



**EUROPEAN COMMISSION**

Brussels, 4 July 2016  
sj.c(2016)3835136

**In the International Court of Arbitration  
of the International Chamber of Commerce**

**Observations**

lodged by the **European Commission**, represented by Antonios Bouchagiar and Tim Maxian Rusche, Members of its Legal Service, acting as Agents, with an address for service at the offices BERL 01/068 and BERL 02/082, Rue de la Loi 200, B-1049 Brussels, Belgium, who consent to service by e-mail to [antonios.bouchagiar@ec.europa.eu](mailto:antonios.bouchagiar@ec.europa.eu) (tel: + 32 2 29 63903) and [tim.rusche@ec.europa.eu](mailto:tim.rusche@ec.europa.eu) (tel: + 32 2 29 54358), intervening as amicus curiae in

**Case no. 18675/GZ/MHM/AGF/ZF**

**Request for Interim Relief of 12 May 2016 by**

**Hellenic Shipyards S.A., Prinvest Holding SAL, Prinvest Shipbuilding SAL Holding  
and Hörn-Beteiligungs GmbH**

v

**The Hellenic Republic.**

1. In order to ensure the coherent application of EU State aid rules, in particular Articles 107 and 108 of the Treaty on the Functioning of the European Union ("TFEU"), the European Commission (the "Commission") has the honour of submitting the following observations as amicus curiae in the case before your Arbitral Tribunal.

## **1 LEGAL BASIS FOR THE COMMISSION'S OBSERVATIONS**

2. Article 29(2) of Regulation 2015/1589 provides the following:<sup>1</sup>

*“Where the coherent application of Article 107(1) or Article 108 TFEU so requires, the Commission, acting on its own initiative, may submit written observations to the courts of the Member States that are responsible for applying the State aid rules. It may, with the permission of the court in question, also make oral observations.*

*The Commission shall inform the Member State concerned of its intention to submit observations before formally doing so.*

*For the exclusive purpose of preparing its observations, the Commission may request the relevant court of the Member State to transmit documents at the disposal of the court, necessary for the Commission's assessment of the matter.”*

3. Article 29(2) of Regulation 2015/1589 is applied by analogy in cases of commercial arbitration that may interact with the application of State aid rules. In accordance with Article 36(2) of Regulation 2015/1589, that regulation is binding in its entirety and directly applicable in all Member States. Therefore, the direct effect of the aforementioned Article 29(2) enables the Commission to submit its written observations in the matter before your Arbitral Tribunal.
4. In that context, on 9 June 2016, the Commission's services sent to your Arbitral Tribunal a letter requesting the transmission of available documents of the case. Your Arbitral Tribunal responded by letter of 21 June 2016 and kindly invited the Commission to directly address any request for documents to the Hellenic Republic.

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<sup>1</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, Official Journal of the European Union ("OJ") L 248, 24.9.2015, p. 9.

The Arbitral Tribunal expressed its confidence that the Hellenic Republic would be in a position to positively react to such requests, and that the Commission would be able to access all necessary documents.

## 2 FACTUAL BACKGROUND

5. On 2 July 2008, the Commission adopted a decision in the case concerning State aid to Hellenic Shipyards (the "Recovery Decision").<sup>2</sup> With the Recovery Decision, the Commission concluded that the Hellenic Republic granted incompatible aid to Hellenic Shipyards and ordered the recovery of that aid including recovery interest to be calculated until the date of actual repayment of the aid. The aid principal was calculated at approximately EUR 256 million at the time.
6. The incompatible aid identified in the Recovery Decision relates to public support measures in favour of Hellenic Shipyards in various forms between 1997 and 2009 and it is not related to the contractual obligations into which the Hellenic Republic and Hellenic Shipyards have entered. The Commission's Recovery Decision has been confirmed by the Courts of the European Union and has by now become final. Specifically, on 15 March 2012, the General Court of the European Union (the "General Court") rejected the application for annulment filed by Hellenic Shipyards against the Recovery Decision.<sup>3</sup> The Court of Justice of the European Union (the "Court of Justice") rejected the appeal of Hellenic Shipyards against that judgment on 28 February 2013.<sup>4</sup>
7. Following the adoption of the Recovery Decision, the Hellenic Republic invoked national security interests under Article 346 TFEU and sought that recovery is implemented only with respect to the civil part of the yard. By letter of 1 December 2010 (the so-called "Military Decision"), the Commission accepted the proposal by the Hellenic Republic for the implementation of certain commitments to be considered as a way of implementing the Recovery Decision. It has to be clarified that the so-called "Military Decision" was simply a letter signed by the vice-President of the Commission responsible for competition (not a formal decision by the

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<sup>2</sup> OJ L 225, 27.08.2009, p. 104.

