



General Court of the European Union

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Press and Information

Judgment in Joined Cases T-639/14 RENV, T-352/15 and T-740/17  
DEI v Commission

**The General Court annuls the decisions by which the Commission found that an arbitration award setting an allegedly preferential tariff for electricity did not involve the granting of an advantage to the aluminium producer Mytilinaios**

*The Commission was required to examine diligently, sufficiently and comprehensively, by carrying out complex economic and technical assessments, whether there had been State aid*

Dimosia Epicheirisi Ilektrismou AE ('DEI'), an electricity producer and supplier established in Athens (Greece) and controlled by the Greek State, and its largest customer, Mytilinaios AE – Omilos Epicheiriseon, formerly Alouminion tis Ellados VEAE, established in Marousi (Greece) ('Mytilinaios'), have been involved in a long-running dispute regarding the electricity supply tariff intended to replace the preferential tariff enjoyed by Mytilinaios stemming from an agreement which was signed in 1960 but which expired in 2006.

As part of an arbitration agreement signed on 16 November 2011, the two parties agreed to entrust the resolution of their dispute to the Rythmistiki Archi Energeias (Greek Energy Regulator, Greece; 'the RAE'), under which a permanent arbitration body ('the Arbitration Tribunal') is established under Greek law.

By decision of 31 October 2013 ('the arbitration award'), the Arbitration Tribunal fixed the energy tariff applicable to Mytilinaios ('the tariff in question'). The action filed by DEI against that arbitration award was dismissed by the Efeteio Athinon (Court of Appeal, Athens, Greece).

In that context, DEI filed two complaints with the Commission, arguing that, first, the RAE and, secondly, the Arbitration Tribunal had granted Mytilinaios unlawful State aid, in so far as the tariff in question required it to supply Mytilinaios with electricity at a price below its costs and thus below the market price. By letter of 12 June 2014, signed by a Head of Unit of the Directorate-General (DG) for Competition ('the contested letter'), the Commission informed DEI that no further action would be taken on its complaints. According to the Commission, the tariff in question did not constitute State aid, as the criteria of imputability and advantage were not met; there was consequently no need to open the formal investigation procedure referred to in Article 108(2) TFEU.

Following that letter, DEI brought an action before the General Court, registered under number T-639/14, seeking annulment of the decision, contained in that letter, not to take further action on its complaints.

In the course of those proceedings, the Commission, by decision of 25 March 2015<sup>1</sup> ('the first contested decision'), withdrew and replaced the contested letter. In that decision, it took the view that the arbitration award did not involve the granting of State aid to Mytilinaios, essentially on the ground that DEI's voluntary submission of their dispute to arbitration was consistent with the conduct of a prudent investor operating in a market economy and therefore did not involve an advantage.

DEI subsequently brought an action before the Court, registered under number T-352/15, seeking to have the first contested decision annulled.

By order of 9 February 2016, the Court held that there was no longer any need to adjudicate on the action in Case T-639/14. On appeal, however, the Court of Justice<sup>2</sup> set that order aside and referred the case back to the Court, where it was registered under number T-639/14 RENV.

On 14 August 2017, the Commission adopted a second decision ('the second contested decision'),<sup>3</sup> repealing and replacing both the contested letter and the first contested decision. Relying on the same grounds as those set out in the first contested decision, the second decision confirms that the arbitration award does not involve the granting of State aid within the meaning of Article 107(1) TFEU.

DEI once again brought an action for annulment of that second decision before the Court, registered under number T-740/17.

After joining the three pending cases, the Third Chamber (Extended Composition) of the General Court upheld the three actions brought by DEI and annulled both the contested letter and the first and second contested decisions (together, 'the contested acts'). In its judgment, the Court clarifies the classification of a complainant as an 'interested party' with standing to bring an action against a Commission decision not to raise objections under State aid law to a State measure. As to the substance, the judgment also defines the scope of the Commission's obligation to determine whether an arbitration tribunal with rights and powers comparable to those of an ordinary State court has granted an advantage within the meaning of State aid law by setting an electricity supply tariff which, as the case may be, does not correspond to the market price.

### **Findings of the General Court**

As regards the admissibility of the action in Case T-740/17, which is examined first, the Court notes that the second contested decision has legally binding effects on DEI. According to settled case-law of the Court of Justice, a decision finding that there is no aid, by which the Commission closes the preliminary investigation phase, also has binding legal effects on an interested party. In that regard, the Court adds that, in so far as DEI claims that the tariff in question constituted aid prohibited by Article 107(1) TFEU and affecting its economic interests, DEI has the status, within the meaning of Article 108(2) TFEU and Article 1(h) of the regulation laying down detailed rules for the

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<sup>1</sup> Decision C(2015) 1942 final of 25 March 2015 (Case SA.38101 (2015/NN) (ex 2013/CP) – Greece – Alleged State aid to Alouminion SA in the form of below-cost electricity tariffs following an arbitration award).

<sup>2</sup> Judgment of 31 May 2017, DEI v Commission (C-228/16 P).

