Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 18 January 2017 [1]

Case C-467/15 P

European Commission
v

Italian Republic

(Appeal — State aid — Aid granted by the Italian Republic to milk producers — Aid scheme linked to the reimbursement of the milk levy aid — Conditional decision adopted by the Council pursuant to the third subparagraph of Article 108(2) TFEU — Failure to comply with the conditions for authorisation — Existing aid — New aid — Alteration to existing aid)

1. By this appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 24 June 2015, *Italy* v *Commission* (T-527/13, EU:T:2015:429) ('the judgment under appeal'), by which the General Court partially annulled Commission Decision 2013/665/EU [2] and dismissed the action as to the remainder.

I – Legal context

A – Regulation (EC) No 659/1999

2. In Article 1(c) of Regulation No 659/1999, [3] 'new aid' is defined as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

3. Article 1(g) of that regulation defines 'misuse of aid' as 'aid used by the beneficiary in contravention of [the approval] decision'.

1 Original language: French.

2 Decision of 17 July 2013 on State aid SA.33726 (11/C) [ex SA.33726 (11/NN)] granted by Italy (deferral of payment of the milk levy in Italy) (OJ 2013 L 309, p. 40) ('the decision at issue').

3 Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1).

B – Regulation (EC) No 794/2004

4. Article 4(1) of Regulation (EC) No 794/2004[4] states as follows:

'For the purposes of Article 1(c) of Regulation (EC) No 659/1999, an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market. However an increase in the original budget of an existing aid scheme by up to 20% shall not be considered an alteration to existing aid.'

II – Background to the dispute and the decision at issue

5. The General Court summarised the background to the case as follows at paragraphs 1 to 8 of the judgment under appeal:'1. In order to enable Italian milk producers to pay the additional levy of EUR 1 386 475 000 owed to the European Union for exceeding the milk quota allocated to the Italian Republic during the period 1995/1996 to 2001/2002, the Italian Republic sought authorisation from the Council of the European Union to establish a State aid scheme pursuant to the third subparagraph of Article 88(2) EC.

2. By Decision 2003/530/EC of 16 July 2003 on the compatibility with the common market of an aid that the Italian Republic intends to grant to its milk producers (OJ 2003 L 184, p. 15, "the Council decision"), the Council authorised that Member State to "itself mak[e] payment to the [European Union] of the amount due from them to the [European Union] by virtue of the additional levy on milk and milk products for the period 1995/1996 to 2001/2002" (Article 1 of the Council decision). The Council also authorised it to "[allow the interested parties] to repay their debt [in relation to the Italian Republic] by way of deferred payment over a number of years without interest" (Article 1 of the Council decision).

3. That statement of compatibility was subject to two sets of conditions. In the first place, the Council required the Italian authorities, first, to declare the amount corresponding to the additional levy owed by the milk producers to the European Agricultural Guidance and Guarantee Fund (EAGGF) and, secondly, to deduct their outstanding debt to the European Union and the interest thereon from the expenditure financed by the EAGGF (Article 2 of the Council decision). In the second place, it required the milk producers to repay in full their debt to the Italian Republic in yearly instalments of equal size and to do so over a period not exceeding 14 years starting from 1 January 2004 (Article 1 of the Council decision).

4. In that context, the Italian authorities adopted decreto-legge n. 49, Riforma della normativa in tema di applicazione del prelievo supplementare nel settore del latte e dei prodotti lattiero-caseari (Decree-law No 49 of 28 March 2003 reforming the rules on the application of the additional levy in the milk and dairy products sector) (GURI No 75 of 31 March 2003, p. 4), and decreto ministeriale del 30 luglio 2003, disposizioni per il versamento del prelievo supplementare, dovuto e non versato per i periodi dal 1995/1996 al 2001/2002 di cui all'art. 10, comma 34, della legge n. 119/2003… (Ministerial Decree of 30 July 2003 on payment of the additional levy which is payable but unpaid for the period 1995/1996 to 2001/2002 and referred to in Article 10(34) of Law No 119/2003) (GURI No 183 of 8 August 2003, p. 33). The combined provisions of those two measures provided, in essence, that the amount of the additional levy borne by the Italian Republic would be fully repaid to it by the milk producers, without interest, in the form of annual payment instalments of the same amount deferred over a period not exceeding 14 years ("the system of staggered payments").

4 Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999 (OJ 2004 L 140, p. 1).

5. Having amended those provisions on several occasions, in particular to enable the persons concerned to request that their debt be staggered over a period of up to 30 years, and then by deferring by six months the payment of the annual instalments due on 30 June 2010, the Italian authorities adopted legge n. 10, conversione in legge, con modificazioni, del decreto-legge n. 225, 29 dicembre 2010, recante proroga di termini previsti da disposizioni legislative e di interventi urgenti in materia tributaria e di sostegno alle imprese e alle famiglie (Law No 10 of 26 February 2011, converting into law, with amendments, Decree-Law No 225 of 29 December 2010, extending time-limits laid down by legislative provisions and urgent interventions in tax matters and to support undertakings and families) (GURI No 47 of 26 February 2011, Ordinary Supplement No 53), which entered into force the following day (27 February 2011). The latter, in particular, inserted Article 1(12)k into Decree-Law No 225, which provided that, "[i]n order to address the serious crisis affecting the dairy sector, the time-limits for payment of the amounts due on 31 December 2010 referred to in the instalment plans laid down by Decree-Law No 49 [and the subsequent legislation] have been extended until 30 June 2011" ("the deferral of payment").

6. The Italian authorities informed the European Commission that the "grant equivalent" of that measure had been offset against the *de minimis* aid provided for that Member State by the annex to Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles [107 TFEU] and [108 TFEU] to *de minimis* aid in the sector of agricultural production (OJ 2007 L 337, p. 35). According to the Italian authorities, the 11 271 beneficiaries of the system of staggered payments included 1 291 milk producers benefiting from that measure, that is to say a proportion of 11.45%. Furthermore, the individual aid obtained on that basis ranged from between EUR 0.08 to EUR 694.19. Lastly, 1 187 of the 1 291 milk producers concerned received less than EUR 100, and 559 of them received less than EUR 12.

