



EUROPEAN COMMISSION

Brussels,
D(2009)

**OPINION OF THE EUROPEAN COMMISSION
FOLLOWING THE REQUEST FROM THE COURT OF FIRST INSTANCE OF ATHENS
IN APPLICATION OF THE COMMISSION NOTICE
ON THE ENFORCEMENT OF STATE AID BY NATIONAL COURTS**

In case

[REDACTED]

[REDACTED]

The Commission has received and examined the request submitted by the Court of First Instance of Athens in the case referred to above and has decided to adopt an Opinion in application of the Commission Notice on the enforcement of State aid by national courts.

I. INTRODUCTION.

1. On 27 July 2009 the Commission received a request for an opinion from the Court of First Instance of Athens in application of the Commission Notice on the enforcement of State aid by national courts (the "Enforcement Notice")¹. That request was made in the context of court proceedings between [REDACTED] [REDACTED] (hereafter "the applicant"), as the universal successor in title of the special consortium of the companies [REDACTED] and [REDACTED] (hereafter "the consortium"), and [REDACTED] (hereafter "the defendant"), as the universal

¹ OJ C 85, 9 April 2009, p 1. See points 89 to 96.

6. According to Greek civil procedural law, the basic procedural precondition for filing a statement in intervention is the existence of a legitimate interest on the part of the intervener creating the legal necessity to do so. A legitimate interest exists where the aim of the intervention is either to protect the intervener's right or to prevent the ~~creation of a legal obligation on its part, when the decision handed down will have~~ an impact on its legal relations.
7. According to the Athens Court of First Instance, in order to establish whether the present statements in intervention are admissible, it does not suffice to merely plead legitimate interest; it must also be found to exist. The Athens Court of First Instance concludes that this issue turns on whether the guarantee given by the Greek State in clause 8.2.2.d of the amending agreement of 20 March 2002, constitutes State aid which is lawful.
8. The Commission understands that, according to the interpretation of legitimate interest by the Athens Court of First Instance, the Greek State has only a legitimate interest in the present proceedings if the guarantee granted to the defendant is valid. If the guarantee is valid, the Greek State would have to compensate the defendant if the Athens Court of First Instance were not to rule in its favour. The guarantee can however only be valid if it does not constitute State aid. If it were to constitute state aid, as it has not been notified this would be unlawful.

3. **QUESTIONS RAISED BY THE COURT OF FIRST INSTANCE OF ATHENS.**

9. In this context, the Athens Court of First Instance referred by its judgment of 12 May 2009 (judgment no.3388/2009) the following questions, for opinion, to the European Commission:

- (1) *"Is the Commission already assessing the compatibility of the aid measure as set out in clause 8.2.2.d of the amending contract between the Greek Government and [REDACTED] of 20 March 2002 for the sale of 100 000 000 ordinary shares of the [REDACTED] ([REDACTED]), or does it intend to do so, given that it has already taken note and dealt with the matter incidentally in its Decision No C16/2004 of 2 July 2008 on aid granted by Greece to [REDACTED]? If so, when is its decision likely to be adopted?"*
- (2) *"If the Commission is not assessing and does not intend to assess the compatibility of the aid measure, could it state (a) whether the measure, as set out in clause 8.2.2.d of the amending contract between the [REDACTED]*

[REDACTED] on top of the State aid included in the guarantee granted by [REDACTED] to the consortium. Accordingly the Commission considered sufficient to order that the latter guarantee has to be stopped immediately⁶ and did not consider it necessary to investigate the guarantee granted by the Greek State to [REDACTED] as set out in clause 8.2.2.d further in the framework of procedures concerning potential State aid to [REDACTED]

13. The Commission would like to draw the attention of the Athens Court of First Instance on the fact that its decision of 2 July 2008 has been referred to the General Court of the European Union as a result of the annulment proceedings lodged on 11 September 2008 by the applicants, [REDACTED] and [REDACTED] (Case T-384/08). The applicants seek in particular the annulment of Article 16 of the decision of 2 July 2008, by which the Commission decided that the indemnification guarantee granted by [REDACTED] to the consortium that acquired [REDACTED] through a share purchase, in the event of State aid recovery from [REDACTED], constitutes illegal State aid and should be stopped immediately⁷. However, this action does not have suspensive effect and cannot therefore prevent the Greek authorities from pursuing the recovery required by the decision of 2 July 2008, or the Greek Court from ruling on the substance.