<sup>3</sup> Case T-391/08 *Ellinika Nafpigeia v Commission* ECLI:EU:T:2012:126.

<sup>4</sup> Case C-246/12P *Ellinika Nafpigeia v Commission* ECLI:EU:C:2013:133.

Commission) setting out one way of implementing the Recovery Decision. The "Military Decision" had to be implemented within six months. It has also become final.<sup>5</sup> To date, the "Military Decision" has not been implemented, in particular because of Hellenic Shipyards' lack of cooperation in the sale of civil assets.<sup>6</sup>

8. On 28 June 2012, the Court of Justice condemned the Hellenic Republic under Article 108(2) TFEU for the non-implementation of the Commission's decisions.<sup>7</sup> In that judgment, the Court of Justice concluded that the Hellenic Republic should have implemented the Recovery Decision by 13 December 2008. The Court of Justice also held that the "Military Decision" did not replace the Recovery Decision but only set out one way of implementing it.<sup>8</sup>
9. In the absence of implementation of the Commission's Recovery Decision, the Commission sent a Letter of Formal Notice to the Hellenic Republic on 27 November 2014 under Article 260(2) TFEU.
10. Nevertheless, in order to implement the Recovery Decision, on 4 December 2015 the authorities of the Hellenic Republic sent a recovery order to Hellenic Shipyards for the amount of EUR 524 million; corresponding to approximately 80% of the amount to be recovered. Hellenic Shipyards submitted an application for the annulment of that national recovery order on 5 February 2016 before the Athens Administrative Court. In March and April 2016, the tax authorities of the Hellenic Republic adopted acts for the enforcement of the abovementioned national recovery order. Hellenic Shipyards submitted an application for the annulment of those enforcement acts on 13 April 2016 before the Athens Administrative Court. Furthermore, on 23 May 2016, Hellenic Shipyards requested before the Athens Administrative Court the suspension of the

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<sup>5</sup> On 19 October 2012, the General Court rejected the application for annulment of Hellenic Shipyards (Case T-466/11 *Ellinika Nafpigeia and Hoern v Commission* ECLI:EU:T:2012:558) and on 12 September 2013 the Court of Justice also rejected the appeal of Hellenic Shipyards against the order of the General Court (Case C-616/12P *Ellinika Nafpigeia and 2. Hoern v Commission* ECLI:EU:C:2013:884).

<sup>6</sup> One of the commitments to be implemented under the "Military Decision" was the sale of the yard's civil assets. However, on 8 August 2012, the sales trustee appointed for the sale of these assets informed the Commission that Hellenic Shipyards disagreed as a matter of principle with the list of assets to be sold.

<sup>7</sup> Case C-485/10 *Commission v Greece* ECLI:EU:C:2012:395.

<sup>8</sup> Case C-485/10 *Commission v Greece* ECLI:EU:C:2012:395, para. 38.

national recovery order and of the relevant enforcement acts of the tax authorities until the main cases are decided (interim relief).

11. To the Commission's knowledge, the case before your Arbitral Tribunal between Hellenic Shipyards S.A., Prinvest Holding SAL, Prinvest Shipbuilding SAL Holding and Hörn-Beteiligungs GmbH (the "Claimants") and the Hellenic Republic concerns a dispute on their contractual relations regarding the construction and maintenance of certain submarines.
12. On 12 May 2016, the Claimants also requested interim relief before your Arbitral Tribunal against the recovery order and the relevant enforcement acts issued by the Hellenic Republic pursuant to the Recovery Decision. By order of 13 May 2016 your Arbitral Tribunal acknowledged receipt of the Claimants' request for interim relief and requested the Hellenic Republic to abstain from taking any unilateral action with regard to the enforcement of the Military or Recovery Decision, without informing the Arbitral Tribunal in advance, until the Arbitral Tribunal has decided on the Claimants' request for interim relief.

### 3 LEGAL ASSESSMENT

#### 3.1 The Hellenic Republic is under the obligation of EU public order to implement the Recovery Decision immediately and effectively

13. According to Article 16(3) of Regulation 2015/1589, "*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*".<sup>9</sup> Moreover, Article 18(4) of the Recovery Decision requires the Hellenic Republic to immediately and effectively recover the incompatible aid granted to Hellenic Shipyards.
14. As already analysed above,<sup>10</sup> the Recovery Decision has been confirmed by the Courts of the European Union and has by now become final. Therefore, there can be no doubt as to the substance of the Recovery Decision and the enforceability of its

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<sup>9</sup> Emphasis added. Article 16(3) of Regulation 2015/1589 is identical to Article 14(3) of the previous Council Regulation (EC) 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, p. 1-9.

operative part, including Article 18(4). The Hellenic Republic is under the obligation to immediately and effectively execute the recovery of the incompatible aid identified in the Recovery Decision.