7. By Decision C(2011) 10055 final of 11 January 2012 on State aid SA.33726 (11/C) (ex SA.33726 (11/NN)) — Deferral of payment of the milk levy in Italy, a summary of which was published in the *Official Journal of the European Union* on 10 February 2012 (OJ 2012 C 37, p. 30), the Commission initiated the procedure laid down in Article 108(2) TFEU. In the first place, it indicated, in essence, that it had doubts relating to the classification of the deferral of payment in the light of Article 107 TFEU, and to the compatibility of that measure with the internal market. In the second place, the Commission stated that that deferral of payment gave rise to an infringement of one of the conditions laid down in the Council decision, that that infringement transformed the whole system of staggered payments established by the Italian authorities into new aid, in so far as it related to milk producers who had benefited from the deferral of payment, and that the compatibility of that new aid with the internal market had also not been established.

8. By [the decision at issue], the Commission considered, following the exchange with the Italian authorities during the administrative procedure, that each of the two measures at issue, namely, the deferral of payment, on the one hand, and the system of staggered payments, on the other hand, constituted new and unlawful aid which was incompatible with the internal market (Article 1 of the … decision [at issue]). It therefore ordered the Italian Republic to ensure the immediate and effective recovery of the sums granted to milk producers who had benefited from the deferral of payment, together with interest (Articles 2 and 3 of the … decision [at issue]).'

III – The procedure before the General Court and the judgment under appeal

6. By application lodged at the Registry of the General Court on 30 September 2013, the Italian Republic brought an action seeking the total or partial annulment of the decision at issue.

7. In support of its action, the Italian Republic relied on two pleas in law alleging (i) infringement of Article 3(7) of Regulation No 1535/2007 and (ii) infringement of Article 3(2) of that regulation.

8. The General Court upheld the second plea of the Italian Republic and annulled Article 1(2) of the decision at issue and also Articles 2 to 4 of that decision in so far as they concerned, first, the aid scheme referred to in Article 1(2) of the decision at issue and, secondly, the individual aid granted under that aid scheme; it dismissed the action as to the remainder.

9. For that purpose, the General Court, first, defined, in paragraph 39 of the judgment under appeal, the scope of the second plea, holding that, although the different complaints relied on by the Italian Republic in the context of that plea were based on infringement of a different provision, they had in common the fact that they also alleged, in essence, that the decision at issue had no valid legal basis, in so far as it classified the system of staggered payments as new and unlawful aid and in so far as it ordered the Italian Republic to recover that aid. In paragraphs 40 to 44 of the judgment under appeal, the General Court took the view that those arguments had been put forward at the application stage and that the arguments stated by the Italian Republic in its reply had to be regarded as developing those arguments in the light of the defence.

10. Secondly, in paragraphs 45 to 47 of the judgment under appeal, the General Court rejected the complaint of the Italian Republic relating to the statement of reasons for the decision at issue.

11. Thirdly, the General Court examined, in paragraphs 49 to 92 of the judgment under appeal, the complaints of the Italian Republic relating to the merits of the decision at issue.

12. In paragraph 50 of the judgment under appeal, the General Court considered that it was common ground that, until the Commission took the view that the system of staggered payments was to be regarded as new aid, that measure constituted an existing aid scheme.

13. Although expressing the view, in paragraphs 66 and 67 of the judgment under appeal, that the Commission could use the procedure regarding misuse of aid laid down in Chapter IV of Regulation No 659/1999, the General Court concluded, in paragraph 68 of that judgment, that it was common ground that the Commission did not base its decision on the relevant provisions of Regulation No 659/1999, but had taken the view that the system of staggered payments had become new aid as a result of the deferral of payment in so far as it applied to milk producers who had benefited from that deferral. The General Court also considered that that classification and that of misuse of aid were mutually exclusive, since misuse could relate only to pre-existing aid, as pointed out in recital 15 of Regulation No 659/1999.

14. Among the various procedures which the Commission could have used, the General Court referred, in paragraphs 69 to 76, to the procedure regarding unlawful aid laid down in Chapter III of Regulation No 659/1999.

15. It considered, in paragraph 74 of the judgment under appeal, that, in the case of an alteration to existing aid, it was not the ‘altered existing aid’ but only the alteration as such that was liable to be classified as new aid, whereas the earlier measure, which could properly be put into effect, had to be regarded as existing aid or as an existing aid scheme.

16. In paragraph 75 of the judgment under appeal, the General Court mentioned an exception to that rule, in the event that the alteration affects the actual substance of the existing aid or existing aid scheme, where that measure is transformed as a whole into new aid or into a new aid scheme. The General Court stated, in the same paragraph, that there could be no question of a substantive alteration where the new element was clearly severable from the pre-existing measure or where it was purely formal or administrative in nature.

17. The General Court concluded, in paragraph 76 of the judgment under appeal, that the possibility, for the Commission, of classifying as new, and, where necessary, unlawful, aid not only the alterations of existing aid, but also all the existing aid to which that alteration relates, was subject, as regards the substance, to the condition that the Commission establish that the alteration affected the very substance of the pre-existing measure. It added that, in the event that the Member State concerned disputed this point during the administrative procedure, and claimed either that that alteration was clearly severable from the pre-existing measure, or that it was purely formal or administrative in character and not capable of influencing the assessment of the compatibility of that measure with the internal market, the Commission had to justify why those arguments appeared to it to be unfounded.

