Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 7 September 2023 [1]

Joined Cases C-701/21 P and C-739/21 P

Mytilinaios AE – Omilos Epicheiriseon
v
Dimosia Epicheirisi Ilektrismou AE (DEI),
European Commission (C-701/21 P)
.....
and
.....
European Commission
v

Dimosia Epicheirisi Ilektrismou AE (DEI) (C-739/21 P)

(Appeal – State aid – Concept of 'aid' – Whether the measure is imputable to the State – Advantage – Private operator test – Arbitration award setting reduced electricity tariffs – Whether the arbitration award is imputable to the State – Regulation (EU) 2015/1589 – Article 4(2) – Decision that the measure does not constitute aid – Doubts or serious difficulties)

I. Introduction

1. By their appeals, Mytilinaios AE – Omilos Epicheiriseon (formerly Alouminion tis Ellados VEAE; 'Mytilinaios') (C-701/21 P) and the European Commission (C-739/21 P) seek annulment of the judgment of the General Court of the European Union of 22 September 2021, *DEI* v *Commission* [2] ('the judgment under appeal').

2. The present appeals provide the Court with an opportunity to clarify the scope of the review which the Commission is required to carry out, under the provisions of Article 108(3) TFEU and Article 24(2) of Regulation (EU) 2015/1589, [3] where an undertaking controlled by a Member State submits a dispute to commercial arbitration proceedings.

3. In the present case, the main difficulty consists in determining whether the Commission, for the purpose of ruling out the existence of State aid at the stage of the preliminary examination of a complaint brought before it, may confine itself to examining the terms of an arbitration

[1] Original language: French.

[2] T-639/14 RENV, T-352/15 and T-740/17, EU:T:2021:604.

[3] Council Regulation of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9).

agreement signed by a public undertaking,[4] in order to conclude that there was no advantage granted through State resources, or whether it is required to review also the content of the arbitration award to ensure that that award does not confer on the other party any advantage which departs from normal market conditions.

4. In the present case, the General Court ruled in favour of a wide-ranging assessment, holding that the Commission should have examined the arbitration award made in a dispute between the main electricity supplier in Greece, Dimosia Epicheirisi Ilektrismou AE ('DEI'), and its largest customer, Mytilinaios, concerning the tariffs to be applied to Mytilinaios.

5. In treating the arbitration tribunal in question in the present case, which is attached to the national regulatory authority for the energy market,[5] in the same way as an ordinary Greek court, the General Court held that the Commission erred in law in refusing to impute the arbitration award to the Greek State,[6] which should have led the Commission to review its content from the perspective of the grant of possible State aid.

6. In my view, that conclusion is based on an erroneous premiss. Like the appellants, I consider that the General Court erred in law in treating the arbitration tribunal in question in the same way a State body.

7. There are, however, cogent arguments in favour of retaining the solution adopted by the General Court, which appears to be the only solution capable of ensuring full compliance with Articles 107 and 108 TFEU in the context of arbitration proceedings involving public entities. Accordingly, I shall propose that the Court consider alternative grounds, which could replace the erroneous grounds relied on in the judgment under appeal.

II. Legal framework

8. Article 1(h) of Regulation 2015/1589 defines an 'interested party' as any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.

9. Article 4 of that regulation, entitled 'Preliminary examination of the notification and decisions of the Commission', provides:

'1. The Commission shall examine the notification as soon as it is received. Without prejudice to Article 10, the Commission shall take a decision pursuant to paragraphs 2, 3 or 4 of this Article.

2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

[4] By 'public undertaking', I mean an undertaking over which the public authorities may exercise directly or indirectly a dominant influence, within the meaning of Article 2(b) of Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ 2006 L 318, p. 17).

[5] Namely the permanent arbitration tribunal of the Rythmistiki Archi Energeias ('the RAE').

[6] The General Court wrongly set out the reasoning relating thereto in paragraphs 150 to 159 of the judgment under appeal in the context of the analysis of 'the existence of an economic advantage'. The question under consideration is whether the arbitration award is imputable to the Greek State.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the internal market of a notified measure, in so far as it falls within the scope of Article 107(1) TFEU, it shall decide that the measure is compatible with the internal market … The decision shall specify which exception under the [FEU Treaty] has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the internal market of a notified measure, it shall decide to initiate proceedings pursuant to Article 108(2) TFEU …

…'

10. Article 16 of the that regulation, entitled 'Recovery of aid', provides, in paragraphs 1 and 3 thereof:

'1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary … The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.

…

3. Without prejudice to any order of the Court of Justice of the European Union pursuant to Article 278 TFEU, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Union law.'

11. Article 24 of that regulation, entitled 'Rights of interested parties', provides in paragraph 2 thereof:

'Any interested party may submit a complaint to inform the Commission of any alleged unlawful aid or any alleged misuse of aid. …

…'

III. The background to the dispute, the decisions at issue and the procedure before the General Court

12. The background to the dispute and the procedure before the General Court are set out in paragraphs 1 to 53 of the judgment under appeal and may be summarised as follows.

13. Mytilinaios, a metallurgical undertaking, is the largest consumer of electricity in Greece.

14. DEI, established as a public limited company, is the main supplier of electricity in Greece. At the material time for the present proceedings, DEI was majority controlled by the Greek State and was under the supervision of the Ministry of the Environment, Energy and Climate Change. The institutional links between DEI and the Greek authorities resulted, in particular, in the appointment by the State of the majority of the members of the undertaking's board of directors.

15. On 4 August 2010, Mytilinaios and DEI signed a framework agreement concerning the electricity supply tariff to be applied during the period from 1 July 2010 to 31 December 2013 and the arrangements for the amicable settlement of a dispute relating to the debt of Mytilinaios which had accrued during the period between 1 July 2008 and 30 June 2010.

