fulfilled in this case because: i) the guarantees in question cover more than 80% of the outstanding amount of each loan; and ii) the scheme under examination appears to be closed to borrowers in financial difficulty.

Regarding the collateral provided by the UACs to the State, as a part of the loan agreement, the Commission underlined that it was at the discretion of the State to make use of it, hence there was no indication that the present aid is not an illegal state aid. Moreover, despite the fact that the collateral was subsequently replaced by a 2% premium on the outstanding amount of the loan, as of 30 March 2011, the guarantee scheme still constituted state aid since the loan restructuring was optional for the UACs and not obligatory.

Moving on its analysis on the compatibility of the state aid scheme under examination, the Commission found that the only derogation which might apply is the one provided for in Article 107(3)(c) TFEU. However, this derogation could not be applied in this case as the type of aid granted by the Hellenic Republic to the UACs and the farmers does not fall in

⁵ European Commission, Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees [2008] OJ C155/10.

the ambit of EU agricultural guidelines⁶ since they do not cover the type of aid which was granted by Greece. In addition, the Temporary Community Framework (TCF)⁷, which had been adopted by the Commission in response to the crisis could not be applied either since the measure had been put into effect prior to the entry into force of the provisions declaring aid to primary agricultural production compatible under Article 107(3)(b) TFEU. Consequently, the Commission found the scheme under review to constitute incompatible state aid aiming to increase farmers' income by artificially increasing cereal prices.

Therefore, the Commission asked for the total recovery of the aid which was considered incompatible with the internal market as well as illegal since it has been granted to its recipients in breach of the procedural obligation stipulated in Article 108(3) TFEU.

III. The Court's Approach to the Legal Issues Raised

The Hellenic Republic sought to annul the Commission's decision putting forward specific arguments in support of its claim which were addressed by the Court. The analysis of the Court's response to the most important pleas invoked will be briefly presented below.

1. The obligation to state reasons

The GC first pointed out that the Commission's decision is clear and sufficiently reasoned, setting aside the applicant's allegations according to which the contested decision was unclear in specifying the nature of the aid, the final aid amount to be recovered as well as the recipients of the aid. The Court reaffirmed its well established jurisprudence pursuant to which the Commission is not required to quantify the aid to be recovered; it is sufficient that it is pos-

sible for the Member State to calculate the amount of the illegal aid, without overmuch difficulty, on the basis of the information given in the decision. Indeed, as the Court observed the decision was sufficiently comprehensible allowing the Greek authorities to identify the amount of the aid to be recovered. In this case, this amount consisted of: i) the interest that should have been paid; and ii) the premium that should have been charged by the State for bearing the risk associated with the guarantee.

With regard to the determination of the recipients of the aid, the applicant's claims were equally unfounded since the decision provided all the necessary information on the two categories of the recipients (the UACs and the cereal producing farmers) and it was thus possible for the Hellenic Republic to examine at national level the specific benefit each category had obtained.

2. On the erroneous interpretation and application of Article 107(1) TFEU

The Court found that the measures introduced by the Greek government, in the form of interest-free loans with State guarantees, did confer an economic advantage liable to favour the beneficiary to the detriment of its competitors.

a. Interest subsidies

In tracing the effect of the aid in the form of interest subsidies, the Court held that the benefit consists in the positive impact of the measure on the terms of sale of grain from producers to the cooperatives. Greece had argued that cereal producers did not really enjoy any competitive advantage because the price of cereals in 2008 was depressed as a result of the over-production and the crisis. In response to that, the GC noted that the mere fact that the prices were low did not necessarily preclude the existence of an economic advantage since the aid scheme may have prevented a further fall in prices. The Court added that in any case, had the loans not been granted, the farmers would not be able to sell their grain stock at the prices achieved.

