The European Court of Justice clarifies the powers of the Council in State aid cases

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On 29 June 2004 the Court of Justice annulled a Council decision adopted on the basis of Article 88(2), 3rd paragraph EC, authorising Portugal to grant State aid to pig farmers (1). The amount of State aid authorized was the same as should have been repaid by 2116 farmers under two final negative decisions of the Commission of 25 November 1999 and 4 October 2000. The Court of Justice found that the Council’s power to declare a measure of State aid compatible with the common market is exceptional in character, and ruled that where the Commission had already initiated the procedure laid down by the treaty and the three-month time-limit laid down by the latter had expired, the Council no longer had the power to adopt such a decision following the application of a member state. It also ruled that the Council had no power to adopt such a decision where the Commission had already declared the aid in question incompatible with the common market.

1. Procedure under Article 88(2) 3rd paragraph

Art 88 (2) paragraph 3 EC states:

‘On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Art 87 or from the regulations provided for in Art 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.’

If a Member State makes such a request to the Council, negotiations take place directly between the Member States. There is no Commission proposal to be made or to be discussed. The Commission may be asked how it would deal with the aid under ‘normal’ State aid rules, and how it sees the merit of these cases. The Commission may choose to say nothing, support approval by the Council, or recommend the Council not to approve. It is important that any Council decision defines precisely what is being authorized by it, in order to know whether it is identical with State aid measure which are or will be examined by the Commission if and when notified.

Such a derogation of State aid rules by a Council decision is in principle only possible if the decision is justified by exceptional circumstances. The Court has accepted that the Council disposes of a large margin of interpretation — the Court will limit its assessment to verifying whether there was any manifest error of assessment (3).

If the Commission has already initiated the formal investigation procedure, the application by the Member State to the Council suspends that procedure until the Council decides. If no Council decision follows within three months of the application, the Commission may continue the procedure.

(1) The views expressed are purely those of the writer and may not in any circumstances be regarded as stating an official position of the European Commission.

(2) C-110/02, 29.7.2004.

(3) In case C-253/84, 15.1.1987, the Court avoided ruling on this point, although the Advocate-General indicated that in his view it had not been shown that there were exceptional circumstances justifying the Council decision. But in case C 122/94, 29.2.1996, ECR I-881, the Court went further and indicated that the Council has a large discretion.
2. Past use of Article 88(2), 3rd paragraph

The Council has used this procedure in the past in the agriculture sector: for example, several various distillation aids have recently been approved by the Agriculture Council which would probably not have been allowed under State aid rules as they seemed to constitute pure operating aid (1).

Outside the agriculture sector, the use of Article 88(2), 3rd paragraph is extremely rare (2). The most recent case concerns the Belgian coordination centers (3), which was also linked with another Council decision in the agriculture sector (4) (and further linked to the approval of the Savings Directive — Belgium and Italy refused to approve the Directive at the beginning of 2003 until a satisfactory arrangement had been found to largely relieve Italian milk producers from the obligation to repay illegal state aid which they had received from their Government, and to find a satisfactory compromise regarding the Belgian Coordination Centres regime which had been condemned by the Commission).

Meanwhile, the Commission has brought a similar annulment procedure (5) as in the Portuguese case against the decision by the Council which authorised Belgium to renew the application of a preferential tax scheme to certain coordination centres whose approval was to expire before the end of 2005. The Council took this decision on 16 July 2003; the Commission considered that like in the Portuguese pig case, the Council's decision is unlawful, because it came after a final decision taken by the Commission on 17 February 2003. That case is still pending.

3. Facts and procedure

In 1999 and 2000 the Commission adopted two final decisions (4) against several measures executed by Portugal for the purpose of assisting intensive livestock farmers of the pig sector. As those aids were declared unlawful and incompatible, repayment was ordered. Portugal did not appeal those decisions, but on 23 November 2001, it requested the Council to adopt, on the basis of Article 88(2) 3rd paragraph, a decision authorising it to grant aid to Portuguese pig farmers obliged to repay the aid and declaring that aid compatible with the common market.