16. Having failed to reach agreement on the draft contract negotiated under the framework agreement, Mytilinaios and DEI entered into an arbitration agreement on 16 November 2011, by submitting their dispute to the RAE arbitration tribunal pursuant to Article 37 of the nomos 4001/2011, gia ti leitourgia Energeiakon Agoron Ilektrismou kai Fysikou Aeriou, gia Erevna, Paragogi kai diktya metaforas Ydrogonanthrakon kai alles rythmiseis (Law No 4001/2011 on the operation of the electricity and gas energy markets, research, production and hydrocarbon transport networks and other regulations). [7]

17. That arbitration tribunal settled the dispute by decision of 31 October 2013 ('the arbitration award'). The action brought by DEI against the arbitration award was dismissed by the Efeteio Athinon (Court of Appeal, Athens, Greece) by judgment of 18 February 2016.

18. On 23 December 2013, DEI lodged a complaint with the Commission, claiming that the electricity supply tariff set in the arbitration award was lower than the actual costs it was incurring and that the award therefore constituted alleged unlawful State aid.

19. By letter of 12 June 2014 ('the contested letter'), the Commission informed DEI that its complaint had been closed on the ground, first, that the Greek State had not been able to exercise a decisive influence on the content of the arbitration award, which was not imputable to it, and, secondly, that DEI's method for calculating actual costs deviated from the methodology adopted by the arbitration tribunal within the parameters set out in the arbitration agreement.

20. By application lodged at the Registry of the General Court on 22 August 2014, DEI brought an action, registered as Case T-639/14, seeking annulment of the contested letter. By order of 24 October 2014, the General Court granted a request for a stay of proceedings in order to allow the Commission to re-examine the issues raised in the application.

21. By decision of 25 March 2015 ('the first decision at issue'), intended to 'replace' the contested letter, the Commission confirmed its assessment concerning the absence of State aid in the present case, on the ground that the decision to submit the dispute to arbitration and the terms of the arbitration agreement concluded by DEI and Mytilinaios did not deviate from the practices of a prudent investor operating in a market economy.

22. By application lodged at the Registry of the General Court on 29 June 2015, DEI brought an action, registered as Case T-352/15, seeking annulment of the first decision at issue.

[7] FEK A' 179/22.8.2011.

23. By order of 9 February 2016,[8] the General Court decided that there was no longer any need to adjudicate in the action in Case T-639/14 on the ground, inter alia, that the first decision at issue had formally replaced the contested letter.

24. By judgment of 31 May 2017,[9] the Court of Justice set aside the order of the General Court of 9 February 2016 and referred the case back to the General Court. The Court of Justice held that, in adopting the first decision at issue, the Commission had not withdrawn the contested letter, but had merely confirmed it, with the result that the action in Case T-639/14 still had purpose.

25. By decision of 14 August 2017 ('the second decision at issue'), the Commission repealed and replaced the contested letter and the first decision at issue, while reiterating its conclusions regarding the absence of State aid in the present case. The reasons given in the second decision at issue were identical to those put forward in the first decision at issue.[10]

26. By application lodged at the Registry of the General Court on 3 November 2017, DEI brought an action, registered as Case T-740/17, seeking annulment of the second decision at issue.

27. By decision of the President of the Third Chamber (Extended Composition) of the General Court of 26 February 2020, Cases T-639/14 RENV, T-352/15 and T-740/17 were joined for the purposes of the oral part of the procedure and the decision which closes the proceedings, in accordance with Article 68 of the Rules of Procedure of the General Court.

IV. The judgment under appeal

28. By the judgment under appeal, the General Court annulled the contested letter and the decisions at issue.

29. The General Court first ruled on the action brought against the second decision at issue, in the light of its possible impact on the continued existence of the purpose of the proceedings and of DEI's interest in bringing proceedings in Cases T-639/14 RENV and T-352/15.

30. As regards the admissibility of the action in Case T-740/17, the General Court held, first, that the second decision at issue constituted a challengeable act producing legally binding effects on DEI, since, inter alia, the closure of the proceedings at the preliminary examination stage had prevented DEI from putting forward its arguments in the context of the formal investigation procedure and, secondly, that DEI had the status of 'interested party' within the meaning of Article 1(h) of Regulation 2015/1589, in view of the extensive wording of that provision.

31. In rejecting the plea of inadmissibility based on the principle *nemo auditur propriam turpitudinem allegans potest*, raised by the Commission in the light of the fact that DEI contested the outcome of the arbitration procedure to which it had freely agreed, the General Court held that such a plea was based on an erroneous confusion between the Greek State and DEI, leading to the imputation to DEI of the alleged satisfaction of the Greek authorities with the outcome of the arbitration.[11]

8 Order in *DEI* v *Commission* (T-639/14, not published, EU:T:2016:77).

9 Judgment in *DEI* v *Commission* (C-228/16 P, EU:C:2017:409).

10 Paragraphs 37 to 48 of the second decision at issue.

11 Paragraphs 89 and 91 of the judgment under appeal.

32. Ruling on the substance in Case T-740/17, the General Court confirmed that the complaints alleging that the Commission had failed to examine the content of the arbitration award from the perspective of the possible grant of State aid were well founded. Relying on the case-law of the Court of Justice,[12] according to which an advantage granted by a national court to a party to a dispute may constitute the grant of State aid, the General Court drew a parallel between the activities of the RAE permanent arbitration tribunal and those of the ordinary Greek courts,[13] and inferred therefrom that the Commission was required to verify the content of the arbitration award.

33. As regards the argument relating to the existence of a possible advantage and the scope of the review to be carried out by the Commission in that regard, the General Court held that, in the circumstances of the present case, the Commission should have carried out complex economic and technical assessments before ruling out any serious doubts as to the absence of State aid at the preliminary examination stage.