15. Article 18(5) of the Recovery Decision required the Hellenic Republic to implement the recovery of the aid **within four months** from the date of notification of the Recovery Decision to the Hellenic Republic. Therefore, the implementation of the Recovery Decision should have been completed **by 13 December 2008**. However, the Hellenic Republic did not proceed with the full recovery of the incompatible aid within the specified deadline.
16. Notwithstanding the significant delay, in order to implement at least partly the abovementioned obligation of recovery, the Hellenic Republic issued the recovery order of 4 December 2015 against Hellenic Shipyards for an amount of EUR 524 million.<sup>11</sup> In execution of that same obligation, the tax authorities of the Hellenic Republic issued the acts for the enforcement of that recovery order in March and April 2016.
17. Given that the so-called "Military Decision" has not been implemented, there is no point in assessing whether an implementation of the Recovery Decision has taken place through an implementation of the "Military Decision". The Commission recalls that the "Military Decision" had to be implemented within a six-month period.
18. Moreover, as stated above,<sup>12</sup> the Recovery Decision relates to public support measures in favour of Hellenic Shipyards and it is not related to the contractual obligations into which the Hellenic Republic and Hellenic Shipyards have entered. The Commission understands that only the latter "private law" relations form the subject-matter of the case before your Arbitral Tribunal, which could not interfere with the "public law" obligation of the Hellenic Republic to implement the Recovery Decision.

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<sup>10</sup> See para. 6 of the present Observations.

<sup>11</sup> The amount of EUR 524 million corresponds to approximately 80% of the total recovery amount, which is currently estimated at approximately EUR 650 million including the principal recovery amount and recovery interest.

<sup>12</sup> See para. 6 of the present Observations.

19. In the light of the above, there is no justification for any further delay in the implementation of the Recovery Decision by the Hellenic Republic. The Commission respectfully submits that any decision by the Arbitral Tribunal blocking or delaying the implementation of the Recovery Decision would be in conflict with public order obligations under Union law. In the hypothetical situation that the Arbitral Tribunal were to issue an interim award blocking or delaying the implementation of the recovery decision, Greek courts would be obliged to annul such an award, since it would run counter to rules of public order of Union law.<sup>13</sup> Moreover, any further delay in the implementation of the Recovery Decision may lead to Court action against the Hellenic Republic under Article 260(2) TFEU, which can lead to the imposition of penalty payments on the Hellenic Republic.

### **3.2 National courts also cannot grant interim relief against the enforcement of the Recovery Decision**

20. Although the above analysis has set out sufficient reasons showing that the implementation of the Recovery Decision must not be inhibited, the Commission would also like to point out that even national courts cannot grant interim relief in the present case.
21. Specifically, in cases where the beneficiary requests interim relief against national measures adopted to implement a recovery decision of the Commission, the national judge has to assess whether the case at hand fulfils the strict conditions established by the Court of Justice in cases *Zuckerfabrik* and *Atlanta*.<sup>14</sup> According to that settled case-law, interim relief can be ordered by the national court **only if** the following **cumulative** conditions are fulfilled:

- 1) the national court entertains serious doubts as to the validity of the Commission's recovery decision and, if the validity of that decision is not

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<sup>13</sup> Case C-126/97 *Eco Swiss* ECLI:EU:C:1999:269.

<sup>14</sup> Joint Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* ECLI:EU:C:1991:65, paras 23-33; Case C-465/93 *Atlanta Fruchthandelsgesellschaft* ECLI:EU:C:1995:369, paras 32-51. See also points 55-59 of the Commission's Communication towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (OJ C 272, 15.11.2007, p. 4-17). See as well points 64-68 of the Commission's Communication on the enforcement of State aid law by national courts (OJ C 85, 9.4.2009, p. 1-22).

already in issue before the Court of Justice, itself refers the question for preliminary ruling to the Court of Justice;

