

The recovery of unlawful State aid: practical issues

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EU legal provisions

- **Article 108 (3) of TFEU**

The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

- **Council Regulation 2015/1589 (‘ Procedural Regulation’):**

- *Article 3 - Standstill clause* - Aid notifiable pursuant to Article 2(1) shall not be put into effect before the Commission has taken, or is deemed to have taken, a decision authorizing such aid.

- Article 16 - *Recovery of aid*

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

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

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

- *Article 29 - Cooperation with national courts*

1. For the application of Article 107(1) and Article 108 TFEU, the courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of State aid rules.

2. 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.

- **Commission Notice on the enforcement of State aid law by national courts (2009/C 85/01)**
- **Commission Notice on recovery of unlawful and incompatible State aid ('2019 Recovery Notice') (2019/C 247/01)**

contains detailed rules concerning the role of the Commission and the Member State concerned, cooperation between the Commission and Member States, implementation of the recovery decisions issued by the Commission, consequences of a failure to implement a Commission recovery decision and litigation before national courts.

A. The obligation to recover the unlawful and incompatible State aid

- The recovery of an unlawful aid - duty of the Member State concerned.
- The purpose of recovery:
 - the restoration of the situation which existed in the internal market before the aid was paid.

C-610/10

- The recovery concerns:

- unlawful state aid and

- interests.

- The scope of recovery:

- to deprive the recipient of any advantage it may have enjoyed over its competitors.

- The applicable rules for the recovery of aid unlawfully paid:
 - relevant procedural provisions of national law which have to be applied in such a way that the recovery is not rendered practically impossible and the interests of the EU are taken fully into consideration.

- An aid implemented without prior notification to the Commission - no legitimate expectations that is lawful.
- The Commission will order recovery of unlawful and incompatible aid, unless that would be contrary to a general principle of the EU law.

B.Limits to the obligation to recover the unlawful and incompatible State aid

I. The recovery of the aid would be contrary to a general principle of Union law

-the principle of the protection of legitimate expectations, the principle of the equal treatment, the principle of the legal certainty etc.

II. An absolute impossibility for a Member State to execute the recovery decision

III. The limitation period

I. The recovery of the aid would be contrary to a general principle of Union law

The principle of the protection of legitimate expectations

- The beneficiary may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the EU law. A diligent businessman should normally be able to determine whether that procedure has been followed.
- But a recipient of illegally granted aid is not precluded from relying on exceptional circumstances based on which it had legitimately assumed the aid to be lawful and thus declining to refund that aid.
- A Member State whose authorities have granted aid in breach of the standstill obligation may not plead that that infringement creates a legitimate expectation for a beneficiary that the aid would not be recovered.

- **3 cumulative conditions:**

1. Precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the EU authorities;

2. Those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed;

3. The assurances given must comply with the applicable rules.

T-207/10

1. Precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the EU authorities.

- The right to rely on the principle of the protection of legitimate expectations applies to any individual in a situation in which an institution of the EU, by giving that person specific and precise assurances, has led him to entertain well-founded expectations.
- Information which is *precise, unconditional* and *consistent* and comes from *authorized and reliable sources* constitutes such assurances.

C-537/08

2. Those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed.

- That expectation must be *legitimate*, that is to say the person concerned must not have been able to foresee the change to the line of conduct previously adopted by the administration.
- If a prudent and circumspect trader could have foreseen the adoption of a Community measure likely to affect his interests he cannot plead the principle of the protection of legitimate expectations if the measure is adopted.

C-221/09

3. The assurances given must comply with the applicable rules.

- A promise made by certain Commission officials could not be admitted, since no official can give a valid undertaking not to apply Union law. No legitimate expectation can arise by such a promise, even if one was made.

C-188/82

- According to settled case-law, the following situations do not create legitimate expectations:
 - the silence of the Commission on an aid measure that was notified to it;
 - an apparent failure of the Commission to react to an aid measure which was not notified;
 - absence of any action by the Commission for a relatively long period of time;
 - the adoption of several successive Commission decisions finding the aid as compatible, subsequently annulled by the Union Courts etc.

T-427/04 and T-17/05; C-81/10; C-471/09 to C-473/09; C-1/09

C-1/09, *CELF II*

The adoption by the Commission of three successive decisions declaring aid to be compatible with the common market, which were subsequently annulled by the Community judicature, is not, in itself, capable of constituting an exceptional circumstance such as to justify a limitation of the recipient's obligation to repay that aid, in the case where that aid was implemented contrary to Article 88(3) EC.

C-182/03 and C-217/03, *Belgium v. Commission*

By its decisions given in 1984 and 1987 and by the reply given on 24 September 1990, the Commission created an **expectation** that the scheme in question did not contain any aid element.

It follows that the coordination centers with an application for renewal of their authorization pending on the date on which the contested decision was notified or with an authorization which expired at the same time as or shortly after that decision was notified were entitled to have a **legitimate expectation** that a reasonable transitional period would be granted in order for them to adjust to the consequences of that decision.