34. According to the General Court, the Commission should have had doubts concerning, in particular, the following factors:[14]

– the characterisation of DEI's costs by reason of its status as a vertically integrated undertaking, the consolidated balance sheet of which is based on an internal accounting transfer of financial flows between its supply and production entries;

– the alleged need to establish DEI's actual costs on an annual rather than an hourly basis by taking account, in particular, of the variable and fixed total costs of all of the power plants available to it;

– the relevance of the choice between, on the one hand, the tariff based on the marginal price of the system and on the time-weighted average, leading to a 'horizontal distribution tariff', and, on the other hand, the tariff which is based on the fixed and variable costs of DEI's lignite-fired power stations, thus on the minimum long-term cost for each consumer;

– the link between those proposed tariffs and the need to cover DEI's actual (variable and fixed) costs and its impact on the tariffs to be charged to the different consumption profiles, either base load, like Mytilinaios', or peak load or high;

– the potential impact of the choice of pricing method on competition in the Greek energy market; and

– the alleged insufficiency of the information provided by DEI in order to establish its actual costs, in particular those relating to the operation of its lignite-fired power stations.

35. Consequently, the General Court upheld the action in Case T-740/17 and annulled the second decision at issue.

36. Secondly, since the grounds underlying the two decisions at issue were identical, the General Court upheld the action brought against the first decision at issue in Case T-352/15.

12 Paragraph 147 of the judgment under appeal.

13 Paragraphs 150 to 159 of the judgment under appeal.

14 Paragraph 188 of the judgment under appeal.

37. Thirdly, in upholding the action in Case T-639/14 RENV, the General Court annulled the contested letter on the ground, inter alia, that the arbitration award, which produces legal effects comparable to those of the judgments of an ordinary Greek court, constituted an act of public authority attributable to the Greek State. [15]

V. Procedure before the Court of Justice and forms of order sought

38. By its appeal in Case C-701/21 P, Mytilinaios claims that the Court of Justice should set aside the judgment under appeal and, in so far as necessary, refer the case back to the General Court, as well as order DEI to pay the costs.

39. The Commission endorses Mytilinaios' claims.

40. DEI contends that the Court of Justice should dismiss the appeal in its entirety, give final judgment in the present proceedings and order Mytilinaios to pay all DEI's costs in the present proceedings and in the proceedings in Joined Cases T-639/14 RENV, T-352/15 and T-740/17.

41. By its appeal in Case C-739/21 P, the Commission asks the Court to set aside the judgment under appeal; give final judgment on the action in Case T-740/17 and dismiss it; declare that the actions in Cases T-639/14 RENV and T-352/15 have become devoid of purpose and that there is no longer any need to adjudicate; and order DEI to pay the costs.

42. In the alternative, the Commission asks the Court to set aside the judgment under appeal; give final judgment on certain pleas in law in the action in Case T-740/17 and refer that case back to the General Court for judgment on the remaining pleas in law; declare that the actions in Cases T-639/14 RENV and T-352/15 have become devoid of purpose and that there is no longer any need to adjudicate; and order DEI to pay the costs.

43. Mytilinaios asks the Court to set aside the judgment under appeal; give final judgment on the action in Case T-740/17 and dismiss it; declare that the actions in Cases T-639/14 RENV and T-352/15 have become devoid of purpose and that there is no longer any need to adjudicate; and order DEI to pay the costs.

44. DEI contends that the Court should dismiss the appeal in its entirety as inadmissible and, in the alternative, as unfounded, and order the Commission to pay all DEI's costs in the present proceedings and in the proceedings in Joined Cases T-639/14 RENV, T-352/15 and T-740/17.

45. In the alternative, DEI contends that the Court should give final judgment on the actions in Cases T-639/14 RENV, T-352/15 and T-740/17, and dismiss the Commission's application for a declaration that there is no need to adjudicate in Cases T-639/14 RENV and T-352/15.

46. By decision of the general meeting of 28 February 2023, Cases C-701/21 P and C-739/21 P were joined for the purposes of the oral part of the procedure and the final judgment.

47. By decision of the President of the Court of 7 April 2023, the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by the Commission.

[15] Paragraphs 230 to 233 of the judgment under appeal.

48. At the hearing held on 27 April 2023, oral argument was presented by Mytilinaios, DEI, the Commission and the Federal Republic of Germany.

VI. Assessment

49. With the exception of part of the first limb of the third ground of appeal raised in Case C-701/21 P,[16] the admissibility of the present appeals does not appear to me to give rise to doubts. I therefore propose to examine in turn the merits of the three grounds of appeal raised by Mytilinaios in this case.

50. In so far as the second limb of the second ground of appeal raised by Mytilinaios in Case C-701/21 P corresponds, in essence, to the single complaint raised by the Commission in Case C-739/21 P, I shall analyse them together.

A. The first ground of appeal raised in Case C-701/21 P

51. The first ground of appeal comprises two limbs.

52. By the first limb of the first ground of appeal, Mytilinaios submits that the General Court failed to respond to the pleas of inadmissibility based on the principles *nemo auditur propriam turpitudinem allegans potest* and *nemo potest venire contra factum proprium*, raised in the light of the fact that, by its action, DEI sought to contest the outcome of the arbitration procedure to which it had freely agreed, and the parameters of which had been determined by mutual agreement between the parties to the dispute.

53. By the second limb of its first ground of appeal, Mytilinaios complains that its objections relating to the principle *nemo potest venire contra factum proprium* were rejected by the General Court in erroneous reasoning set out in paragraph 91 of the judgment under appeal.

54. Apart from the fact that the complaint alleging a failure to state reasons runs counter to the second limb of the first ground of appeal, it should be noted that the General Court, in paragraph 91 of the judgment under appeal, in referring to DEI's interest in bringing proceedings,[17] held that the argument based on the principle *nemo propriam turpitudinem* 'is merely a further variant of the argument intended to conflate the applicant's situation with that of the Greek State and to attribute to it any satisfaction on the part of the Greek authorities with the outcome of the arbitration procedure; it cannot therefore be upheld either'. The General Court therefore gave reasons for its position, albeit succinctly.