18. In paragraphs 78 to 80 of the judgment under appeal, the General Court held that the Commission had not demonstrated in the decision at issue that the deferral of payment affected the actual substance of the system of staggered payments. The General Court concluded, in paragraphs 81 and 82 of the judgment under appeal, that the Commission had misconstrued the concept of new aid by reclassifying an existing aid scheme as new unlawful aid without complying with the substantive conditions laid down in Regulation No 659/1999 and had wrongly ordered the recovery of the aid granted under the existing aid scheme.

19. In paragraphs 83 to 91 of the judgment under appeal, the General Court rejected the arguments put forward by the Commission to show that the failure by the Italian authorities to comply with one of the conditions attached to the declaration of compatibility adopted by the Council entailed, in essence, the reclassification of the existing aid scheme as new and unlawful aid.

20. For that purpose, the General Court pointed out, in paragraph 85 of the judgment under appeal, that, where the Commission detected a failure to comply with a decision which declared aid or an aid scheme to be compatible with the internal market, subject to certain conditions, and chose to exercise its monitoring powers, it had to confine itself to examining the new aid, unless it could demonstrate that the latter had altered the actual substance of existing aid or an existing aid scheme.

21. In paragraph 86 of the judgment under appeal, the General Court found that the Commission was not entitled to take the view that failure to comply with such a condition involved *ipso facto* the reclassification of that measure as new aid, and still less to consider that measure as unlawful *ab initio* and to order its recovery as if it were aid that had been unlawfully implemented and not aid authorised in advance.

22. The General Court pointed out in this regard, in paragraph 87 of the judgment under appeal, that any existing aid was covered by the authorisation decision relating to it, except where the Commission considered that that aid had been misused or that its very substance had been altered by new aid and was therefore to be regarded, subject to those two situations, as lawful as long as the Commission had not found that it was incompatible with the internal market.

23. Moreover, in paragraph 88 of the judgment under appeal, the General Court held, having regard to the objective pursued by the conditions attached to the declaration of compatibility, that any subsequent failure to comply with them could lead the Commission to call into question, by having recourse to one of the various legal remedies provided for by the FEU Treaty and Regulation No 659/1999, only the benefit of the declaration of compatibility with the internal market granted to the measure at issue, and not its classification as existing aid, subject to the exception referred to in paragraph 85 of the judgment under appeal.

24. In paragraphs 89 and 90 of the judgment under appeal, the General Court observed that that declaration of incompatibility could produce effects only in the future; failing that, a properly implemented aid scheme and individual aid lawfully granted before the Member State concerned failed to fulfil its obligations would be retroactively deemed to constitute aid which was unlawful and incompatible with the internal market, which would amount to a revocation of the decision authorising the implementation of those measures.

25. Furthermore, the General Court took the view, in paragraph 91 of the judgment under appeal, that the theory put forward by the Commission would make it possible to circumvent the procedures established by the legislature in order to ensure, in compliance with the principle of legal certainty, that State-aid monitoring was effective.

26. By the judgment under appeal, the General Court therefore upheld the second plea and dismissed the action as to the remainder.

IV – The appeal

27. The Commission and the Italian Republic set out their views at the hearing held on 10 November 2016.

28. In support of its appeal, the Commission raises three grounds, concerning, respectively, (i) prohibition on raising of its own motion a plea relating to the substantive legality of the measure at issue; (ii) infringement of Article 108 TFEU and of Article 1 of Regulation No 659/1999 as regards the concepts of new aid and existing aid; (iii) infringement of Article 108 TFEU and of Articles 4, 6, 7, 14 and 16 of Regulation No 659/1999 as regards the procedures applicable to new aid and to misuse of aid.

A – The first ground of appeal, relating to the prohibition on raising of its own motion a plea relating to the substantive legality of the measure at issue

1. Arguments of the parties

29. The Commission claims that, in paragraphs 39 to 44 of the judgment under appeal, the General Court infringed the principle that a court must rule on the issues submitted to it, the prohibition on raising of its own motion a plea relating to the substantive legality of the decision, Article 21 of the Protocol on the Statute of the Court of Justice of the European Union and Article 44(1) of the Rules of Procedure of the General Court, articles from which it is apparent that the case is in principle determined and delimited by the parties and that the EU Courts cannot adjudicate *ultra petita*, by raising of their own motion the question of the classification of the system of staggered payments as new aid, and not as existing aid, owing to the allegedly unsubstantial nature of the alteration made to it by the Italian authorities. The Commission considers that, in the application lodged with the General Court, that substantive matter was raised only with regard to the alleged infringement of Article 4(1) of Regulation No 794/2004, a different matter from that to which the reasoning of the General Court related.

30. The Commission considers that, if the Court of Justice were to uphold this ground of appeal, it should not merely set aside the judgment under appeal and dismiss the action at first instance, but, in the interests of the sound administration of justice, in order to prevent the repetition of serious infringements of substantive EU law and to obtain clarification concerning the procedures to be followed for examining State aid granted in breach of the conditions imposed by the compatibility decision, should also examine and uphold at least one of the other two grounds of appeal.

31. The Italian Republic considers that this ground of appeal is unfounded.

2. Assessment

32. Unlike the Commission, I think that the Italian Republic did indeed raise that plea in its application before the General Court.

33. In the wording of the second plea in its action before the General Court, the Italian Republic refers to a complaint alleging infringement of Article 1(c) of Regulation No 659/1999 relating to the concept of new aid.

34. The Italian Republic first states, in connection with that plea, that 'there is no evidence capable of establishing that the beneficiaries of the existing aid who benefited from the measure at issue are required to repay not only the amount corresponding to the measure at issue, but also that received as part of the existing aid (and therefore, on the basis of the authorisation decision, the interest unpaid on the first staggered payment)' (paragraph 56 of the application before the General Court).

35. It then alleges, still in connection with this plea, that the Commission distorted the concept of 'alteration of existing aid' referred to in Article 1(c) of Regulation No 659/1999 in the following terms: 'Nor is it possible to take the view that the recovery decision may be extended to existing aid as a result of a substantial alteration to that aid which is capable of resulting in those two measures being regarded as a single new aid, not notified to the Commission and therefore unlawful' (paragraph 57 of the application before the General Court).

