



HIGHLIGHT

TEMPUS AND TWO VISIONS OF THE REQUIRED LEVEL OF DILIGENCE IN STATE AID ASSESSMENT

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In the judgment in case C-57/19 P *Commission v Tempus Energy and Tempus Energy Technology*,¹ the Court of Justice quashed the judgment of the General Court² and provided some useful clarifications as regards the assessment of whether the Commission should have had serious doubts at the end of the preliminary examination and thus should have opened a formal investigation procedure. If, however, the judgment of the General Court, by raising expectations with regard to the quality of the Commission's assessment, gained a considerable amount of attention as an opportunity for the applicants,³ the judgment on appeal must be seen as a harsh return to the traditional approach.

In *Tempus*, the General Court assessed whether the Commission was right to conclude that the UK capacity mechanism did not raise doubts as to its compatibility with the internal market,⁴ more specifically in light of Guidelines on State aid for environmental protection and energy.⁵ The procedure before the Commission was atypical because it

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¹ Case C-57/19 P *Commission v Tempus Energy and Tempus Energy Technology* ECLI:EU:C:2021:663.

² Case T-793/14 *Tempus Energy and Tempus Energy Technology v Commission* ECLI:EU:T:2018:790.

³ See e.g. M Herbing, 'The Search For a Bridge Over Troubled Waters: Cases T-630/15 Scandlines v Commission and T-631/15 Stena Line v Commission' (2020) *European State Aid Law Quarterly* 58; M Segura, M Clayton and A Nowak, 'Third Party Rights and the State Aid Procedures Revisited by the European Courts: An Ever-Sounder State Aid Control' (2019) *Journal of European Competition Law & Practice* 212; P Staviczyk, 'What Will the EU Courts' Recent Judgments Annuling Commission's State Aid Decisions Bring to Member States?' (2019) *European State Aid Law Quarterly* 293.

⁴ Decision C(2014) 5083 final of the European Commission of 23 July 2014 not to raise objections to the aid scheme for the capacity market in the United Kingdom, on the ground that that scheme is compatible with the internal market pursuant to art. 107(3)(c) TFEU (State aid 2014/N-2).

⁵ Communication 2014/C 200/01 from the Commission Guidelines of 28 June 2014 on State aid for environmental protection and energy 2014-2020.



involved eighteen-month-long pre-notification contacts, followed by a preliminary examination, which was concluded after only one month by a decision not to raise objections against this State aid.

It may be recalled that for an applicant to challenge a Commission's decision not to raise objections after the preliminary examination, the Court has established a specific path.⁶ Namely, if the applicant demonstrates that the Commission did not eliminate all doubts as to the compatibility of aid (in other words, if "serious doubts" as to its compatibility remain), such a decision will be annulled because the Commission in such a case would have been obliged to open a formal investigation procedure.⁷ It is therefore on procedural grounds, and not on the merits, that the decision is challenged.

In *Tempus*, the Court rejected the General Court's reasoning and replaced it with, in essence, a totally opposite vision of the action based on procedural grounds. These two visions differ as regards the level of diligence imposed on the Commission, the type of evidence required from the applicants, and the scope of review to be carried out by the General Court.

Indeed, the General Court first made some unusual preliminary remarks on the level of "due diligence" by the Commission in light of the concept of elimination of all doubts. It emphasized that, as an interested party, *Tempus* had neither powers of investigation nor investigatory capabilities comparable to those enjoyed by the Commission, and that it was for the Commission to research and examine, thoroughly and impartially, all of the relevant information for purposes of that analysis. Accordingly, *Tempus* could rely on all relevant information that was or could have been available to the Commission on the date when it adopted the contested decision.⁸ The General Court thus envisaged the Commission as very proactive in the collection of information, and considerably lowered the burden of proof imposed on the applicants.

The Court very strongly rejected this approach. In doing so, it may have been motivated by the risk that operators would routinely question the Commission's preliminary assessments (which, by definition, do not involve third parties), as well as the risk of blurring the distinction between the preliminary examination and the formal investigation. Accordingly, it found that "[t]he mere existence of a potentially relevant piece of information of which the Commission was not aware and which it was not required to investigate, in the light of the pieces of information that were actually in its possession, cannot demonstrate that there were serious difficulties obliging the Commission to initiate the formal investigation procedure".⁹

⁶ See cases C-225/91 *Matra v Commission* ECLI:EU:C:1993:239 para. 17; C-198/91 *Cook v Commission* ECLI:EU:C:1993:197 para. 23.

⁷ See art. 4(4) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union.

