

◆ LEXCELLENCE ◆

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EEUStAID

**Building of Central and Eastern European judicial
capacities for the enforcement of EU State aid law**

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PROTECTING UNDISTORTED COMPETITION
VERSUS ENSURING EFFECTIVE JUDICIAL
PROTECTION

THE ROLE OF NATIONAL COURTS IN THE PROVISION OF
INTERIM RELIEF





“Admittedly, there is some inherent tension between the right of aid recipients to challenge, before a court, acts which may be detrimental to them, and the right of their competitors to have a situation of legality and a level playing field re-established as soon as possible.

Since both these rights are vital to a Union based on the rule of law and one of whose cornerstones is the internal market, I am of the view that neither of them should be unconditionally sacrificed for the sake of the other.”

(Advocate General Wahl in his opinion of 13 February 2014, prepared to Commission v Germany, C-527/12, EU:C:2014:90, par. 58-59.)



INTRODUCTION



THE EXAMPLE OF THE NUCLEAR POWER PLANT

A nuclear power plant which had been entirely financed from lawfully implemented State aid will subsequently be decommissioned if it turns out finally that the Commission can not lawfully authorise the aid.

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The nuclear power plant will be decommissioned. True or false?

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— True False



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SOME OF THE RELEVANT TREATY PROVISIONS

Article 264(1) TFEU:

„If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.”

Article 266 TFEU:

„The institution whose act has been declared void or whose failure to act has been declared contrary to the treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.”

Article 340(2) TFEU:

„In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.”



PRINCIPLES CONCERNING RECOVERY

The Commission has to order recovery of illegally implemented incompatible new aid (has no discretion in that regard) except in case it would be contrary to one of the general principles of EU law (legal certainty, protection of legitimate expectations).

The beneficiary may rely on legitimate expectations concerning the lawfulness of the aid only if

- ❖ a Union institution (i.e. the European Commission) gave him precise, unconditional and consistent assurances

Acts of the Union institutions are presumed to be lawful

- ❖ meaning that they produce legal effects until such time as they are withdrawn, annulled or declared invalid

Annulment takes place *ex tunc* and with an *erga omnes* effect

Interpretation laid down in judgment of 12 February 2008, CELF, C-199/06, EU:C:2008:79, par. 61-69. (the French Book Export Centre case)



INTERPRETATIONS OF ARTICLE 266 TFEU

”[...] under Article 266 TFEU, an institution whose act has been declared void is required to take the necessary measures to comply with the judgment. Those measures involve, inter alia, the **removal of the effects of the illegal conduct found in the judgment annulling the act.** [...]”

Judgment of 30 May 2013, Joined cases T-454/10 and T-482/11, *Anicav and Agrucon and Others v Commission*, EU:T:2013:282, par. 49.

„The annulment of an act which has already been implemented or which has in the meantime been repealed from a certain date is thus still capable of having legal consequences. **Such annulment places a duty on the institution concerned to take the necessary measures to comply with the judgment. The institution may thus be required to take adequate steps to restore the applicant to its original situation or to avoid the adoption of an identical measure.**[...]”

Judgment of 14 September 1995 in *Antillean Rice Mills and Others v Commission*, T-480/93, EU:T:1995:162, par. 60.

In the Commission’s practice in the State aid field:

- ❖ New assessment of the measure – if the final decision has been annulled, the Commission continues proceedings on the basis of the original opening decision
- ❖ Legal uncertainty concerning its obligation to restore the applicant to its original situation – the Commission seems to deny it and the question has not yet been dealt with by the Court



ANOTHER QUESTION CONCERNING THE NPP

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If it is decommissioned, who will bear the costs of decommissioning?

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INTERPRETATIONS CONCERNING THE NON-CONTRACTUAL LIABILITY OF EU INSTITUTIONS

- ❖ Actions for damages concerning national measures implementing EU law are not admissible as far as those national measures were decided on the basis of the national authority's own discretion;
- ❖ The three cumulative conditions for extra-contractual liability:
 - ◆ there must be a **sufficiently serious breach of a rule of law intended to confer rights on individuals** (such as to give rise to the EU's liability, where the sufficiently serious breach is to be evaluated with regard to the discretion enjoyed by the institution concerned);
 - ◆ there must be **damage** suffered by the party claiming compensation and that damage must be real (actual) and certain;
 - ◆ and there must be a **sufficiently direct causal link** between the damage suffered and the alleged illegal conduct.
- ❖ Division of powers between the Commission and the Member States is not a rule of law intended to confer rights on individuals
- ❖ In order to establish the sufficiently serious breach (of a rule of law intended to confer rights on individuals), the applicant must prove that the institution concerned has manifestly and gravely disregarded the limits of its discretion.
- ❖ Assessment of compatibility under Article 107(3)c) is a complex economic assessment where the Commission has wide margin of manoeuvre



„According to settled case-law of the Court, the assessment whether aid measures or a State aid regime are compatible with the internal market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union. On the other hand, it is also settled case-law that **where a national court considers that one or more arguments for invalidity of an act of the Union institutions, including a Commission decision authorising State aid are well founded, it is incumbent upon it to stay proceedings and to make a reference to the Court for a preliminary ruling on the act’s validity.**

Consequently a private person not directly and individually concerned by a Commission decision authorising State aid within the meaning of Article 263(4) is not deprived of effective judicial protection since he can contest the aid before national courts and in that context may challenge the validity of the said decision.”