36. Furthermore, it adds that 'such a conclusion is the clear result of a distortion of the concept of "alteration of existing aid", relevant for the application of Article 1(c) of Regulation No 659/1999' (paragraph 58 of the application before the General Court).

37. It follows that, even though the Italian Republic also complained, in that context, that the Commission had given an inadequate statement of reasons, it criticised the Commission for having classified the system of staggered payments as new aid, without ascertaining whether the conditions for that classification had been met.

38. The foregoing is confirmed by the fact that the Commission clearly understood the complaint of the Italian Republic which it summarised and refuted in its statement in defence submitted to the General Court (see paragraphs 22 and 32 to 36 of the statement of defence submitted to the General Court).

39. Accordingly, the first ground of appeal must be rejected as unfounded.

B – The second ground of appeal, alleging infringement of Article 108 TFEU and of Article 1 of Regulation No 659/1999 as regards the concepts of new aid and existing aid

40. This ground comprises two parts, the first relating to the contention that the aid implemented in infringement of the conditions for authorisation was new aid and not existing aid, and the second to the contention that the argument of the General Court did not take into account the institutional balance between the Council and the Commission.

1. Arguments of the parties

a) The Commission

i) Preliminary observations

41. The Commission maintains, in essence, that it is apparent from the case-law of the Court [5] that a simple infringement of the conditions imposed in an earlier decision on the compatibility of aid implies the existence of new aid, and, in the absence of new facts which may lead to a different assessment, justifies a new incompatibility decision.

42. According to the Commission, legal certainty requires that it be determined with certainty whether a national measure is covered by the incompatibility decision, certainty which may be acquired only if the measure at issue is fully in line with the authorisation and complies with all its conditions. The Commission also points out that, where a Member State infringes the conditions for authorisation, the aid implemented does not correspond to that authorised by the Council and therefore cannot constitute existing aid.

43. Furthermore, the Commission points out that, in the event of non-compliance with the conditions imposed by the authorisation decision, the Member State concerned may still request a new authorisation decision, on the basis, inter alia, of changes in factual circumstances.

ii) The first part

44. In the first place, the Commission complains that the General Court was wrong to take the view, in paragraph 50 of the judgment under appeal, that the system of staggered payments constituted an existing aid scheme until the Commission took the view that it was to be regarded as new aid. By so doing, the General Court misconstrued the objective nature of the concepts of 'existing aid' and 'new aid'.

45. In the second place, the Commission considers that, in paragraph 74 of the judgment under appeal, the General Court was wrong to cite the judgments of 20 May 2010, *Todaro Nunziatina & C.* (C-138/09, EU:C:2010:291); of 30 April 2002, *Government of Gibraltar* v *Commission* (T-195/01 and T-207/01, EU:T:2002:111); and of 16 December 2010, *Netherlands and NOS* v *Commission* (T-231/06 and T-237/06, EU:T:2010:525), in support of the view that, where existing aid was altered, it was not the altered existing aid, but only the alteration as such that was liable to be classified as new aid.

46. In the third place, the Commission complains that the General Court, in paragraph 75 of the judgment under appeal, made classification of altered existing aid or an altered aid scheme as new aid subject to the condition that the Commission establish that the alteration affected the very substance of the pre-existing measure, and required in paragraph 76 of the judgment under appeal that, if this were disputed, the Commission justify, during the administrative procedure, why the arguments of the Member State concerned, alleging that the alteration was not substantial, appeared to it to be unfounded.

5 Judgments of 3 October 1991, *Italy* v *Commission* (C-261/89, EU:C:1991:367, paragraphs 2 to 4 and 20 to 23); of 5 October 1994, *Italy* v *Commission* (C-47/91, EU:C:1994:358, paragraphs 24 to 26); and of 21 March 2002, *Spain* v *Commission* (C-36/00, EU:C:2002:196, paragraphs 22 to 25); see also the order of 22 March 2012, *Italy* v *Commission* (C-200/11 P, not published, EU:C:2012:165, paragraph 26).

47. In the fourth place, the Commission complains that the General Court drew conclusions on the substance from an alleged insufficiency of reasons for the decision at issue, even though the General Court had already rejected, in paragraphs 46 and 47 of the judgment under appeal, the complaint raised by the Italian Republic concerning the statement of reasons of the decision at issue.

48. In the fifth place, the Commission complains that the General Court gave a misleading description of the Commission's position regarding the question of whether the system of standard payments had undergone substantial alteration.

49. In the sixth place, the Commission considers, for the reasons already stated, that the conclusions reached by the General Court in paragraphs 81 and 82 of the judgment under appeal are based on premises which are erroneous in law.

50. In the seventh place, the Commission complains that the General Court was wrong to hold, in paragraph 88 of the judgment under appeal, that, in the event of failure to comply with the conditions attached to a decision of compatibility, the Commission could call into question only the benefit of the declaration of compatibility with the internal market granted to the measure at issue, and not its classification as existing aid, subject to establishing that the measure at issue had been substantially altered.

51. In the eighth place, the Commission takes the view that the General Court, in paragraph 89 of the judgment under appeal, misinterpreted the judgment of 15 September 1998, *Ryanair* v *Commission* (T-140/95, EU:T:1998:201), relating to the failure to comply with a decision which approved, subject to conditions, aid designed to be released in successive tranches. It is apparent from that judgment that failure to comply with an authorisation decision means not only that the aid is not covered by the initial decision, but also that the following tranches are presumed to be incompatible unless the Commission decides to grant an exemption.