C-316/86, *Hauptzollamt Hamburg*

A wrongful act on the part of the Commission or its officials and likewise a practice of a member state which does not conform with Community rules is not capable of giving rise to legitimate expectations on the part of an economic operator who benefits from the situation thereby created.

It follows that the principle of the protection of legitimate expectations cannot be relied upon against a precise provision of Community law and that the conduct of a national authority responsible for applying Community law, which acts in breach of that law, cannot give rise to legitimate expectations on the part of an economic operator that he will benefit from treatment which is contrary to Community law.

The principle of equal treatment

- This principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

C-182/03 and C-217/03, *Belgium v. Commission*

By failing to adopt transitional measures for the state aid recipients that were in the same situation the Commission infringed the general principle of equal treatment.

The principle of legal certainty

- Since the national authorities have no discretion in the matter, the recipient of unlawfully granted aid ceases to be in a state of uncertainty once the Commission has adopted a recovery decision.
- The principle of legal certainty cannot preclude repayment of the aid on the ground that the national authorities were late in complying with the decision requiring such repayment.
- The principles of the primacy and effectiveness of EU law mean that Member States and aid beneficiaries cannot rely on the principle of legal certainty to limit recovery in case of an alleged conflict between national and EU law.

C-91/01, Italy v Commission

- In view of the mandatory nature of the supervision of State aid by the Commission under Article 88 EC, undertakings to which aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article.
- It follows that, so long as the Commission has not taken a decision approving aid and also so long as the period for bringing an action against such a decision has not expired, the recipient cannot be certain as to the lawfulness of the proposed aid which alone can give rise to a legitimate expectation on his part.
- It follows that the Commission did not infringe the principles of protection of legitimate expectations and legal certainty.

C-24/95, Alcan

Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even if the authority has allowed the time-limit laid down for that purpose under national law in the interest of legal certainty to elapse.

C-232/05, Commission v. France

In case of unlawful aid which is not compatible with the common market, effective competition should be restored and for this purpose it is necessary that the aid be recovered without delay.

The application of the national rules should not therefore impede the restoration of effective competition by preventing the immediate and effective execution of the Commission decision.

By providing for the suspensory effect of actions brought against demands for payment issued for the recovery of aid granted, the procedure laid down by French law and applied in the case cannot be considered to allow the 'immediate and effective' execution of recovery decision.

The French rule providing for the suspensory effect of actions brought against demands for payment should therefore have been left unapplied.

II. An absolute impossibility for Member State to execute the recovery decision

- The principle that ‘no one is obliged to do the impossible’ - a general principle of EU law.
- The only defence that a Member State to which a decision has been addressed can raise in legal proceedings - the implementation of the decision is absolutely impossible.
- The burden of proof - the Member State must demonstrate the existence of reasons justifying the absence of recovery.

C-622/16 to C-624/16; C-52/84; C-63/14

The "absolute impossibility" condition

This condition is not fulfilled where the Member State merely informs the Commission of the legal, political or practical difficulties involved in implementing the decision, without taking any real steps to recover the aid from the beneficiaries.

- The Member State concerned cannot plead the existence of absolute impossibility based on national limitation periods, the absence of a right under national law to impose recovery or a legal vacuum.
- The Member State must identify and adopt the necessary measures without delay - it may have to adopt new legal acts or to set aside provisions of national legislation which do not allow for a swift removal of the difficulties encountered.

C-94/87; C-24/95; C-303/88; C-263/12; C-63/14

Nor can the economic situation of the beneficiaries be invoked in order to justify the non-implementation of the Commission decision.

- The beneficiary is in financial difficulty or even insolvent – no proof that recovery is impossible, unless it has been liquidated and no assets are recoverable.
- The recipients have not ceased their activity - no an absolute impossibility to execute the recovery decision.
- The recipients have ceased their activity and transferred their assets - no automatically an absolute impossibility for that Member State to execute the recovery decision.

C-52/84; C-499/99; C-277/00

C-24/95, Alcan

- A Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under European law.
- Particularly, a provision laying down a time-limit for the revocation of an administrative act may not be invoked by the Member State as an absolute impossibility to apply the recovery decision.

III. The limitation period

- The powers of the Commission to recover aid shall be subject to a limitation period of 10 years.
- The limitation period begins on the day on which the unlawful aid is awarded to the beneficiary.
- Any aid with regard to which the limitation period has expired shall be deemed to be existing aid.

T-818/14

Final remarks

Role of the national courts

- National courts are under a duty to protect equally the public and the private interests and therefore to give full effect to EU law.
- National courts must ensure that all appropriate conclusions will be drawn from an infringement of Article 108(3), in accordance with their national law, as regards both
 - the validity of measures giving effect to the aid and
 - the recovery of financial support in disregard of that provision.
- In order to fulfil their role, the national courts may or must request the Court for a preliminary ruling on the interpretation of Article 108 of the Treaty.

C-39/94; C-349/17; C-199/06

Thank you for your attention.