The Court also rejected the applicant's allegations supporting that the advantage from the subsidies was relatively minor, by reminding that any advantage not obtained under free market conditions consti-

6 European Commission, Guidelines for State aid in the agriculture and forestry sector 2007-2013, [2006] OJ C319/1.

7 European Commission, Communication concerning the temporary Community framework for state aid measures to support access to finance in the current financial and economic crisis, [2009] OJ C16/1. The Communication was amended on 31.10.2009.

tutes State aid, except of the case of the de minimis aid rules, on the condition that the thresholds posed therein are met.

b. State guarantees

The Court, after examining the conditions attached to the guarantee, rejected the applicant's assertions that the collateral provided by the Loan agreement along with its subsequent replacement by the 2% premium charge indicate the absence of any economic advantage for the aid recipients. Again, it shared the view of the Commission stating that the use of the rights arising from the collateral agreement is at the discretion of the State whereas the execution of the potential charge of the 2% premium by the UACs is optional and thus non automatic. In addition, the Court sided with the Commission in that the guarantee scheme in question does not comply with the requirements provided for in the Commission Notice on Guarantees as it appears not to exclude undertakings in financial difficulty and because the guarantees covered more than the permissible limit of the 80% of the outstanding amount of each loan.

The applicant further maintained that the Commission had erred in assessing the facts and had provided insufficient reasons regarding the selectivity element of the aid in question. The GC set aside this plea also, by stating that the Commission had sufficiently reasoned its assessment in finding that since the beneficiaries of the aid were only those cooperatives and farmers who purchased or produced cereals in Greece in the year 2008, the selectivity criterion was met.

Greece countered, *inter alia*, that the final economic advantage for the recipients was too small. The GC did not accept the argument. In accordance with established case law, even aid of a relatively low amount is liable to affect competition and trade between Member States where there is strong cross-border competition. The agricultural sector falls within the latter category as there is intense competition between growers in the Member States whose production is traded within the Community. Furthermore, the Court reiterated that what is crucial in this assessment is not to establish that the aid has a real effect on intra-Community trade and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition. When aid granted by a Member State

strengthens the position of an undertaking compared with its competitors in intra-Community trade, the latter must be regarded as being affected by that aid. With respect to the argument that the State intervention must distort competition, the Court recalled that any aid that relieves an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities, in principle distorts competition.

c. The application of Article 107(3) TFEU

The applicant argued that the Commission should have considered the measures to be compatible with the common market on the basis of Article 107(3)(b) TFEU, given the manifestly severe disruption of the Greek economy caused by the financial crisis that had erupted in 2008. In assessing the applicant's allegation, the Court first noted that the Commission enjoys a wide discretion when listing the types of aid that may be deemed to be compatible with internal market. The Commission, in the light of the seriousness of the economic crisis, had adopted the above-mentioned Temporary Community Framework ('TCF') which provided for a derogation on the basis of Article 107(3)(b) TFEU.⁸ As the Court observed, primary agricultural production was not included within the sectors for which an exemption was granted from Article 107(1) TFEU. It was only after its amendment on October 2009 that the TFC was extended to include the primary agricultural sector. Any State aid scheme approved prior to the entry into force of this provision could not be covered by the Temporary Framework. Hence, the TFC could not be applicable in this case since the aid had been granted in 2008. Contrary to the Greek assertions on the possible retroactive effect of the provisions of the TCF, the Court reiterated that any derogation from the State aid prohibition must be interpreted narrowly. According to established case law, the principle of legal certainty precludes a Community measure from taking effect from a point in time before that measure was published; it may exceptionally be otherwise, where the purpose to be achieved so demands in so far as it follows clearly from the terms, objectives or general scheme of the rules of Community law concerned, that such effect must be given to

⁸ *ibid.*

them. However, according to the judgment, this is not the case with regard to the aid scheme at issue. Indeed, the objective pursued, which in this case falls within the ambit of the general interest to tackle the financial crisis, does not demand a retroactive effect of the measure. Such retroactivity would serve to encourage Member States not to notify aid which they consider incompatible with the common market, in the absence of an applicable derogation, in the hope that such derogation might be subsequently allowed. As the Court further noted, the measures in question do not meet the conditions laid down in the TCF, pursuant to which in order for the aid to be considered compatible it must apply to the entire agricultural sector and not just to one category of farmers, the cereal-producing farmers in this case.

IV. A Brief Critical Assessment

The present judgment cannot be described as innovative case law, but some of its findings are nevertheless useful for several reasons: Apart from the fact that it reaffirms established case law, it touches upon some interesting aspects of State aid control.