52. In the ninth place, the Commission considers that the General Court's finding, in paragraph 90 of the judgment under appeal, that certain aid does not correspond to what was authorised, cannot be equated to the revocation of an earlier decision. Therefore, contrary to what the General Court states in paragraph 91 of the judgment under appeal, it submits that there is no circumvention of Regulation No 659/1999 or any infringement of the principle of legal certainty.

b) The Italian Republic

53. First, the Italian Republic counters by submitting that the General Court did not rely on the thesis that the existing aid, as authorised by the Council, included the deferral of payment granted in 2001, but relied rather on the thesis that the deferral of payment constituted new aid which, since the Commission had not established that that measure substantially altered the existing aid, could not have had any effect on the existing aid.

54. Secondly, the Italian Republic considers that the Commission is wrong to complain that the General Court did not draw the appropriate conclusions from its own considerations regarding the possibility for the Commission to apply to the Court of Justice, pursuant to Article 108(2) TFEU, for a declaration that the Italian Republic had not complied with the conditions of the authorisation decision.

55. Thirdly, as regards the Commission's complaint that the General Court failed to give reasons for its finding in paragraph 74 of the judgment under appeal that only if it can show that an infringement of the authorisation conditions affects the very substance of the authorised aid can it invoke its usual powers in respect of new aid, the Italian Republic claims that the Commission does not take into account the rule that recovery of existing aid can be ordered only when it ceases to be existing aid,

namely when it becomes, by alteration connected with the existing aid, new aid. In order for that to happen, it is necessary, according to the Italian Republic, for the alteration made to an aid scheme not to be clearly severable from the original scheme and, furthermore, for that alteration to affect the very substance of the original scheme.

56. Fourthly, with regard to the Commission's complaints concerning the classification of the measure at issue as new aid and not as existing aid, the Italian Republic points out that the General Court did not state, contrary to what the Commission claims, that, in the event of failure to comply with the authorisation conditions, the Commission could intervene only by establishing that the Member State had made a substantial alteration to the existing aid.

57. In any event, if the new measure itself constitutes unlawful aid, the Commission could adopt a decision prohibiting the implementation of that measure, or, if the measure has already been implemented, order recovery of the aid, thus restoring the conditions under which the aid had been authorised.

58. The Italian Republic also questions the Commission's argument that, irrespective of whether or not existing aid has been properly implemented, the infringement of one of the conditions for authorisation attached to the authorisation decision transforms the whole of the pre-existing measure into new aid. Relying on the judgment of 13 June 2013, *HGA and Others* v *Commission* (C-630/11 P to C-633/11 P, EU:C:2013:387, paragraphs 29 and 30), that Member State submits that the Court adopts different reasoning in its case-law.

2. Assessment of the first part of the second ground of appeal

59. In the present case, it is common ground that the alteration made to the pre-existing measure authorised by the Council constitutes new and unlawful aid, since this was decided by the General Court and is not contested before the Court of Justice. The question which is therefore at the heart of the case before the Court of Justice is whether that alteration transforms the whole of the existing aid thus altered into new aid and under what conditions. Is it automatic or must the alteration be substantial and not severable from the pre-existing measure?[6]

60. In other words, did the General Court err in law by holding that the transformation of existing aid into new aid was subject to its being shown that the alteration affected the pre-existing measure substantially and was not severable from it, something which the Commission has not demonstrated in this case?

a) What does the case-law say?

i) The judgment in Heineken Brouwerijen (91/83 and 127/83)

61. The first judgment which draws my attention is the judgment of 9 October 1984, *Heineken Brouwerijen* (91/83 and 127/83, EU:C:1984:307, paragraphs 19 to 22), in which the referring court asked the Court of Justice about the prohibition, laid down in the final sentence of Article 93(3) of the Treaty, on implementation of the proposed measures before the procedures prescribed in Article 93(2)

6 It is therefore not appropriate, in the present case, to address the questions (a) whether or not, in the judgment of 20 March 2014, *Rousse Industry* v *Commission* (C-271/13 P, EU:C:2014:175, paragraphs 30 to 39), the Court laid down (indirectly) as a relevant criterion the 'substantial alteration' of the pre-existing measure to render that alteration new aid, and (b) to what extent the judgment of 26 October 2016, *DEI and Commission* v *Alouminion tis Ellados* (C-590/14 P, EU:C:2016:797), which rejected in clear terms the line taken by the General Court on the basis of that concept, may be reconciled with the judgment of 20 March 2014, *Rousse Industry* v *Commission* (C-271/13 P, EU:C:2014:175), in which the Court appears to have validated the reasoning of the General Court in the judgment under appeal, based on verification of the substantial nature of the alteration made to existing aid. It should be noted that, in the 2016 judgment, the Court does not refer to the 2014 judgment. Both judgments were delivered by chambers of three judges, without an Advocate General's Opinion.

and (3) had resulted in a final decision. The referring court asked whether that prohibition on implementation applied to an aid scheme which had been duly notified in its original version but altered subsequently without the Commission being informed, and whether, in that case, the prohibition applied only to that part of the aid which had been introduced by that alteration.

62. According to paragraph 20 of that judgment, 'as the Court has already emphasised, inter alia in its order of 20 September 1983 (Case 171/83 R *Commission* v *France* [1983] ECR 2621), the final sentence of Article 93(3) is the means of safeguarding the machinery for review laid down by that article, which, in turn, is essential for ensuring the proper functioning of the common market. The prohibition laid down by that article is intended to ensure that the aid measures do not come into effect before the Commission has had a reasonable period in which to consider the plan in detail and, if necessary, to initiate the procedure provided for in Article 93(2).'

