Enforcement of State aid recovery decisions

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The Procedural Regulation of 1999 provides that the Commission should order a Member State to recover any unlawful State aid that is found to be incompatible, except where such recovery would be contrary to a general principle of Community law. Article 14(3) of the Regulation clarifies that the Member State concerned should ‘effect recovery without delay and in accordance with the procedures under national law, provided that they allow the immediate and effective execution of the Commission’s decision’.

Since the entry into force of the Procedural Regulation in 1999, the number of recovery decisions adopted by the Commission increased significantly. At the same time, the Commission noted that the execution of these decisions by the Member States did not proceed in a satisfactory manner. As a result, the number of recovery decisions that were still awaiting execution at national level (hereinafter referred to as ‘pending recovery cases’) started to rise rapidly.

As recovery is the ultimate sanction for breaking State aid rules, the non-execution of recovery decisions threatened to undermine the credibility of the Community’s State aid policy. Commissioner Monti recognised this problem and decided in 2003 to set up an Enforcement Unit that was given as one of its main objectives to improve the implementation of recovery decisions by Member States.

This article presents some statistical data on State aid recovery decisions and on the progress made towards their execution since the establishment of the Enforcement Unit.

Development of the stock of pending recovery cases (1)

Since the entry into force of the Procedural Regulation in 1999, the number of ‘pending recovery cases’ has increased considerably, from 55 at the end of 2000 to 90 at the end of 2003. In 2004, the number of pending cases continued to rise to 93, a modest increase due mainly to the ‘inflow’ of an unusually high number of new recovery decisions adopted in 2004 (22 new recovery decisions, compared to 19 pending cases that could be closed). Preliminary data for the first months of 2005 suggests that the stock of pending recovery cases has now finally started to fall (2 new recovery decisions adopted; 15 pending cases that could be closed between 1 January and 30 April 2005).

More than nine out of ten pending recovery cases concern only four Member States (Germany, Spain, Italy and France). At the same time, there are no pending cases for six of the fifteen old Member States, nor any for the ten new Member States.

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Figure 1 – Number of pending recovery cases by Member State (31/12/2004)

Source: DG Competition.

The execution of recovery decisions at national level tends to be a lengthy process. Almost one quarter of the 93 recovery decisions that were pending on 31/12/2004, had been adopted more than five years earlier (i.e. before 1/1/2000). Of the 91 decisions adopted between 2000 and 2004, Member States had executed only 21 by the end of 2004.

Figure 2 – Number of recovery cases executed/pending by year of decision (situation on 31/12/2004)

Source: DG Competition.

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(1) The statistical data in this article refer to recovery decisions that fall within the remit of DG Competition only.
Aid amounts involved

The information available confirms that the total amount of unlawful and incompatible aid concerned by the Commission’s recent recovery decisions is very important: at least € 9.2 billion of aid to be recovered under decisions adopted between 2000 and 2004 (1).

In spite of the delays in the execution of many recovery decisions, significant amounts of incompatible aid have been effectively recovered by Member States in recent years, and especially in 2004/2005. By the end of April 2005, € 5,998 million of unlawful and incompatible aid had been reimbursed or declared lost in bankruptcy proceedings (i.e. 65.1% of the total amount of aid to be recovered) and a further € 1,998 million in recovery interests. The table below gives an overview of the amounts recovered related to Decisions adopted since year 2000 till 2004.

Table 1 — Aid amounts to be recovered and recovered by 30/04/2005

<table>
<thead>
<tr>
<th>Date of Decision</th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of recovery decisions adopted</td>
<td>16</td>
<td>21</td>
<td>21</td>
<td>10</td>
<td>22</td>
<td>90</td>
</tr>
<tr>
<td>Number of recovery decisions for which the aid amount is known</td>
<td>15</td>
<td>12</td>
<td>16</td>
<td>8</td>
<td>17</td>
<td>68</td>
</tr>
<tr>
<td>Total aid (1) to be recovered (in million €)</td>
<td>361.6</td>
<td>1 827.5</td>
<td>1 089.3</td>
<td>1 115.3</td>
<td>4 822.2</td>
<td>9 215.9</td>
</tr>
<tr>
<td>Of which:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Principal reimbursed/in blocked account</td>
<td>121.4</td>
<td>811.3</td>
<td>1 440.0</td>
<td>1 228.1</td>
<td>4 396.2</td>
<td>7 997.0</td>
</tr>
<tr>
<td>(b) Aid lost in bankruptcy</td>
<td>17.1</td>
<td>797.8</td>
<td>1 036.4</td>
<td>892.4</td>
<td>3 134.9</td>
<td>5 878.6</td>
</tr>
<tr>
<td>(c) Recovery interest paid</td>
<td>104.3</td>
<td>13.5</td>
<td>1.2</td>
<td>0.7</td>
<td>119.7</td>
<td></td>
</tr>
<tr>
<td>Amount outstanding on 30/04/2005 (excluding interest)</td>
<td>240.2</td>
<td>1 016.2</td>
<td>51.7</td>
<td>222.2</td>
<td>1 687.3</td>
<td>3 217.6</td>
</tr>
<tr>
<td>% still pending to be recovered</td>
<td>66.4%</td>
<td>55.6%</td>
<td>4.7%</td>
<td>19.9%</td>
<td>35.0%</td>
<td>47.8%</td>
</tr>
</tbody>
</table>

Source: DG Competition.