In assessing the aid provided in the form of the 100% State guaranteed loans, the Court ruled that the existence of the collateral provided from the UACs to the State or its subsequent replacement by a charge of 2% premium do not rule out the presence of a potential economic advantage within the meaning of Article 107(1) TFEU. What appears to be the crucial element for the Court's assessment is the discretion the State enjoys in making use of the rights granted by the collateral agreement along with the non-automatic execution of the 2% premium charge. Hence, it seems that the requirement of the unconditional nature of the conditions linked to the State guarantees is a decisive factor in determining the presence of an economic advantage when assessing the com-

patibility of state guarantees with state aid rules. The Court at this point sheds light on the central notion of the 'economic advantage' ruling in fact that unlimited guarantees provided by the State are considered to confer an advantage and thus entail State aid which has to be notified and pre-approved by the Commission. It appears that an adequate remuneration of the State by the beneficiary is regarded as a precondition for guarantee schemes to get the green light and be considered compatible with state aid rules.⁹ It is further interesting to note that the Court's assessment of the guarantee scheme in the present case is coherent with the assessment of the economic advantage element as the latter is being interpreted in the forthcoming Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU.¹⁰

Furthermore, the Court, reiterating its settled case law, makes clear that even relatively small amounts of aid are liable to distort competition and affect intra-Community trade. The same holds for undertakings with relatively small size. There is no actual threshold, below which aid can be regarded as not affecting trade between the Member States. The only exception applicable is the de minimis aid rule which however is a matter to be considered at the recovery stage at national level regarding each individual beneficiary.¹¹ Hence, it is, inter alia for this reason, important for the Member States to think about the implications of illegal state aid at an early stage and therefore notify the European Commission pursuant to Article 108(3) TFEU.

Another point of particular interest is the Court's response to the applicant's claim as regards the retroactive effect of the Temporary Framework. The Court here made clear that the ad hoc assessment of any derogation provided for in Article 107(3) TFEU lies in the wide discretion of the Commission. The Commission has no obligation to grant an exemption pursuant to Article 107(3) TFEU. The Court, in line with previous case law, underlined that EU rules apply as of the date on which they are published, according to the *tempus regit actum* principle. It is only exceptional, that rules can be under concrete circumstances applied retroactively. Indeed, this retroactive effect would result in State practices opposite to the aims pursued by the State aid rules as Member States would be encouraged not to notify aid measures hoping that future legal provisions will remove any element of their incompatibility with the internal market.

9 See European Commission, 'The application of State Aid Rules to government guarantee schemes covering bank debt to be issued after 30 June 2010', DG Competition Staff Working Document, 30.04.2010, 1. <http://ec.europa.eu/competition/state_aid/studies_reports/phase_out_bank_guarantees.pdf> accessed 20.10.2014.

10 European Commission, 'Draft Notice on the notion of State aid pursuant to Article 107(1) TFEU' (2014) <http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf> accessed 28.07.2014.

11 See on this issue, A Metaxas, 'Recovery obligation and the limits of national procedural autonomy', (2007) 6 EStAL 407.

V. Conclusion and Outlook

The judgment at hand is firmly based on well-established jurisprudence of EU Courts. The Court has rejected the entirety of the pleas invoked by the Member States reiterating its settled case law rendering the judgment indicative of what the Member States should avoid to claim in State aid cases. Thus, the importance of the judgment lies rather in that it contains *examples of arguments not to be put forward before the Court*. Although the ruling of the Court does not entail any great surprises it still draws some interesting conclusions. The Court's approach regard-

ing the arguments pertaining to the definition of the 'economic advantage' is in line with the forthcoming Commission Notice on the notion of State aid and makes clear that unlimited State guarantees will be considered to fall within the scope of Article 107(1) TFEU. Furthermore, in response to the particularly interesting applicant's request for treating an already implemented aid scheme as compatible with state aid rules, the Court has clarified that the retroactive effect of legal provisions declaring aid to be compatible with the internal market is very rare and can be recognised under very narrowly interpreted exceptional circumstances in State aid cases.