63. The Court concluded in paragraph 21 of that judgment that 'it follows that the prohibition applies to the aid programme in its entirety and in the final version adopted by the national authorities. If the initial plan has been altered, the last sentence of Article 93(3) therefore applies to the plan as altered. Where the plan has been notified and the Commission has not raised any objections to it, but the Member State concerned has made alterations of which the Commission has not been informed, the provision precludes the putting into effect of the aid programme *in its entirety*. The position may be different only where the alteration in question is in actual fact a separate aid measure which should be assessed separately and which *is therefore not such as to influence the assessment which the Commission has already made of the initial plan*' (emphasis added).

ii) The judgement in Italy v Commission (C-261/89)

64. In the case which gave rise to the judgment of 3 October 1991, *Italy* v *Commission* (C-261/89, EU:C:1991:367, paragraphs 2 to 4 and 20 to 23), the Commission had authorised aid envisaged by the Italian Republic and had requested the Italian Government to provide no further aid in whatever form to the State-owned group in the aluminium industry until the end of 1988, but, on 18 September 1987, the Italian authorities decided to authorise EFIM (Ente partecipazione e finanziamenti industrie manifatturiere) to issue, at the expense of the State, a debenture loan, LIT 100 000 million (approximately EUR 52 million) of which would be devoted to financing investments in the undertakings Alumínia (LIT 70 000 million; approximately EUR 36 million) and Compagnia Sarda Alluminio ('Comsal') (LIT 30 000 million; approximately EUR 15.5 million).

65. In paragraph 20 of that judgment, the Court held that 'as regards the argument that in order to make a finding that the previous decision had been infringed the Commission should have referred the matter to the Court, it must be pointed out first of all that when the Commission considers the compatibility of State aid with the common market it must take all the relevant factors into account, *including, where relevant, the circumstances already considered in a prior decision and the obligations which that decision may have imposed on a Member State*. In this case the Commission cannot be criticised for considering the new aid in the framework of the whole of the aids to the aluminium industry as, moreover, the Italian Government itself did in its comments at the pre-litigation stage' (emphasis added).

66. In paragraph 21 of the same judgment, the Court held that 'moreover, the procedure for assessing aid under Article 93(2) makes it possible to appraise any new fact capable of altering the Commission's assessment, regard being had to the purpose of any new aid and all relevant economic circumstances at the time when the aid is granted'.

67. According to paragraph 22 of that judgment, 'it must be stated that in this case the Italian Government did not provide, at any time during the procedure, any new features capable of altering the assessment which the Commission had already made in its decision of 17 December 1986. It confined itself, without producing any argument, to asking for the new aid to be assessed in the light of Article 92(3)(c) of the EEC Treaty'.

68. Lastly, according to paragraph 23 of that judgment, 'it follows that, since the Commission had not been informed, when it took the decision at issue, of any new fact allowing it to assess whether the aid in question might have the benefit of the derogation laid down in Article 92(3)(c) of the Treaty, it was justified in basing its decision on the assessments it had already made in its previous decision and *the failure to comply with the conditions it had imposed thereby*' (emphasis added).

iii) The judgment in Italy v Commission (C-47/91)

69. It is also necessary to mention the judgment of 5 October 1994, *Italy* v *Commission* (C-47/91, EU:C:1994:358, paragraphs 24 to 26), paragraph 24 of which states that 'when the Commission has before it a specific grant of an aid alleged to be made in pursuance of a previously authorised scheme, it cannot at the outset examine it directly in relation to the Treaty. *Prior to the initiation of any procedure, it must first examine whether the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving it*. If it did not do so, the Commission could, whenever it examined an individual aid, go back on its decision approving the aid scheme which already involved an examination in the light of Article 92 of the Treaty. This would jeopardise the principles of the protection of legitimate expectations and legal certainty from the point of view of both the Member States and traders since individual aid in strict conformity with the decision approving the aid scheme could at any time be called in question by the Commission' (emphasis added).

70. The Court goes on to say, in paragraph 25, that 'if, following the examination thus circumscribed, the Commission finds that the individual aid is in conformity with its decision approving the scheme it must be regarded as *authorised aid*, and thus as *existing aid*. Therefore, the Commission is not entitled to order the suspension thereof since Article 93(3) of the Treaty empowers it to do so only in regard to new aid' (emphasis added).[7]

iv) The judgment in Spain v Commission (C-36/00)

71. The last judgment (and the most recent) to which I should like to refer is that of 21 March 2002, *Spain* v *Commission* (C-36/00, EU:C:2002:196), paragraph 24 of which states that 'where the Commission finds that aid alleged to have been made in pursuance of a previously authorised scheme of aid does not comply with the conditions laid down in its decision approving the scheme and is therefore not covered by it, that aid must be regarded as new aid'.[8]

72. The Court adds, in paragraph 25 of that judgment, that 'if, when aid is granted in pursuance of a previously authorised scheme, the Member State does not comply with the conditions to which the Commission made its decision approving the scheme subject, since the aid paid is new aid, the Commission is obliged to institute the special procedure provided for by the first subparagraph of Article 88(2) EC'.[9]

7 The Court refers to this paragraph 25 in paragraph 83 of its judgment of 16 May 2002, *ARAP and Others* v *Commission* (C-321/99 P, EU:C:2002:292).

8 The Court cites the judgment of 5 October 1994, *Italy* v *Commission* (C-47/91, EU:C:1994:358, paragraphs 24 to 26).

9 The Court cites the judgment of 4 February 1992, *British Aerospace and Rover* v *Commission* (C-294/90, EU:C:1992:55, paragraph 13).

b) Application to the present case

73. It is apparent from the case-law examined above that, by citing, in paragraph 61 of the judgment under appeal, the settled case-law which, as we have seen, authorises the Commission to base its new decision on the assessments already made in the earlier decision and on the failure to comply with the conditions imposed by that decision, the General Court overlooks the fact that, for the Court of Justice, the infringement of those conditions was sufficient in itself to found a new decision, this time a decision of incompatibility, for the aid previously authorised, and this in the context of the examination of new aid and certainly not existing aid.

74. It is apparent from that case-law that, if the Commission finds that aid granted on the basis of a scheme already authorised does not satisfy the conditions laid down by the decision approving the scheme and therefore no longer complies with that decision, that aid is to be regarded as new aid. In other words, infringement of the conditions imposed in an earlier decision of compatibility transforms the aid authorised into new aid and, in the absence of new facts which may result in a different assessment, justifies a new decision of incompatibility.