(1) Only for Decisions for which the aid amount is known.

Main obstacles to the immediate and effective execution of recovery decisions

The data presented above suggests that, since 2003, some progress was made towards an improved execution of recovery decisions. Significant amounts of incompatible aid have already been recovered (especially since 2004) and the stock of pending recovery cases appears to have stabilised in 2004. More recent data confirms that the number of pending cases has even declined in the first months of 2005. In spite of these positive developments, the situation regarding the execution of recovery decisions is still unsatisfactory. The information available shows that there are still unacceptably long delays in the execution of recovery decisions at national level in far too many cases.

The experience gained by the Enforcement Unit confirms that these delays are due to three main factors:

**Failure by the Member State to take adequate action**

In many cases, the delays are caused by the Member State’s failure to take effective action to implement the decision. In this context, one should keep in mind that the authority charged with the execution of the recovery order is often the very same authority that originally granted the incompatible aid (and presumably, at the time of the granting, the authority responsible was convinced that the granting of that aid was fully justified). On this point, though, the Procedural Regulation is very clear: Article 14(3) provides that the Member State concerned is to effect recovery ‘without delay’ and that it should take ‘all necessary measures available under national law to recover the aid from the beneficiary’. It is of course true that, in some cases, the Member State might be faced with a number of practical difficulties to execute recovery decisions (e.g. in cases in which the incompatible aid was granted through fiscal schemes with many thousands of beneficiaries). In such cases, the ECJ has confirmed on several occasions that only the absolute impossibility can be accepted in order not to
comply with a recovery decisions(1). Therefore, it is not sufficient for the Member State to inform the Commission of some legal and practical difficulties preventing the implementation of a particular recovery decision, without taking any step whatsoever to recover the aid from the undertaking in question and without proposing to the Commission any alternative arrangement for implementing the decision. In such a case, the Commission and the Member State must, in accordance with Article 10 ECT, work together in order to overcome the difficulties whilst fully observing the EC treaty provisions.

Whenever the Commission considers that the Member State does not take all measures available under national law to execute a particular recovery decision, it can refer the matter directly to the ECJ. In a first step it can file an Article 88(2) ECT action against the Member State concerned for its failure to comply with the recovery decision within the prescribed time. If the Member State has been condemned by the ECJ for failing to execute the recovery decision and if it still does not take all measures available under national law, the Commission can bring a further action under Article 228(2) ECT action, this time for the Member State's failure to comply with the ECJ's judgment.

Since 2003, the Commission decided to initiate an Article 88(2) ECT action for failure to execute recovery decisions against four Member States, namely Spain (Basque fiscal schemes(2)), France (Kimberley Clark/Scott Paper) (2), Italy (Municipalizzatte) (3) and Germany (Thuringen Porzellan (Kahla)) (4). In addition, the Commission also decided to send a letter of formal notice (the first step in the Article 228(2) ECT procedure) to Spain for its failure to execute the recovery decision regarding Spanish Shipyards (4). More details on these cases can be found in the box.

**Lack of precision in the recovery decision**

A second factor that has sometimes complicated the execution of recovery decisions is the lack of precision of the recovery provisions in the final negative decisions (e.g. lack of precision regarding the identity of the undertaking that has to reimburse the aid or regarding the precise amount to be reimbursed). To avoid this problem in the future, the Enforcement Unit is now closely involved in the drafting of the final decision to ensure that the operative part of the decision includes all the necessary elements to allow a smooth execution of the recovery.

**Length of national recovery procedures**

In the majority of cases, however, the main cause of the delay in the execution of recovery decisions lies in the long duration of national recovery procedures. On several occasions, the ECJ has enounced that the recovery of unlawfully paid aid must take place in accordance with the relevant procedural provisions of the national law, subject however to the proviso that those provisions should be applied in such a way that the recovery required by Community law is not rendered practically impossible. The Procedural Regulation has reinforced this principle in article 14(3), which says that '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 experience gained in recent years by the Enforcement Unit shows that national procedures tend to be complicated and that national courts responsible for their application are often overburdened. As a result, even in cases in which the recovery decision is crystal clear and in which the Member State acts in a diligent and efficient manner, beneficiaries are still able to delay effective recovery for a very long time. Moreover, the complexity of national procedures makes it sometimes difficult for the Commission services to establish clearly whether or not the measures taken by the Member State concerned are the most effective measures available under national law.