55. I wonder, however, whether that reasoning is sufficient and whether it can be regarded as well founded in the light of the facts of the present case. Those questions fall within the scope of the second limb of the first ground of appeal.

56. In my view, the reasoning in paragraph 91 of the judgment under appeal is based on a premiss which has not been clearly articulated, namely that the decision to have recourse to arbitration had to be imputed to the Greek State, whereas the complaint before the Commission was at the exclusive initiative of DEI, which was able to rely before the General Court on its own interest in

[16] See points 114 and 115 of this Opinion.

[17] Paragraphs 86 to 89 of the judgment under appeal.

bringing proceedings, separate from the interest of that Member State. Only such a reading of the contested reasoning makes it possible to provide a response to the complaint raised by Mytilinaios, alleging the contradictory and unfair nature of the actions taken by one and the same party, namely DEI, that is to say, initiating the arbitration proceedings and then contesting their outcome before the Commission.

57. However, even if the decision to have recourse to arbitration could indeed be imputed to the Greek authorities – which should have been established in the light of all the facts of the present case, [18] having regard, in particular, to the State's majority holding in DEI's share capital and the close institutional links between the Greek Government and the management of the undertaking – the General Court did not explain why the position is different with respect to the decision to challenge the arbitration award by means of a complaint before the Commission, which the General Court imputed solely to DEI in its capacity as an interested party separate from the State.

58. I therefore consider that the General Court has not addressed to the requisite legal standard the plea of inadmissibility raised by Mytilinaios.

59. I wonder, however, whether that plea is effective in the light of the logic underlying EU law on State aid, in particular in the context of the obligations on Member States under the applicable rules on the recovery of unlawful aid.

60. The logic inherent in the review carried out by the Commission in that context is to give full effect to the provisions of Articles 107 and 108 TFEU, irrespective of the contradictory nature of the conduct of the Member State from which the aid measure originates. The effectiveness of that review would be compromised if the State authorities did not have the possibility of drawing the Commission's and, where appropriate, the General Court's attention to the potentially anticompetitive effects of their previous decisions.

61. In that regard, I would point out that the recovery of unlawful aid must be effected without delay by the Member State concerned, in accordance with the procedures laid down by national law and, in particular, by bringing the matter before the national courts, without prejudice to any order which may be made by the Court pursuant to Article 278 TFEU. [19] In those circumstances, it is difficult to accept that a plea of inadmissibility, such as that raised in the present case before the General Court, could prevent proceedings seeking a finding of unlawful State aid from being brought before the Courts of the European Union.

62. Moreover, in the event of infringement of the obligation to suspend the relevant measure provided for in Article 108(3) TFEU, a Member State whose authorities have granted aid contrary to the procedural rules laid down by the FEU Treaty may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the

[18] In accordance with the Court's case-law on State aid, 'the mere fact that a public undertaking is under State control is not sufficient for measures taken by that undertaking, … to be imputed to the State. It is also necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures. On that point, it cannot be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question. … Having regard to the fact that relations between the State and public undertakings are close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent way and in breach of the rules on State aid laid down by the Treaty. …. For those reasons, it must be accepted that the imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the circumstances of the case and the context in which that measure was taken'. See judgment of 16 May 2002, *France* v *Commission* (C-482/99, EU:C:2002:294, paragraphs 52 to 55).

[19] Article 16(3) of Regulation 2015/1589.

steps necessary to implement a Commission decision instructing it to recover the aid.[20] If it could do so, Articles 107 and 108 TFEU would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive decisions taken by the Commission under provisions of the Treaty of their effectiveness.[21]

63. I consider that the rules referred to in the previous paragraphs are relevant for the purposes of assessing the effectiveness of the plea of inadmissibility raised in the present case before the General Court, in so far as, inter alia, the complaints based on the principles *nemo propriam turpitudinem* and *venire contra factum proprium* constitute a variant of the line of argument based on the principle of legitimate expectations.

64. In the light of the Commission's exclusive powers to assess the existence and compatibility of aid with the internal market, a Member State concerned – in the same way as an 'interested party' within the meaning of Article 1(h) of Regulation 2015/1589, provided that it is substantially affected by the Commission decision finding that there is no aid –[22] must be able to challenge before the EU Courts the Commission's decisions refusing to initiate the formal investigation procedure, without the possibility of a plea of inadmissibility based on that Member State's previous conduct being relied on against it.

65. To uphold such a plea would undermine the rules on State aid, in so far as the national authorities and, where appropriate, interested parties such as DEI, could have their own unlawful conduct held against them, with the result that the EU Courts would be prevented from reviewing Commission decisions finding that there was no aid at the preliminary examination stage.

66. Such a possibility would weaken not only the effectiveness of the provisions of the FEU Treaty, but also that of Article 24(2) of Regulation 2015/1589, in so far as the possibility of lodging a complaint, provided for in that provision, necessarily has as its corollary the possibility of bringing an action before the General Court seeking to establish the existence of aid when the Commission finds that there is no aid.[23]

[20] According to settled case-law, solely the undertakings which are recipients of aid, and only in exceptional circumstances, may effectively oppose the recovery of unlawful aid by relying on a legitimate expectation on their part. See judgments of 24 November 1987, *RSV* v *Commission* (223/85, EU:C:1987:502, paragraph 17), and of 29 April 2004, *Italy* v *Commission* (C-298/00 P, EU:C:2004:240, paragraph 90). However, the legitimate expectation relied on in such a case can arise only from the conduct of the Commission itself, in the light of its exclusive competence to assess the compatibility of aid with the internal market. The conduct of parties other than the Commission, such as the conduct of the authorities of the Member State concerned, is irrelevant in that regard. See judgment of 15 November 2018, *Deutsche Telekom* v *Commission* (T-207/10, EU:T:2018:786, paragraphs 69 to 71). I would add that the assessment of any exceptional circumstances carried out in that context is a matter relating to the substance of the case and should not preclude the admissibility of an action before the General Court seeking a finding of State aid.