Acceding to that request, the Council adopted the contested decision, Article 1 of which is worded as follows: 'Exceptional aid by the Portuguese Government to the Portuguese pig sector involving the grant of aid to beneficiaries covered by the Commission Decisions of 25 November 1999 and 4 October 2000, totalling not more than EUR 16.3 million, equivalent to the amounts which those beneficiaries must reimburse under those Decisions, shall be considered compatible with the common market.' The Council took its decision more than 15 months after adoption of the Commission's second final negative decision.

For the Commission the Council's use of Article 88 to cancel out de facto the financial impact of the two final decisions — unacceptably violated the legal security of all the interested parties;

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(1) On 19.12.2000 the Council adopted three Decisions declaring aid to be granted in Germany (Rhineland Palatinate), Italy (for the production of ‘Asti’ and ‘Moscat d’Asti’) and France for the distillation of certain wine sector products to be compatible with the common market. On 22.5.2001, the Council adopted a Decision on the granting of exceptional national aid by the Portuguese Government for the distillation of certain wine sector products.


(4) Council Decision of 16 July 2003 on the compatibility with the common market of an aid that the Italian Republic intends to grant to its milk producers, OJ L 184, 23.7.2003, p. 15.


— involved an assumption by the Council of a position of higher authority that infringes both the Commission's decision-making power and the Court's jurisdictional power;
— raised questions of principle, on the reality of the Commission's authority in State aid policy matters and on the allocation of responsibilities between the Institutions as intended by the Treaty itself.

The Court accepted that the Council could no longer exercise the exceptional power conferred upon it by Article 88(2) 3rd paragraph in order to declare aid compatible which has previously been considered incompatible by the Commission. This limitation in time of the exceptional power of the Council pursuant to Article 88(2) 3rd paragraph also contributes to legal certainty, and avoids that the same State aid can be the subject of contrary decisions by the Commission and the Council.

Furthermore, the Court considered that the Council could also not declare compatible with the common market a new aid designed to compensate the beneficiaries of unlawful and incompatible aid for the repayments they are required to make. Such power of the Council would thwart the effectiveness of recovery decisions taken by the Commission.

4. Conclusion

The Court reaffirmed the central role of the Commission in matters of State aid control. The powers attributed to the Council by virtue of Article 88(2) 3rd paragraph EC are exceptional and time-limited.

The Court also emphasized that the effectiveness of Commission decisions need to be ensured, both by the Member States and by the Council:

‘43. In those circumstances, to hold that a Member State is able to grant to beneficiaries of unlawful aid, which has previously been declared incompatible with the common market by a Commission decision, new aid in an amount equivalent to that of the unlawful aid, intended to neutralise the impact of the repayments which the beneficiaries are obliged to make pursuant to that decision, would clearly amount to thwarting the effectiveness of decisions taken by the Commission under Articles 87 EC and 88 EC.’

‘47. It follows from the whole of the above considerations that, on a proper interpretation of the third subparagraph of Article 88(2) EC, the Council cannot, on the basis of that provision, validly declare compatible with the common market an aid which allocates to the beneficiaries of an unlawful aid, which a Commission decision has previously declared incompatible with the common market, an amount designed to compensate for the repayments which they are required to make pursuant to that decision.’

This is also in line with Article 14(3) of Regulation 659/1999 (1) which states: ‘[...] 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. […]’

The confirmation of the principle of effectiveness (‘effet utile’) for recovery decisions is may be even more important than the limitation of the scope of Article 88(2) 3rd paragraph. It is clear that in principle it excludes new aid to compensate for previously granted unlawful and incompatible aid which needs to be recovered. The previous behaviour of the Member State is thus an element which should be taken into account in any State aid analysis.