**Conclusion**

In spite of the progress made since 2003, the execution of recovery decisions by Member States remains unsatisfactory: the number of 'pending recovery cases' remains high and the 'turn-around' of cases remains too slow. This situation is clearly unacceptable. Ineffective enforcement of recovery decisions does not only undermine the credibility of the Commission's state aid control, it also results in inequality of treatment between Member States. In this respect, it is also relevant to keep in mind that more than 90% of all pending recovery decisions concern only four Member States. Acceptance of long delays in the execution of these decisions therefore amounts to a de facto discrimination against Member States that enforce recovery decisions in a more effective manner, and even more so against Member States that play by the rules and do not grant illegal aid at all.

The Commission will therefore need to continue its efforts to improve the execution of recovery

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decisions by the Member States concerned. To this end, the Commission services will continue to monitor closely the recovery measures taken at national level. Where it appears that a Member State does not take the most effective measures available under national law, the Commission will not hesitate to bring action against that Member State under Articles 88(2), or even 228(2) of the Treaty.

The requirement that recovery should be implemented in accordance with national procedures constitutes undoubtedly the single most important obstacle to effective recovery. The experience gained by the Enforcement Unit during its first full year of operation suggests that, in most cases, national recovery procedures are not very efficient and do not allow Member States to achieve an ‘immediate and effective execution of the Commission’s decision’ (as is also required by article 14(3) of the Procedural Regulation). At some point in the near future, therefore, the Commission will inevitably have to ask itself whether it is sufficient to require Member States to take all measures available under national law to execute recovery decisions (‘obligation d’effort’). In order to avoid inequality of treatment, it may perhaps be necessary to move a step further and to impose strict deadlines for the execution of recovery orders by the Member States (an ‘obligation de résultat’).

**Article 88(2) and 228(2) ECT action against Member States for failure to execute recovery decisions**

**Basque fiscal aid schemes (ES)**

On November 2003, Commission filed Art. 88(2) action against Spain before the ECJ on the grounds of the non execution by the Spanish authorities of 6 decisions adopted by the Commission in relation to the Basque fiscal aid schemes (1). Commission considered that Spain did not act in conformity with its obligation to co-operate with the Commission, as it has not provided any information on the measures adopted for the recovery of the incompatible aid granted through these fiscal schemes.

**Kimberley Clark/Scott Paper (FR)**

In October 2004, the Commission found that France did not comply with the recovery decision of 12 July 2000 on the aid granted to Scott Paper (2) and therefore decided to refer the matter to the Court of Justice of the European Communities directly in accordance with Article 88(2) EC. (3)

The recovery decision of 12 July 2000 is currently being challenged by the beneficiary and by the French local authorities before the Court of First Instance of the European Community. (4) At the same time, the beneficiary challenged the national recovery orders in the national courts.

The Commission considered that it was necessary to refer the case to the Court for a number of the reasons. The main reason is that the national authorities and the national judge have agreed to suspend proceedings in the national court until the Court of First Instance of the European Community issue its judgement on the case. This is contrary to Article 242 EC, which provides that an appeal before the European Court does not have any suspensory effect. Furthermore, there are no provisional measures available under French law to ensure that the aid is withdrawn from Scott during the proceedings before national courts. Finally, the Commission considered that France did not act in conformity with its obligation to co-operate with the Commission, as it has not provided any new information on the recovery since July 2003.

**Municipalizzato (IT)**

On April 2005, the Commission decided to initiate Art. 88(2) action against Italy. The Commission considered that Italy had not respect the Decision of the Commission of 5 June 2002 (5), by which the aid granted by Italy to public services company was declared incompatible with the common market, and must to be recovered. More than two years since the decision was adopted, the Commission considered that the measures proposed by the Italian authorities to proceed with the execution of the Commission Decision were not satisfactory, and did not allow for an immediate and effective recovery as requested by art. 14(3) of the Procedural Regulation 659/99.

**Thuringen Porzellan (Kahla) (DE)**

On 25 February 2005, the Commission decided to initiate Art. 88(2) actions against Germany, for failure to comply with a decision of 30 October 2002 (6). This decision ruled that aid given to German porcelain manufacturer Kahla Porzellan GmbH and its successor company Kahla/Thuringen Porzellan GmbH by the German Land of Thuringia was incompatible and had be recovered from the beneficiaries The Commission noted that more than two years after the decision was issued, Germany had not fully complied with the decision, since an amount of € 3.3 million plus interests remains to be recovered from the still operating successor company Kahla/Thuringen Porzellan GmbH. Kahla Porzellan GmbH is in bankruptcy since 1993.