[21] See, inter alia, judgments of 20 September 1990, *Commission* v *Germany* (C-5/89, EU:C:1990:320, paragraph 17), and of 7 March 2002, *Italy* v *Commission* (C-310/99, EU:C:2002:143, paragraph 104).

[22] Judgment of 11 September 2008, *Germany and Others* v *Kronofrance* (C-75/05 P and C-80/05 P, EU:C:2008:482, paragraph 40 and the case-law cited).

[23] Provided that the interested party is substantially affected by the Commission decision finding that there is no aid (see point 64 of this Opinion).

67. It follows that the complaints based on DEI's conduct prior to the action for annulment being brought before the General Court cannot succeed, even if well founded. [24]

68. I therefore propose that the Court replace the General Court's erroneous reasoning in paragraph 91 of the judgment under appeal with a ground to the effect that the plea of inadmissibility raised before the General Court is ineffective. [25]

69. I therefore propose that both limbs of the first ground of appeal raised by Mytilinaios in Case C-701/21 P be rejected.

B. The second ground of appeal raised in Case C-701/21 P

70. The second ground of appeal raised by Mytilinaios, alleging infringement of Article 107(2) TFEU, comprises two limbs.

1. The first limb of the second ground of appeal

71. By the first limb of the second ground of appeal, Mytilinaios submits that the General Court erred in law in its interpretation of the private operator in a market economy test which is used to examine the existence of an advantage, in that the General Court limited the application of that test to an analysis solely of the tariff set in the arbitration award.

72. According to Mytilinaios, that 'extremely restrictive' interpretation led the General Court to reach a finding of the existence of aid, without, however, assessing all the relevant facts of the case, including the circumstances which led the parties to submit the dispute to arbitration and the technical parameters for settling the dispute set out in the arbitration agreement.

73. I consider that the first limb of the second ground of appeal has no factual basis.

74. First, the General Court did not reach a finding of the existence of aid in the judgment under appeal, but merely held that the Commission ought to have encountered serious difficulties in assessing the existence of an advantage at the preliminary examination stage. [26]

[24] The Opinion of Advocate General Kokott in *Residex Capital IV* (C-275/10, EU:C:2011:354, point 80) seems to support my assessment. In that case, the Municipality of Rotterdam (Netherlands) sought to claim that a guarantee which it had provided for the benefit of an undertaking was null and void, on the ground that it was allegedly unlawful under the rules on State aid established by the FEU Treaty. In assessing, in that context, the merits of a plea based on the principles *venire contra factum proprium* and *nemo propriam turpitudinem*, raised in that case against the Municipality of Rotterdam, Advocate General Kokott considered that its application 'would be the antithesis of the protective purpose of European competition law in general and of the third sentence of Article 108(3) TFEU in particular … A public authority must be able to present the defence in court that the advantage or the payment required of it by an undertaking would infringe competition rules under EU law. … Conversely, it is recognised that an undertaking may also claim in judicial proceedings that a payment demanded of it is incompatible with competition law'. As an extension to that reasoning, I consider that a public undertaking, such as DEI, which seeks to establish the existence of State aid which may have been granted through it, must be entitled to bring its dispute before the EU Courts, irrespective of its previous conduct, even if that conduct was unlawful.

[25] It must be recalled that, if the grounds of a decision of the General Court reveal an infringement of EU law but the operative part of the judgment can be seen to be well founded on other legal grounds, that infringement is not capable of leading to the annulment of that decision and a substitution of grounds must be made (judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission, Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci*, C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 48 and the case-law cited).

[26] Paragraphs 190 and 191 of the judgment under appeal.

75. Secondly, in applying the private operator test, the General Court did not disregard the facts of the case preceding the arbitration award,[27] but confined itself to finding that the assessment made by the Commission was incomplete from the perspective of the existence of an advantage and should have taken into account the tariff conditions set as a result of the arbitration.[28]

76. I therefore consider that the first limb of the second ground of appeal should be rejected.

2. The second limb of the second ground of appeal

77. By the second limb of the second ground of appeal,[29] Mytilinaios and the Commission argue that the consequences of the arbitration proceedings cannot be imputed to the Greek State, which was the result of the General Court treating the RAE permanent arbitration tribunal in the same way as an ordinary State court.[30]

78. The reasoning followed by the General Court is based on the case-law of the Court of Justice, recalled in paragraph 147 of the judgment under appeal, according to which a national court is liable to disregard its obligations under the FEU Treaty by perpetuating or even triggering the granting of unlawful aid.[31]

79. By treating the RAE permanent arbitration tribunal in the same way a State court, the General Court found that the arbitration award made in this case was capable of conferring on Mytilinaios an unlawful advantage imputable to the Greek State.

80. The merits of that reasoning must be assessed in the light of the judgment in *DOBELES HES*,[32] delivered on 12 January 2023, that is to say, after the judgment under appeal, in which the Court of Justice, sitting as the Grand Chamber, held that the establishment of State aid cannot result from a judicial decision.[33]

81. The Commission argued at the hearing that the effect of the judgment in *Dobeles* was to invalidate the reasoning adopted by the General Court, in so far as the treatment of the RAE permanent arbitration tribunal in the same as an ordinary court, even if it were established, could not lead to any advantage granted to Mytilinaios by the arbitration award being imputed to the Greek State.

[27] The General Court took into account special circumstances, relating inter alia to the imprecise nature of the wording of the arbitration agreement and of the pricing parameters used therein, holding that they should have led the Commission to examine 'diligently, sufficiently and comprehensively' the existence of a possible advantage granted to Mytilinaios by the arbitration award (paragraphs 167 to 170 of the judgment under appeal).

[28] Paragraphs 142 and 185 of the judgment under appeal.