<sup>3</sup> Decision C(2017) 5622 final of 14 August 2017 (Case SA.38101 (2015/NN) (ex 2013/CP) – Greece – Alleged State aid to Alouminion SA in the form of below-cost electricity tariffs following an arbitration award).

application of Article 108 TFEU,<sup>4</sup> of an ‘interested party’ which is prevented, by virtue of the contested acts deciding that no further action is to be taken on its complaints, from submitting its observations in a formal investigation procedure.

Thus, in so far as DEI’s action seeks to safeguard the procedural guarantees which it would enjoy, as an interested party, if a formal investigation procedure were to be opened under Article 108(2) TFEU, it is admissible. In that regard, the Court states that the pleas for annulment relied on by DEI seek to establish the existence of doubts<sup>5</sup> or serious difficulties which should have led the Commission to open the formal investigation procedure.

As regards the substantive question of whether the Commission should have encountered doubts or serious difficulties in its assessment of the complaints lodged by DEI, the Court rejects the Commission’s argument that a prudent private investor in DEI’s situation would have opted for arbitration and accepted the fixing of the applicable tariff by an Arbitration Tribunal comprising experts whose discretion was limited by parameters comparable to those contained in the arbitration agreement; the fixing of the tariff in question by the Arbitration Tribunal could therefore not have had the effect of granting an advantage to Mytilinaios.

In that regard, the Court confirms that the Arbitration Tribunal, ruling under an arbitration procedure provided for by law and fixing an electricity tariff by means of a legally binding decision, must be classified as a body exercising a power coming within the scope of public authority rights and powers, having regard to its nature, the context in which its activity takes place, its objective and the rules to which it is subject, according to which its decisions may be challenged before the State courts, have the force of *res judicata* and are enforceable. The Arbitration Tribunal can therefore be treated in the same way as an ordinary State court.

That being the case, in view of the division of powers between national courts and the Commission in the monitoring of State aid, national courts are themselves liable to disregard their obligations under Articles 107(1) and 108(3) TFEU and, in so doing, to make possible or perpetuate the granting of unlawful aid, or even to become the instrument of such aid, this being a matter which comes within the scope of the Commission’s supervisory power.

Thus, in order to be able to remove any doubts or serious difficulties as to whether the tariff in question, set by the arbitration award, involved an advantage as contemplated in Article 107(1) TFEU, the Commission was required to carry out a review as to whether a State measure which was not notified but which was challenged by a complainant, such as that tariff, came within the definition of State aid, within the meaning of Article 107(1) TFEU, including the criterion of an advantage. That review requires complex economic assessments, relating, in particular, to how consistent the tariff is with normal market conditions.

However, by limiting its analysis to the question of whether a private operator would have submitted to the arbitration accepted by DEI, the Commission delegated those

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<sup>4</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ 2015 L 248, p. 9).

<sup>5</sup> Within the meaning of Article 4(3) and (4) of the Regulation laying down detailed rules for the application of Article 108 TFEU.

complex assessments to the Greek courts, while disregarding its own supervisory duty. Moreover, having regard to the information submitted by DEI in the course of the administrative procedure, the Commission ought to have carried out its own analysis as to whether DEI's method for determining costs, as applied by the Arbitration Tribunal, was both appropriate and sufficiently plausible to establish that the tariff in question was consistent with normal market conditions.

Since the Commission did not, in the second contested decision, comply with its supervisory obligations, the Court finds that it ought to have experienced serious difficulties or had doubts requiring the opening of the formal investigation procedure. Accordingly, the Court upholds the action in Case T-740/17 and annuls the second contested decision.

Since the second contested decision is thus declared null and void, it cannot repeal and replace either the first contested decision or the contested letter. Consequently, the action for annulment of the first contested decision retains its purpose.

In view of the almost identical content of the first and second contested decisions, the Court, for the same reasons, upholds the action in Case T-352/15 and annuls the first contested decision. In so far as the latter is no longer capable of repealing and replacing the contested letter, Case T-639/14 RENV also retains its purpose.

After having declared the action in the latter case admissible, the Court finds that the contested letter, which amounts to a definitive statement of the Commission's position on DEI's complaints by deciding to take no further action in their regard, is vitiated by a procedural error in that it should have been adopted by the Commission as a collegiate body and not by a Head of Unit of the Competition DG, which is why the Commission itself repealed and replaced that letter. The Court further confirms that the Commission ought to have had serious difficulties or doubts as to whether there was State aid or, at the very least, that it was not entitled to dismiss such doubts on the ground that the arbitration award was not attributable to the Greek State. In recalling that, by its nature and legal effects, the arbitration award is comparable to judgments delivered by an ordinary Greek court, and can therefore be classified as an act of public authority, the Court emphasises that DEI has demonstrated that imputability to the requisite legal standard.

The Court, having upheld the third application, therefore also annuls the contested letter.

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**NOTE:** An appeal, limited to points of law, may be brought before the Court of Justice against the decision of the General Court within two months and 10 days of its notification.

**NOTE:** The purpose of an action for annulment is to have acts of the EU institutions that are contrary to EU law annulled. Under certain conditions, Member States, European institutions and individuals may bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must remedy any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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