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(4) CFI Cases T-366/00 and T-369/00.
The German authorities maintain for several reasons that no further recovery action is needed. The Commission disagrees with this view and considers that the reasons brought forward by Germany to refrain from recovery are not acceptable. The Commission therefore insists on a complete and effective enforcement of the decision to restore competition.

**Spanish Shipyards (ES)**

On 26 June 2003, the Court of Justice of the European Community had condemned Spain for its failure to implement the Commission's recovery decision of 26 October 1999 (¹) regarding aid granted to the Publicly-owned Shipyards (²). In October 2004 the Commission noted that Spain had still not complied with the recovery decision of 26 October 1999, as it had not taken the most effective measures available in the Spanish legal system to effect the recovery. The Commission therefore considered that Spain did not comply with the judgment of the Court of Justice of 26 June 2003 and decided to pursue the matter in accordance with Article 228(2) of the Treaty. To this effect, the Commission sent a letter of formal notice to Spain on 28 October 2004. The Commission is currently assessing the measures adopted by Spain.

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² ECJ Case C-404/00, ECR 2003, I-6695.
The practical impact of the exercise of the right to be heard: A special focus on the effect of Oral Hearings and the role of the Hearing Officers

Serge DURANDE and Karen WILLIAMS (1), Hearing Officers attached to the Cabinet of the Commissioner

Executive summary

The purpose of this paper is to give an overview of the effect that the exercise of the right to be heard has in the Commission’s decision-making process in competition matters. More particularly, it analyses the influence that oral hearings and also the role the Hearing Officers can have in practical terms. In doing so, the paper is intended to shed some light on an often neglected area of the Commission’s antitrust and merger work, the visibility of which is frequently precluded by its mainly internal nature.

Introduction

The right to be heard as a fundamental right

The Commission must comply with general principles of EU law, which include inter alia the respect of the rights of defence, during its administrative proceedings (2). More specifically, the European courts have consistently held that the right to be heard, as an essential component of the rights of defence (3), arises in all proceedings initiated against a person which are liable to culminate in an adverse measure against that person (4). The right to be heard, as a consequence drawn from its fundamental nature, (5) must be guaranteed even in the absence of any specific legislation (6).

The need to respect the right to be heard has been recently codified and, arguably, reinforced in the Charter of Fundamental Rights. Article 41 thereof states that ‘every person has the right to be heard before any individual measure which would affect him or her adversely is taken’. It may appear the Charter goes beyond the existing case law, to the extent that it seems to eliminate the requirement for it to apply of ‘having a proceeding initiated against a person’. The only condition in Art. 41, appears to be that ‘an individual measure could affect [that person] adversely’.

What is the content of the right to be heard? In competition proceedings it involves two dimensions: first, an obligation on the Commission to make its case known to the defendants; secondly, an obligation to grant the defendants an opportunity to submit their comments on the Commission’s objections (7).

The first dimension entails, in turn, that the defendant must have access to the Commission’s file (8). We know now that such access is not restricted to the documents on which the Commission has based its objections, but covers the entirety of the Commission’s file, other than business secrets, other confidential information and internal documents (9). This is generally known as the principle of ‘equality of arms’ which was previously enshrined in the jurisprudence of the ECHR (10). In the light of this principle, the fullest possible access to the Commission’s file may be now seen as a necessary corollary of the right to be heard.

The second dimension of the right to be heard, i.e., the possibility for the defendant to make known its own views on the Commission’s objections, does not, in principle, require that comments are submitted in any particular form, whether oral or written. The choice is left to the legislator, although

(1) The authors would like to thank Aitor Montesa Lloreda for his contribution to this article. The views expressed are personal to the authors.
(2) Cases 100 – 103/80 Musique Diffusion Française, [1983] ECR 1825, point 8 and 9, among many others.
(3) The European courts have stated that the rights of defence include, in particular (i) the right to be heard, (ii) the right of access to file and (iii) the principle of good and sound administration. See Cases T-191/98 and T-212 to 214/98 Atlantic Container Line v. Commission [2003] ECR II-3275.
(4) A person against whom proceedings which are liable to culminate in an adverse measure are initiated shall hereinafter be referred to as ‘a defendant’.
(7) This is constant since Cases 56 and 58/64 Consten and Grundig [1966] ECR 429 at para. 5. It is the basis for Articles 27(1) of Regulation 1/2003 and 11(2) of Regulation 773/2004.
(8) Case T-10 to 12 and 15 /92 Cimenteries [1992] ECR-II 2667