[29] I would point out that the second limb of that second ground of appeal is the same as the single ground of appeal raised by the Commission in Case C-739/21 P. The following assessment therefore also concerns the latter ground of appeal.

[30] Paragraphs 150 to 159 of the judgment under appeal.

[31] Judgments of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraphs 61 to 63); of 11 November 2015, *Klausner Holz Niedersachsen* (C-505/14, EU:C:2015:742, paragraphs 41 to 45); of 26 October 2016, *DEI and Commission* v *Alouminion tis Ellados* (C-590/14 P, EU:C:2016:797, paragraphs 107 and 108); and of 4 March 2020, *Buonotourist* v *Commission* (C-586/18 P, EU:C:2020:152, paragraphs 94 and 95).

[32] Judgment of 12 January 2023 (C-702/20 and C-17/21, 'the judgment in *Dobeles*', EU:C:2023:1).

[33] Paragraph 76 of the judgment in *Dobeles*.

82. Such a conclusion appears hasty to me. In my view, in the judgment in *Dobeles*, the Court of Justice ruled out only the possibility that State aid could be imputed to a judicial body, but did not rule out the possibility that the anticompetitive effects of a judicial decision granting aid could be imputed to the State itself.

83. First, therefore, I consider it necessary to assess any consequences of the judgment in *Dobeles* on the possibility of imputing to the Greek State the outcome of the arbitration proceedings in the present case.

84. Secondly, I shall examine the appellants' complaints alleging an error of law resulting from the treatment of the RAE arbitration tribunal in the same way as a State court.

85. Thirdly, since the complaints in question do not appear to me to be entirely unfounded, I shall propose that the Court consider alternative grounds, which could be substituted for the grounds given in the judgment under appeal. Indeed, I consider that there are cogent arguments, relating to the need to ensure the effectiveness of the provisions of Articles 107 and 108 TFEU, for retaining the solution adopted by the General Court in the judgment under appeal.

(a) The consequences of the judgment in Dobeles

86. In the case giving rise to the judgment in *Dobeles*, one of the questions referred [34] related to whether a legal action for payment of an unreceived portion of an advantage introduced by national legislation, which constitutes State aid within the meaning of Article 107(1) TFEU, could be regarded as a request for the grant of new aid, separate from the aid already paid to the applicants.

87. It is in that specific context, in which the national court was called upon to rule pursuant to a law introducing the advantage in question, that it is necessary to read the Court of Justice's finding that the sums awarded to the applicants by the courts 'cannot in any event be regarded as constituting State aid distinct from that advantage', [35] since 'the establishment as such of State aid cannot result from a judicial decision'. [36]

88. In that regard, the Court's reasoning in the judgment in *Dobeles* reflects the traditional approach to the separation of powers, which limits the role of the courts to the application of pre-existing rules of law. In the light of that traditional approach, a judicial decision granting an advantage incompatible with the internal market is necessarily based on an earlier rule, which constitutes the legal basis for the claim brought before the court in question. From that point of view, as the Court stated, aid can under no circumstances be introduced as a result of the judgment itself.

89. However, the question of the legal basis for the aid, which was settled by the Court in the judgment in *Dobeles*, does not preclude any State liability for the implementation, by the courts, of national legislation [37] granting aid which is incompatible with the internal market. On the

[34] That is to say, the fourth of the 13 questions referred to the Court for a preliminary ruling in that case.

[35] Paragraph 78 of the judgment in *Dobeles*.

[36] Paragraph 76 of the judgment in *Dobeles*.

[37] The same would apply in the case of the performance of contractual obligations.

contrary, in so far as judicial decisions are necessarily based on State legislation, the State cannot avoid its obligations under Articles 107 and 108 TFEU by delegating to its judicial bodies the power to determine the manner in which it will dispose of its resources.

90. In that regard, it is irrelevant whether the judgment granting the advantage in question is based on the application of a specific substantive rule or a general principle of law, or even a discretionary assessment made by the court within the limits of the rules which determine the scope of its jurisdiction. In all these cases, a court decision remains imputable to the State.

91. I therefore consider that the judgment in *Dobeles* does not have the scope attributed to it by the Commission, in so far as the latter argues that the treatment of the arbitration tribunal in the same way as the ordinary Greek courts cannot lead to the consequences of the arbitration proceedings being imputed to the Greek State.

92. However, like the appellants, I harbour doubts as to whether that tribunal is a court or tribunal of the State.

(b) The treatment of the RAE arbitration tribunal as a State court or tribunal

93. In treating the RAE arbitration tribunal in the same way as a State court, the General Court based its reasoning on a number of factors, namely the function of the RAE tribunal, which is identical to that of the ordinary courts; the requirements of independence and impartiality imposed on its arbitrators; the application of the Greek Code of Civil Procedure to proceedings before that tribunal; the fact that its decisions have the force of *res judicata* and are enforceable; and, lastly, the possibility of appealing against the arbitration award before the Efeteio Athinon (Court of Appeal, Athens).[38]

94. In my view, none of those factors justifies such treatment of that tribunal.

95. First, the circumstances considered by the General Court do not make it possible to distinguish the arbitration of the RAE from any other commercial arbitration. Arbitration tribunals often rule in accordance with a procedure laid down by law and deliver binding decisions which are subject to appeal before the State courts. Moreover, the requirements of independence and impartiality are generally recognised as inherent in any arbitration proceedings. Application of the criteria adopted by the General Court could therefore lead to a large number of arbitration tribunals being attached to the State, which I do not consider feasible.

96. Secondly, as the Commission has rightly noted, treating the RAE arbitration tribunal in the same way as a State court runs counter to the case-law of the Court of Justice relating to Article 267 TFEU. It follows from that case-law that arbitration tribunals whose jurisdiction is optional, in that it depends on the prior agreement of both parties,[39] are not courts or tribunals of the Member States for the purposes of the second paragraph of Article 267 TFEU.[40]

[38] Paragraphs 153 to 157 of the judgment under appeal.