Order of 10 October 2017, Greenpeace Energy v Commission, C-640/16 P, EU:C:2017:752, par. 60-61.

„In the context of [the obligation of sincere] cooperation, national courts must take all the necessary measures, whether general or specific, to ensure the fulfilment of the obligations under European Union law and refrain from taking those which may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU. Therefore, **national courts must, in particular, refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional.**”

Judgment of 15 September 2016, PGE, C-574/14, EU:C:2016:686, par. 33.



THE DILEMMA CONCERNING SUSPENSION OF OPERATION



THE BUCZEK AUTOMOTIVE CASE

The measure

- ❖ Pursuing the debt recovery proceedings (with little practical effect) instead of requesting that the beneficiary be declared insolvent during 2004-mid 2006

Formal investigation proceedings

- ❖ Opened on 7 June 2006, closed by negative decision of 23 October 2007, ordered recovery of PLN 13,6 m from Huta Buczek and PLN 7,2 m from Buczek Automotive

The infringement proceedings

- ❖ Opened shortly after the Polish authorities notified the Commission of the difficulties of double recovery (declaration of insolvency for TB: 16 August 2006; for BA: 25 June 2008; for HB: 29 April 2009)
- ❖ Brought before the Court on 17 August 2009
- ❖ Infringement declared by judgment of 14 April 2011 (Commission v Poland, C-331/09, EU:C:2011:250)

Annulment of the Commission Decision

- ❖ Application for suspension of operation rejected by order of 14 March 2008 (EU:T:2008:79) lack of urgency (no grave and irreparable harm established)
- ❖ Judgment of 17 May 2011, Buczek Automotive v Commission, T-1/08, EU:T:2011:216
- ❖ Judgment of 21 March 2013, Commission v Buczek Automotive, C-405/11 P, EU:C:2013:186

Implementation of the judgment annulling the Commission Decision

- ❖ Procedure became devoid of purpose as the alleged beneficiary has been deleted from commercial register (November 2012), Commission Decision closing the case on 25 June 2014.



Infringement declared for failure to effect recovery of incompatible aid

Judgment of 5 June 2014, Commission v Italy, C-547/11, EU:C:2014:1319

The competent court of Sardinia granted the application for suspension of operation each time the lawfulness of the Commission Decision was challenged and pending before the General Court (3 times, in cases T-50/06, T-56/06, T-60/06, T-62/06 and T-69/06)

- ❖ The Commission ordered recovery for the period from October 2001
- ❖ Italy argued that the suspension of operation of the implementing measures was lawfully granted by its national courts so non-recovery was justified
- ❖ The orders granting interim relief were delivered later than the expiry of the 4 month period allowed by the Commission to execute recovery, so failure to fulfil obligations was not justified
- ❖ No material assessment of the possibility for justification



COMMISSION GUIDANCE AND EUCJ CASE-LAW
CONCERNING SUSPENSION OF OPERATION OF
A RECOVERY ORDER BY NATIONAL COURTS



- ❖ „[...] the beneficiary of an aid who could have asked for interim relief before the Community Courts [...] and has failed to do so cannot ask for a suspension of the measures taken by national authorities for implementing that decision on grounds linked to the validity of the decision. **This question is reserved for the Community Courts.**”

Notice from the Commission, Towards an effective implementation of Community decisions ordering Member States to recover unlawful and incompatible aid (The Recovery Notice), 2007/C 272/05, par. 57.

- ❖ In case its legal standing before the GC is not obvious, the beneficiary may ask for interim relief, the conditions of which are those of the Zuckerfabrik case-law.
- ❖ No guidance concerning the case when the beneficiary has challenged the validity of the Commission decision before the GC and applies for interim relief against national implementing measures before the national court



Cumulative conditions of suspension of operation (of national measures implementing the Commission's recovery order):

- ❖ The national court must entertain serious doubts as to the validity of the Commission decision and there must be ongoing proceedings for its annulment before the GC/EUCJ or a reference (is to be made) for preliminary ruling
- ❖ Urgency (i.e. interim relief is necessary to avoid serious and irreparable damage to the party seeking relief)
- ❖ The court takes due account of the Community interest
- ❖ The court respects any decisions of the EUCJ/GC ruling on the lawfulness of the Commission decision and on an application for interim measures seeking similar interim relief at Community level (!)