4.2. Question 2:

14. By its second question, the Athens Court of First Instance is in substance asking whether the measure, as set out in clause 8.2.2.d of amending agreement of 20 March 2002 ("clause 8.2.2.d"), can be classified as State aid. If so, the Athens Court would like to know how the exact amount of the aid is to be calculated and if the measure is existing aid or is caught by an exemption regulation and therefore did not require notification.
15. Clause 8.2.2.d of the amending agreement of 20 March 2002 between the Greek State and the defendant stipulates:

⁶ Article 16 of the decision

⁷ OJ C 301, 22.11.2008, p.48

market, as regards the underwriting of claims by ██████████ following the recovery from ██████████ of any incompatible aid granted before and during its privatisation due to a binding decision by the European Commission".

20. As regards the conclusion of the Athens Court of First Instance, the Commission would like to reiterate its findings as laid down in the decision of 2 July 2008. The Commission considered that the guarantee granted by ██████████ to the consortium constitutes State aid to ██████████ independently of the guarantee granted by the Greek State to the defendant by clause 8.2.2.d. The Commission, however, considered as a subsidiary reasoning that even if the guarantee of ██████████ to the consortium were not to constitute State aid to ██████████ when viewed on its own, it formed part of a two-step guarantee in favour of ██████████⁹. The Commission must stress that under this subsidiary reasoning, the guarantee granted by the Greek State to the defendant by clause 8.2.2.d taken on its own could not constitute aid to ██████████ but that this guarantee has to be considered jointly with the guarantee granted by ██████████ to the consortium.
21. The Commission observes that Article 16 of the decision of 2 July 2008 orders the guarantee of ██████████ to the consortium to be stopped immediately. This provision ends the guarantee between ██████████ and the consortium. In addition, it also renders the guarantee between the Greek State and the defendant without object insofar as losses resulting from an obligation to repay illegal and incompatible aid are concerned, as the conditions that would trigger the obligation to indemnify the defendant no longer exist.
22. The question referred by the Athens Court of First Instance also raises issues in relation with the second scenario, meaning the other aspects of clause 8.2.2.d of amending agreement of 20 March 2002. The Court asks in particular if the guarantee by the Greek State to compensate any damage caused to the defendant by third party claims linked to the privatisation of ██████████, other than the indemnification in case of recovery of aid from ██████████ constitutes State aid.

⁹ For a more detailed explanation please point 316 of the decision of 2 July 2008

agreement between the Greek State and the defendant concerning the sale of [REDACTED]. The guarantee is financed by State resources since by committing to grant the guarantee the State puts State resources at risk. Finally, the measure is selective because only one company, the defendant, shall benefit from the guarantee.

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27. In order to establish whether an economic advantage has been granted, the market economy investor principle should be applied. In this case, it has to be assessed whether a private company would have granted the same advantage when selling its share of a firm that was itself in the process of selling one of its subsidiaries or one of its major assets.
28. In this respect, the national court should examine if the risk that the State runs by granting the guarantee is reflected in the purchase price following an open, transparent and competitive procedure. To this end, the national court can verify if the Greek State offered in the tender proceedings for the sale of [REDACTED] to all bidders the same contractual terms including the same guarantee which covers all third party claims which might arise in respect of the privatisation of [REDACTED] S.A. If the condition that the Greek State would continue to manage the sale of [REDACTED] even after the privatisation of [REDACTED], was also included in the tender proceedings, the guarantee could be considered as its logical consequence since all the decisions linked to the privatisation of [REDACTED] would be imputable to the Greek State. Under these circumstances, the national court could consider that clause 8.2.2.d does not give rise to aid since [REDACTED] was sold at the market price taking into account the value of the guarantee.
29. However, even if during the privatisation of [REDACTED] the principles set out above were respected, this might not suffice to exclude the existence of an advantage¹³. Comparing the wording of the guarantee with the wording used by other operators in similar transactions could give additional insight.
30. The national court should especially examine if a private company which only holds 57,1% of the shares in an undertaking would commit to pay to the purchaser 100% of any losses related to the sale of one of the subsidiaries of the undertaking. The

¹³ Commission decision of 21 October 2008 on measure C 35/04 implemented by Hungary for Postabank and Takarékpénztár RT / ErsteBank Hungary Nyrt. (OJ L 62, 6 March 2009, p.14., para. 48 to 63)

unlawful aid, it must normally grant that application¹⁵. To quantify the aid element, it has to be asked which price the beneficiary would have to pay for the guarantee on the market

¹⁵ See Communication of the Commission, dated March 2000, applying Article 87 and 88 of the EC Treaty to State aid in the form of guarantees, op. cit., point 63