[39] That optional nature distinguishes the permanent arbitration tribunal of the RAE from a 'semi-optional' arbitral body, to which a matter may be referred at the initiative of a single party to the dispute, allowing, under certain conditions, such a body to be treated in the same way as a State court in the context of the application of Article 267 TFEU. See judgment of 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* (C-377/13, EU:C:2014:1754, paragraphs 27 to 29), and my Opinion in that case (C-377/13, EU:C:2014:246, points 38 to 40).

[40] Judgments of 23 March 1982, *Nordsee* (102/81, EU:C:1982:107, paragraphs 10 to 12), and of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 34).

97. The Court thus held that the circumstances that there are certain similarities between the activities of an arbitration tribunal and those of an ordinary court or tribunal inasmuch as the arbitration is provided for within the framework of the law, the arbitrator must decide according to the law and his or her award has the force of *res judicata* and may be enforceable are not sufficient to give such a tribunal the status of a 'court or tribunal of a Member State', particularly in view of the fact that the parties are under no obligation to refer their dispute to arbitration. [41]

98. In the light of the foregoing considerations, I am of the view that the ground relied on by the General Court in paragraphs 150 to 159 of the judgment under appeal is vitiated by an error of law. However, I am of the view that that error does not preclude the possibility of imputing the consequences of the arbitration in question to the Greek State.

(c) Imputation of the outcome of the arbitration proceedings to the Greek State

99. Like the reasoning of the General Court, the pleadings and submissions of the parties focused largely on the question whether the RAE permanent arbitration tribunal is a State body. That question does not, however, seem to me to be decisive in the light of what is, in my view, the essential issue in the present appeals.

100. In that regard, I would point out that the condition that there must be intervention by the State or through State resources, laid down in Article 107(1) TFEU, is satisfied not only where aid is granted directly by the State but also where it is granted by public or private bodies established or designated by the State with a view to administering the aid. [42] In accordance with settled case-law, it follows that it is not appropriate to distinguish cases in which aid is granted directly by the State from those in which it is granted by a public or private body, [43] since the status of such a body is not regarded as a determining factor for the application of the rules of the FEU Treaty on State aid. [44]

101. I therefore consider that the question which arises in the present cases is to determine not whether the RAE arbitration tribunal is actually akin to a State court, but whether a public undertaking, such as DEI, can avoid application of the provisions of Articles 107 and 108 TFEU by submitting to arbitration a dispute which involves the allocation of State resources.

102. In my opinion, the answer to that question is undoubtedly in the negative.

41 Judgment of 23 March 1982, *Nordsee* (102/81, EU:C:1982:107, paragraphs 10 and 11).

42 Judgment of 13 September 2017, *ENEA* (C-329/15, EU:C:2017:671, paragraph 23 and the case-law cited).

43 Opinion of Advocate General Saugmandsgaard Øe in *ENEA* (C-329/15, EU:C:2017:233, point 67 and the case-law cited).

44 Judgment of 20 September 2007, *Salvat père & fils and Others* v *Commission* (T-136/05, EU:T:2007:295, paragraph 139).

103. Irrespective of whether the arbitration organised under the auspices of the RAE was of a State or private nature, it must be noted that DEI, which, in view of its close organic and capital links with the Greek State, was under *the dominant influence of that Member State*,[45] enjoyed a right, *provided for by Greek legislation*, to use an alternative means of dispute resolution. In the circumstances of the present case, the decision to submit the dispute to arbitration and the legal effects attaching to the arbitration award can be imputed to the Greek State.

104. However, unlike the Commission, I do not believe that the terms of the arbitration agreement determine, in such a case, the limits of the examination which the Commission must carry out as regards the existence of a possible advantage which can be imputed to the State. The decision to have recourse to arbitration involves not only the arrangements for settling the dispute, but also an element of litigation risk, linked to the possibility of a solution to the dispute which does not correspond to the parties' expectations, or is even contrary to the terms of the agreement, and the implementation of which could give rise to the granting of an unlawful advantage through State resources.

105. It is true that an element of uncertainty also characterises traditional court proceedings, but this is all the more important because arbitration tribunals operate outside the State judicial system and the guarantees inherent therein. The experiences of Member States with commercial arbitration also show that the risks associated with it are not purely hypothetical.[46]

106. I therefore consider that, in having recourse to arbitration, a public undertaking must accept the probability, however small, of being required to dispose of its resources in a manner which departs from normal market conditions. From that point of view, even assuming that an arbitration tribunal cannot be linked to the State, the situation is different with respect to the litigation risk associated with the decision to submit the dispute to arbitration and any advantage which may be conferred on the other party to the dispute pursuant to the arbitration award.

107. In the event that such a risk materialises – as DEI alleges in the present case, arguing that the pricing set in the arbitration award does not comply with the terms of the agreement – the fact that it was not a State court but an arbitration tribunal which was called upon to rule on the dispute does not seem to me to release the State from its obligations under Articles 107 and 108 TFEU. In recognising the binding nature of arbitration awards, the State remains responsible for the measures necessary for compliance which it will be required to take as a result of the arbitration.

[45] I would recall that, at the material time, the Greek State held a majority of DEI's share capital and a majority of the votes on its board of directors. Among the indicators which make it possible to impute to the State the measures taken by public undertakings, account must be taken, in particular, of the presence of factors of an organic nature linking the public undertaking to the State, the degree of supervision that the public authorities exercise over the management of the undertaking, the fact that the undertaking in question could not take the measure in question without taking account of the requirements of the public authorities, and any other factor showing the involvement of the public authorities in adopting the measure in question or the unlikelihood of their not being involved, taking account of the scope of the measure, its content or the conditions it contains. See Commission Notice on the notion of State aid as referred to in Article 107(1) [TFEU] (OJ 2016 C 262, p. 1, paragraphs 39 to 43). I would also recall that, under the provisions of Article 2(b) of Directive 2006/111, a dominant influence on the part of the public authorities is to be presumed when these authorities hold the major part of the undertaking's subscribed capital or can appoint more than half of the members of the undertaking's administrative, managerial or supervisory body.