75. Furthermore, this approach seems to me to accord with the system of prior control of plans to grant new aid, established by the Treaty.[10] Aid is existing aid only if the conditions of compatibility are observed.

76. I therefore take the view (as does the Commission) that, by definition, aid implemented in breach of the conditions of compatibility imposed by Commission or, as in the present case, by the Council, is different from the measure authorised by the competent institution, and is therefore no longer existing aid and thus loses its description as authorised aid.

77. In a situation such as that in the present case, it is therefore not necessary to consider whether the alterations are substantial in nature or whether they are severable.

78. The facts of the case and the theories discussed at the hearing illustrate the foregoing principles.

79. I would reiterate that the aid authorised by the Council, namely for the Italian Republic to take the place of its milk producers and to pay to the European Union the sum owed by those producers by virtue of the additional levy on milk and milk products for the period 1995/1996 to 2001/2002, was subject to, inter alia, the condition that those milk producers repay in full their debt to the Italian Republic in yearly instalments of equal size, without interest and over a period not exceeding 14 years starting from 1 January 2004.

80. Having received the authorisation of the Council, Italy unilaterally granted an extension until 30 June 2011 of the deadline for payment of the sums due on 31 December 2010.

81. I would also point out that, according to Article 1(b) of Regulation No 659/1999, there are five different categories of existing aid: (i) 'historical' aid (or aid schemes), namely those in force in a Member State before its accession and continuing to exist after its entry into the European Union; (ii) individual aid (or aid schemes) authorised by the Commission or the Council; (iii) situations relating to the consequences of the Commission's failure to act in examining new aid; (iv) aid discovered by the Commission after expiry of the limitation period for taking action (ten years, in accordance with Article 15 of Regulation No 659/1999); and, lastly, (v) financing, exemptions, tax advantages, etc., granted to economic operators and/or sectors which, following the liberalisation of trade, are no longer compatible with compliance with the competition rules and State aid discipline.

10 See the judgments of 11 December 1973, *Lorenz* (120/73, EU:C:1973:152, paragraph 2) and of 12 February 2008, *CELF and Ministre de la Culture et de la Communication* (C-199/06, EU:C:2008:79, paragraph 37).

82. As the Commission has pointed out, for categories (i), (iv) and (v), it is sufficient in principle to look at the date on which the aid was granted, since the Commission does not have to examine its content as such. By contrast, for aid in category (ii), like the aid to which the present case refers, and in category (iii), the Commission must ascertain its content in order to satisfy itself that that aid actually corresponds to what it has authorised or to what the Council has authorised. If that is the case, it will be existing aid; if not, it will *ipso facto* be new aid.

83. In the present case, the deferral of payment was granted by the Italian Republic to beneficiaries of the aid which had been authorised by the Council and alters for the same beneficiaries the table of standard repayments which was one of the conditions for authorisation of the aid by the Council.

84. I therefore think that, *ipso facto*, the measure thus altered becomes new aid, since it is no longer covered by the definition of existing aid stated in the implementing regulation which imposes the condition that the aid should indeed correspond to what has been authorised. If it no longer corresponds to what has been agreed, it simply can no longer be existing aid.[11]

85. At the hearing, it was mentioned that, although the aid in question was authorised by the Council only for milk producers in Italy, the Italian Republic added Sicilian milk producers to the same scheme. In that case, the aid granted to the Sicilian producers unquestionably constitutes new aid but it lies outside the purpose of the aid authorised and concerns other beneficiaries. The aid authorised is therefore still existing aid, and the conditions imposed by the Council are still applicable to all the beneficiaries of the authorised aid. Only the extension to Sicily constitutes new aid.

86. The foregoing is fully in accordance with the philosophy of the system of review of State aid as provided for in the FEU Treaty: it is important for the proper functioning, clarity, transparency and effectiveness of that system that existing aid should be only aid actually authorised and not aid which has been altered.

87. It follows that the General Court erred in law in its interpretation of Article 108 TFEU and of Article 1 of Regulation No 659/1999 in so far as concerns the concepts of ‘new aid’ and ‘existing aid’, since it considered, in essence, that the aid which was the subject of the decision at issue was still existing aid because it had originally been authorised by the Council, at the request of the Italian Republic, by Decision 2003/530, even if Italy had not complied with one of the two cumulative conditions to which the Council had made that authorisation subject, and in particular that of obtaining from the beneficiaries repayment in full of their debt to the Italian Republic in yearly tranches of the same amount, over a period not exceeding 14 years, from 1 January 2004.

88. The General Court was therefore wrong to hold that the Commission could regard that measure, thus altered, as constituting new aid, rather than as existing aid, only if it had shown that the alteration affected the aid substantially or was not severable from it.

89. It follows that the first part of the second ground of appeal must therefore be upheld.

11 From the moment at which the beneficiary duly made payment in accordance with the scheme of yearly tranches established by the Council, there were no consequences other than those which were provided for by the Council in its decision. Therefore, there are no grounds for recovery. Conversely, if the beneficiary was granted an extension and therefore no longer complied with the 14-year repayment scheme, it will have obtained something extra to what the Council had authorised. Consequently, the entire amount becomes new aid.

3. The second part

a) Arguments of the parties

90. The Commission claims, in essence, that the judgment of the General Court fails to take proper account of the fact that the system of staggered payments was authorised by the Council.

91. The Italian Republic contends that the General Court by no means held that the measure at issue was covered by the authorisation decision in respect to it. On the contrary, it is submitted, the General Court confirmed the decision at issue in that it declared that the aid concerned was unlawful and ordered its recovery.