⁸ *Commission v Tempus Energy and Tempus Energy Technology* cit. paras 67-70.

⁹ *Ibid.* para. 51.

Next, the General Court took a global approach to the State aid procedure and examined the entirety of indications. This led to the conclusion that the Commission should have had serious doubts after its preliminary examination. In particular, the General Court considered the excessive length of the pre-notification phase, during which the Commission addressed several sets of questions to the UK and during which Tempus and other operators submitted observations concerning the incompatibility of the planned measure. The General Court also took into account the fact that the measure was significant, complex and novel. It concluded that the Commission could not have simply relied on the information provided by the UK without carrying out its own investigation in order to examine and, if necessary, seek relevant information from interested parties.¹⁰

The Court disagreed with the General Court on this point as well. Instead of looking at the entire "body of consistent indications concerning [...] the circumstances and the length of the preliminary examination procedure",¹¹ it decomposed the "body" and analysed each "indication" separately. This targeted approach led to the conclusion that neither the length of the pre-notification contacts, nor the complexity and novelty of the measure, nor the multiplicity of third-party observations could demonstrate the existence of serious doubts.¹²

As regards the content of the challenged decision, a subtle but important qualification was made as to the evidence the applicant is required to adduce in order to obtain annulment. Indeed, Tempus raised a plethora of arguments according to which the measure could not be considered as compatible with the internal market at the end of the preliminary examination. The General Court held that, faced with all these arguments, the Commission should have entertained doubts and opened a formal investigation.¹³ In contrast, the Court made a distinction between the arguments against the compatibility of the measure on the one hand, and arguments demonstrating that serious doubts were justified, on the other. Indeed, it considered that assessment of the existence of serious doubts in light of the arguments against the measure is a separate step of the analysis; however, Tempus, according to the Court, did not provide such arguments.

More specifically, the General Court seemed to consider that the information provided by Tempus and others should reasonably have led the Commission to question the compatibility of the State aid and to investigate further whether their critique was justified. This approach was consistent with the initial finding that the Commission should actively search for all relevant information. The Court, however, expected a more concrete analysis inasmuch as the simple fact that arguments to the contrary existed could not be sufficient. Indeed, the Court did not find indications as to how exactly the

¹⁰ *Ibid.* paras 74-116.

¹¹ *Ibid.* para. 67, in which the General Court interpreted, to that effect, case T-388/03 *Deutsche Post and DHL International v Commission* EU:T:2009:30 para. 93.

¹² *Commission v Tempus Energy and Tempus Energy Technology* cit. para. 46.

¹³ *Commission v Tempus Energy and Tempus Energy Technology* cit. paras 117-266.

Commission should have reacted to these arguments, and why they should have undermined the Commission's findings. Moreover, while the General Court tried to identify this missing link, the Court held that "the General Court did not verify whether *Tempus* had succeeded in demonstrating that the assessment of the information and evidence available should have caused the Commission to have doubts".¹⁴ It was therefore the applicant's, not the General Court's, task to justify the existence of doubts.

The Court set aside the judgment of the General Court and gave, in eight paragraphs,¹⁵ the final judgment by which it dismissed the action.

Tempus might have become a victim of its own success. While the facts of the case provided an opportunity to pinpoint deficiencies of the preliminary examination by the Commission, the findings of horizontal nature made *Tempus* too promising and thus dominated the assessment, also by the Court. The impression one may get is that the Court had to intervene in order to limit the potentially uncontrollable impact of this judgment.

It is true that the system outlined by the General Court posed a risk of upsetting the equilibrium typical to State aid assessment, where the preliminary examination (as well as pre-notification contacts) involve only the Commission and the notifying Member State and where the Commission, as the Court admitted itself, enjoys a certain level of discretion as to whether serious doubts exist.¹⁶ Besides that, the approach adopted by the General Court might have been justified in *Tempus*, but it could render the assessment too subjective in other cases. The Court has successfully eliminated those risks. Still, the focus on the Commission and the notifying Member State confirms that attempts to give more weight to third parties in the State aid procedure might be contrary to the aim and dynamics inherent to that procedure.

¹⁴ *Commission v Tempus Energy and Tempus Energy Technology* cit. paras 119, 129 and 150-151, italics added.

¹⁵ *Ibid.* paras 180-188.

¹⁶ Case T-375/04 *Scheucher-Fleisch and Others v Commission* ECLI:EU:T:2009:445 para. 73; case T-304/08 *Smurfit Kappa Group v Commission* ECLI:EU:T:2012:351 para. 75.