[46] To illustrate that point, I shall confine myself to recalling the *Tapie* v *Crédit Lyonnais* case, between a well-known businessman and a French public bank. Following the arbitration award made in that case – by which the businessman was awarded EUR 45 million for non-material damage and EU 358 million for material damage – a former minister, in her capacity as the supervisory authority of the bank concerned, was convicted by the Cour de justice de la République française (Court of Justice of the Republic, France) of negligence leading to the misappropriation of public funds. The negligence attributed to the minister was not due to the actual decision to have recourse to arbitration – which could be justified in the light of the circumstances of the case – but to her failure to challenge the arbitration award before the State courts, which had prevented the discovery of a potentially fraudulent modification of the terms of the arbitration agreement, made after it had been validated by the public authorities.

108. That conclusion seems to me to be supported by the Court's case-law relating to arbitration in the context of a bilateral investment treaty, in so far as the international nature of tribunals active in that field does not prevent the effects of their decisions, in the form of the granting of possible aid, from being imputed to Member States. [47]

109. In that regard, I do not agree with the arguments of the parties to the appeal and the German Government, which emphasised the need to distinguish investment arbitration from commercial arbitration as regards the imputability of any State aid. In deciding to ratify an investment treaty, and in signing an arbitration agreement, a State must assume the risk that the effects of future awards made on that basis may be imputed to it. If the possibility of delegating the settlement of a dispute to a non-State body made it impossible to impute responsibility to the State, this would create a blind spot in the system of control of advantages granted through State resources. In view of the importance of the issues associated with arbitration proceedings involving public entities, such a situation would considerably weaken the effectiveness of the relevant provisions of the FEU Treaty.

110. In the light of the foregoing considerations, I consider that the erroneous grounds adopted by the General Court in paragraphs 150 to 159 of the judgment under appeal should be replaced by reasoning based on the need to impute to the Greek State the legally binding outcome of the arbitration procedure to which that Member State had recourse through DEI, by assuming the associated litigation risk.

111. I therefore propose that the second limb of the second ground of appeal in Case C-701/21 P and the single ground of appeal in Case C-739/21 P be rejected.

C. The third ground of appeal raised in Case C-701/21 P

112. The third ground of appeal raised by Mytilinaios, alleging infringement of Article 4 of Regulation 2015/1589, also comprises two limbs.

113. By the first limb of its third ground of appeal, Mytilinaios argues, first, that the General Court erred in law in holding that the Commission was required to examine the content of the arbitration award [48] and, secondly, that the General Court was wrong to hold that the Commission should have made complex economic and technical assessments in order to be able to rule out the existence of aid at the preliminary examination stage. [49]

114. For the reasons set out in the assessment of the second limb of the second ground of appeal, relating to the imputability of the outcome of the arbitration procedure to the Greek State, I consider that the first part of the first limb of the third ground of appeal is unfounded. I am therefore of the view that it should be rejected.

115. By the second part of the first limb of this ground of appeal, Mytilinaios appears, in essence, to challenge all the factual assessments made by the General Court, in paragraphs 167 to 188 of the judgment under appeal, concerning the imprecise nature of the terms of the arbitration agreement, the production and consumption profile of Mytilinaios and the particular features of

[47] See judgment of 25 January 2022, *Commission* v *European Food and Others* (C-638/19 P, EU:C:2022:50), and my Opinion in that case (C-638/19 P, EU:C:2021:529, points 124 to 135).

[48] Paragraph 164 of the judgment under appeal.

[49] Paragraphs 167 to 189 of the judgment under appeal.

its commercial relationship with DEI. In so far as the General Court did not consider that the Commission was under a general obligation to carry out a complex assessment at the preliminary examination stage, but confined itself to concluding that such an assessment was necessary in the light of the *special circumstances of the present case*, I am of the view that that complaint concerns a question not of law but of fact.

116. Accordingly, I consider that the second part of the first limb of the third ground of appeal is inadmissible and should be rejected.

117. By the second limb of the third ground of appeal, Mytilinaios complains that the General Court reversed the burden of proof relating to the existence of serious difficulties or doubts justifying the initiation of the formal investigation procedure by the Commission. According to Mytilinaios, the General Court thereby relieved DEI of the obligation to establish that the examination carried out by the Commission during the preliminary examination procedure was insufficient or incomplete.

118. In support of its claim, Mytilinaios refers, in particular, to paragraph 167 of the judgment under appeal, in which the General Court held that the special circumstances of the present case should have led the Commission to examine 'diligently, sufficiently and comprehensively', all the relevant circumstances of the case from the perspective of the existence of aid.

119. However, a clear distinction must be drawn between the obligations imposed on the Commission at the stage of investigating a complaint, referred to in paragraph 167 of the judgment under appeal, and the obligations relating to evidence imposed on an applicant at the stage of the action before the General Court.

120. As regards the latter obligations, it does not appear that the General Court relieved DEI of the obligation to adduce evidence in support of its application for annulment, in particular in so far as the General Court expressly refers to the circumstances put forward by DEI, which, in its view, were such as to justify the doubts which the Commission should have entertained at the stage of the preliminary examination of DEI's complaint. [50]

121. I am therefore of the view that the second limb of the third ground of appeal is unfounded and, consequently, that the third ground of appeal in Case C-701/21 P must be rejected in its entirety.

VII. Conclusion

122. In the light of all the foregoing considerations, I propose that the Court:

– dismiss the appeal in Case C-701/21 P;

– dismiss the appeal in Case C-739/21 P.

[50] See the summary of the complaints set out in paragraphs 120 and 124 of the judgment under appeal, referred to by the General Court in the assessment set out in paragraphs 167 to 189 of that judgment.