92. Furthermore, the Italian Republic points out that Article 1(b)(ii) of Regulation No 659/1999 places aid schemes and individual aid authorised by the Commission and those authorised by the Council on equal footing, considering them both to be existing aid. The General Court also made that finding in the judgment under appeal.

b) Assessment

93. I agree with the Commission that the judgment under appeal fails to take proper account of the fact that the system of staggered payments was authorised by the Council by virtue of the extraordinary powers conferred on it by the third subparagraph of Article 108(2) TFEU.

94. A decision taken pursuant to such extraordinary powers must be interpreted restrictively and cannot be construed as covering aid which does not correspond exactly to what was authorised by the Council. Therefore, the interpretation of the General Court according to which aid granted in breach of the conditions imposed by the Council must be regarded as existing aid unless it has been shown that non-compliance with those conditions affected the very substance of the aid approved, is misconceived.

95. Moreover, although the Council may exercise the extraordinary powers conferred on it by the third subparagraph of Article 108(2) TFEU, the Commission, which does not have a discretionary power as extensive as that attributed to the Council, can merely verify compliance with the conditions for authorisation laid down by the Council. The Commission must, in fact, assume that compliance with those conditions imposed by the Council under its extraordinary powers is of fundamental importance, without variation or exception. Furthermore, the Commission cannot, where authorisation is based on the Council's extraordinary discretionary power, carry out a new assessment.

96. If necessary, the Italian authorities could have asked the Council to adopt a new decision and to authorise the scheme resulting from the deferral decided on in 2011. They did not do so, and the Commission could not take the place of the Council.

97. Consequently, even if it is conceded that the argument of the General Court has a certain validity in the case of aid authorised subject to certain conditions by the Commission itself, those considerations cannot be relied upon in the case where the aid has been authorised by the Council.

98. Therefore, the second part of the second ground of appeal must also be upheld and, accordingly, the second ground must be upheld in its entirety, with the result that the judgment under appeal must be set aside.

C – The third ground of appeal, alleging infringement of Article 108 TFEU and of Articles 4, 6, 7, 14 and 16 of Regulation No 659/1999 concerning the procedures applicable to new aid and misused aid

1. Arguments of the parties

99. The Commission complains that the General Court, having accepted, first, in paragraph 67 of the judgment under appeal, that failure by a Member State to comply with the conditions for authorisation also constituted a form of misuse of aid, excluded, in paragraph 68 of that judgment, the relevance of the provisions relating to misuse of aid, stating that it had not based its decision on those provisions and considering that the concepts of new aid and misuse of aid were mutually exclusive.

100. The Commission, invoking recital 15 and Article 16 of Regulation No 659/1999, claims that new aid and misuse of aid produce similar effects, which is why they are subject to similar procedures, except for the order for recovery, which is limited to the procedure relating to new aid. According to the Commission, since there was no question in the dispute before the General Court of the application of an order of recovery as referred to in Article 11(2) of that regulation, the error which the Commission might have made by classifying the aid as new aid and not as a misuse of aid would be an innocent mistake, of no legal consequence, since all the procedural requirements applicable to misuse of aid were met in the present case. Therefore, such a mistake in the classification of the aid cannot lead to annulment of the decision at issue, since it concerns the aid scheme referred to in Article 1(2) of that decision and the individual aid granted in application of that aid scheme.

101. The Italian Republic counters by stating that, even though the Commission's powers are similar in the procedure relating to new aid and the procedure relating to misuse of aid, the result of those two procedures is not necessarily the same. That Member State points out that the reason why it is impossible to adopt a provisional order for recovery in the procedure for monitoring misuse of aid is that it is aid which has previously been approved by the Commission and it is precisely for that reason that, in the procedure relating to misuse of aid, particularly where it is an issue of misuse of aid by a Member State, the Commission's intervention should be directed mainly towards linking the measure to the original authorisation, namely towards the imposition of an alteration to the aid, not its abolition. Any other approach would be contrary to the principle of legitimate expectations and thus contrary to the second sentence of Article 14(1) of Regulation No 659/1999.

2. Assessment

102. It need only be stated in this regard that the General Court did not conclude, in the judgment under appeal, that the system of staggered payments had been misused, but merely expressed the view that 'since the deferral of payment infringed the Council decision, *the Commission was entitled*, in accordance with the first subparagraph of Article 108(2) TFEU, *to determine whether or not it was necessary to consider that the system of staggered payments authorised by the Council had been misused as a result of such an infringement*' (paragraph 66 of the judgment under appeal; emphasis added).

103. The fact that the General Court recognised, in paragraph 67 of the judgment under appeal, that the concept of misuse of aid also included the failure, by a Member State, to comply with conditions imposed in the approval decision, does not in any way alter that finding.

104. Consequently, the Commission's complaint must be rejected, since the General Court did not classify the system of staggered payments as constituting a misuse of aid.

D – The consequences of setting aside the judgment under appeal

105. Since the General Court has already rejected the other pleas put forward at first instance, the Court of Justice may itself give final judgment in the matter by dismissing the action at first instance in its entirety, in accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union.

V – Costs

106. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. As the Commission has requested that the Italian Republic be ordered to pay the costs, and as the latter has been unsuccessful, the Italian Republic must be ordered to pay the costs of both sets of proceedings.

VI – Conclusion

107. For the foregoing reasons, I propose that the Court should:

– set aside the judgment of the General Court (Third Chamber) of 24 June 2015 in Case T-527/13, *Italian Republic* v *Commission*, in so far as it annulled, on the one hand, Article 1(2) of Commission Decision 2013/665/EU of 17 July 2013 on State aid SA.33726 (11/C) [ex SA.33726 (11/NN)] granted by Italy (deferral of payment of the milk levy) and, on the other, Articles 2 to 4 of that decision in so far as they concern, first, the aid scheme referred to in Article 1(2) thereof and, secondly, the individual aid granted under that aid scheme;

– dismiss the appeal as to the remainder; and

– dismiss the action brought at first instance and order the Italian Republic to pay the costs of both sets of proceedings.