- 2) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;
  - 3) the national court takes due account of the European Union's interest; and
  - 4) in its assessment of all those conditions, the national court respects any judgment of the Court of Justice or of the General Court ruling on the lawfulness of the Commission's recovery decision or on an application for interim measures seeking similar interim relief at Union level.
22. With respect to the first of the abovementioned four conditions, the Court of Justice has made clear that, in the context of interim relief proceedings before a national court, the national court can order interim relief against the national administrative act issued in implementation of a Union act<sup>15</sup> **only if the national court has serious doubts as to the validity of that Union act.**<sup>16</sup> The Court of Justice has stressed that "*[o]nly the possibility of a finding of invalidity [of the Union act], a matter which is reserved to the Court [of Justice], can justify the granting of suspensory measures [against the national administrative act]*".<sup>17</sup>
23. Therefore, in the present case, in order to be able to provide interim relief against the national recovery order,<sup>18</sup> a national court would have to entertain serious doubts as to the validity of the Recovery Decision of the Commission. However, the validity of the Recovery Decision has been confirmed both by the General Court and by the Court of Justice, which have respectively rejected the application for annulment and the appeal **submitted by Hellenic Shipyards itself** against the Recovery Decision.<sup>19</sup>

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<sup>15</sup> In the present case: the national recovery order in implementation of the Recovery Decision of the Commission.

<sup>16</sup> Joint Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* ECLI:EU:C:1991:65, para. 23; Case C-465/93 *Atlanta Fruchthandelsgesellschaft* ECLI:EU:C:1995:369, para. 32.

<sup>17</sup> Joint Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen* ECLI:EU:C:1991:65, para. 23 (emphasis added). See also Case C-465/93 *Atlanta Fruchthandelsgesellschaft* ECLI:EU:C:1995:369, para. 35.

<sup>18</sup> As well as against the relevant enforcement acts of the tax authorities of the Hellenic Republic.

<sup>19</sup> See para. 6 of the present Observations.



24. It is thus clear that the first of the four abovementioned cumulative conditions is not fulfilled in the present case. This would suffice for a national court to be unable to provide any interim relief against the national recovery order. For the sake of completeness, the Commission notes that none of the other three conditions is fulfilled either.
25. Regarding the second condition of "urgency", the Court of Justice has clarified that the damage to the applicant would be considered irreversible only in case it could not be made good if the **Recovery Decision** (and not the national recovery order) were to be declared invalid.<sup>20</sup> However, as already analysed,<sup>21</sup> the validity of the Recovery Decision has been definitively confirmed by the Courts of the European Union.
26. Regarding the third condition, it is clear that the interest of the European Union requires the immediate and effective recovery of the incompatible aid, as stipulated in Article 16(3) of Regulation 2015/1589.<sup>22</sup> Besides, the implementation of the Recovery Decision should have already been completed by 13 December 2008.<sup>23</sup>
27. Regarding the fourth condition, it is settled case-law that the national court is obliged to respect what the Courts of the European Union have decided on the questions at issue before it. Therefore, given that the General Court (and the Court of Justice on appeal) has dismissed on the merits the Hellenic Shipyards' action for annulment of the Recovery Decision, **a national court can no longer order interim measures.**<sup>24</sup>
28. On the basis of the above, it is clear that in the present case none of the abovementioned four conditions would be fulfilled, and thus a national court would be unable to provide interim relief to Hellenic Shipyards against the recovery order<sup>25</sup> issued by the Hellenic Republic in implementation of the Recovery Decision. Therefore, the Commission respectfully submits that, on the same grounds, your Arbitral Tribunal would not be entitled to grant interim relief to the Claimants against

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<sup>20</sup> Case C-465/93 *Atlanta Fruchthandelsgesellschaft* ECLI:EU:C:1995:369, para. 41 (last sentence).

<sup>21</sup> See para. 6 of the present Observations.

<sup>22</sup> See para. 13 of the present Observations.

<sup>23</sup> See para. 15 of the present Observations.

<sup>24</sup> Case C-465/93 *Atlanta Fruchthandelsgesellschaft* ECLI:EU:C:1995:369, para. 46.

<sup>25</sup> As well as against the relevant enforcement acts of the tax authorities of the Hellenic Republic.

the recovery order and the relevant enforcement acts issued by the Hellenic Republic pursuant to the Recovery Decision.

**4 CONCLUSION**

29. Accordingly, the Commission respectfully submits that your Arbitral Tribunal should:

- not grant any form of interim relief to the Claimants against the recovery order and the relevant enforcement acts issued by the Hellenic Republic pursuant to the Recovery Decision; and
- not order any other measure that could interfere either with the obligation of the Hellenic Republic to recover the incompatible aid granted to Hellenic Shipyards pursuant to the Recovery Decision or the way of implementing it.

30. The Commission stands ready to provide any further clarifications to your Arbitral Tribunal and to take part, if necessary, in an eventual oral hearing before your Arbitral Tribunal.



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