Reference: Judgment of 21 February 1991, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, C-143/88 and C-92/89, EU:C:1991:65.



- a) The existence of domestic remedies against recovery measures may exclude fulfilment of the condition of urgency at Union level
- ❖ *„[...] according to settled case-law, when a undertaking that is a recipient of State aid is faced with a Commission decision addressed to a Member State and ordering recovery of that aid, **the existence of domestic remedies permitting that undertaking to defend itself against recovery measures at national level is capable of allowing that undertaking to escape serious irreparable damage caused by the repayment of the aid.**” par. 59. op. cit.*
 - ❖ *„[...] It follows that in proceedings for interim measures seeking such a decision, it is for that undertaking to show that the domestic means of obtaining redress offered by the applicable national law for contesting the immediate recovery of the aid do not enable it, by relying in particular on its financial situation or on the illegality of the national recovery measure, to avoid suffering serious and irreparable damage, failing which the judge hearing the application for interim measures will find that urgency has not been established in the proceedings before him [...].” par. 59. op. cit.*
- b) Interlocutory proceedings before the Union judicature are subsidiary to those before the national court
- ❖ *„That case-law [...] makes the interlocutory proceedings before the Union judicature subsidiary to any proceedings that may be brought before the national court hearing applications for interim measures, which is undoubtedly better placed to appraise the legality of national measures and the situation of the undertaking concerned in the light of the national rules on insolvency and winding-up [...].” par. 60. op. cit.*



- c) It is not contrary to EU law for the national court to order suspension of operation of a national recovery order when the validity of the Commission decision is challenged before the EU judicature
- ❖ *„in national proceedings for the recovery of State aid, it is not contrary to the law of the Union for the national court to order suspension of operation of an order for recovery adopted by the national authorities pending the General Court’s ruling on the merits or a ruling by the Court of Justice on a question referred to it pursuant to Article 267 TFEU. Inasmuch as the applicant has challenged the legality of the contested Union decision under Article 263 TFEU, the national court is not bound by that decision’s being definitive.”* par. 60. op. cit.
- d) The national court is not bound by the EU Court’s decision concerning suspension of operation
- ❖ *„the fact that an application for suspension of operation has been unsuccessful before the Union judicature does not prevent the national court ordering suspension.”* par. 60. op. cit.



e) Although the existence of domestic remedies against recovery measures may be taken into account by the Union judge (i.e. it may exclude fulfilment of the condition of urgency), exhaustion of national rights of action is not a precondition for interim relief sought at Union level, because such a precondition would limit access to justice disproportionately.

❖ *„S’agissant du deuxième argument de la Commission, selon lequel la demande en référé est prématurée en ce que le requérant n’a pas épuisé les voies de recours au niveau national, il convient de relever qu’il résulte effectivement de la jurisprudence que, lorsqu’une entreprise bénéficiaire d’une aide d’État demande au juge de l’Union le sursis à l’exécution d’une décision de la Commission ordonnant la récupération de cette aide, la circonstance qu’il existe des voies de recours internes permettant à ladite entreprise de se défendre contre les mesures de recouvrement au niveau national est susceptible de permettre à ladite entreprise d’éviter un préjudice grave et irréparable résultant du remboursement de ladite aide. [...] Ainsi, le juge de l’Union peut prendre en considération l’existence de telles voies de recours dans le cadre de l’appréciation au fond de la demande en référé et notamment de l’existence d’un préjudice grave et irréparable. [...] la thèse de la Commission reviendrait à imposer, de manière catégorique et mécanique, au requérant d’épuiser les voies des recours internes, limitant ainsi de manière disproportionnée l’accès au juge de l’Union.”* par. 100-101 and 104. op. cit.

Further references:

- ❖ Order of 7 March 2014, *Aluminios Cortizo v Commission*, T-1/14 R, EU:T:2014:106, par. 20.
- ❖ Order of 14 December 2011, *Alcoa Trasformazioni v Commission*, C-446/10 P(R), EU:C:2011:829, par. 43-51.



QUESTIONS TO DISCUSS

Possibility to suspend the operation of national implementing measures taken in pursuance of a Commission Decision concerning State aid

- ❖ Does your national procedural background empower the national judge ruling on disputes concerning the implementation of a Commission Decision on State aid to grant an application for suspension of operation?
- ❖ Would you need to refer questions to the EUCJ?
- ❖ Are there any specific criteria for similar interim measures?
- ❖ Were you aware of the Zuckerfabrik case-law? Could you apply them without referring questions for preliminary ruling? Could you apply them on your own initiative or only if referred to by the parties?

Whether detailed legislation governing interim relief (suspension of operation) could make it easier for you to make lawful decisions concerning interim relief (i.e. respecting also EU law requirements)?



Thank you for your attention!