No export aid to large firms outside the EU

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Introduction

On May 19, 2004 the Commission adopted a partially negative decision (not yet published), with recovery, in respect of incompatible aid granted to a large firm, in Italy.

The latter was deemed to take advantage of national funding for trade penetration programmes in non-EU countries (mainly South-East Asia).

The Commission’s decision, adopted on the grounds that the assessed grants were to be qualified as aid to export-related activities, hence incompatible, has been challenged before the Court both by the beneficiary and the Member State concerned.

Background

The case was raised by a European competitor complaining that a subsidiary of an Italian firm, established in Great Britain, involved in the same market segment he was active in, was able to make an aggressive pricing policy thanks to public subsidization.

It turned out that indeed the mother undertaking benefited twice, in 1995 and in 2000, of financial facilities for trade penetration programmes in non-EU countries, in order to establish subsidiaries abroad, such as representative offices, shops and warehouses.

Aid was allowed in the form of soft loan, for 85% of the admissible expenses. The interest rate rebate could attain 60% of the reference rate. The loan had to be repaid in 5 years, on a straight line basis. A two years grace period was envisaged.

Eligible costs were mainly constituted by costs related to the establishment of permanent structures abroad and to trade promotion activities.

Relevant case-law

It has been stressed by the European Court of Justice, in its judgement of 21 March 1990 on case 142/87 (Tubemeuse ruling; ECr 1990 I-00959), that even if the aid aims at exporting outside the EU, nevertheless intra-community exchanges may be affected. Moreover, having regard to the interdependence between the markets on which Community undertakings operate, it is possible that such aid might distort competition within the Community.

In addition, according to the quoted case law of the ECJ, even if the beneficiary exports almost its whole production outside the E.U., the E.E.A. and the acceding countries, subsidization of export activities can affect trade between MS.

It has been ascertained, in the case at hand, that sales abroad represented, from 1995 until 1999, 52 to 57.5% of the overall annual turnover of the beneficiary, and that two-thirds of them took place inside the EU.

Furthermore, as it concerns outward-oriented competition among Community undertakings, it came out that one of the funded programmes was to be carried out in conjunction with a local firm controlled at 100% by the beneficiary.

Aid to forward FDI (Foreign Direct Investments)

The Commission’s practice towards these aids has been that only initial productive investments, carried out by SMEs, can be subsidized under EU State aid rules, even if the investment concerned takes place outside the EU.

In its decision of 5 June 1996 on case C50/95 (1), it approved a scheme subject to aid being granted only for FDI by SMEs, provided all the requirements set down for State aid to SMEs are met, and to aid for large enterprises being notified individually.

Furthermore, the only notification of an individual aid to a large undertaking on the basis of the above mentioned decision resulted in a negative decision (2).

The Commission, in the case at hand, held the view that aid granted towards the above mentioned expenses (see ‘background’) was to be qualified as aid to export-related activities, thus not falling under the category of outward foreign direct (productive) investments.

In addition, by admission of the Italian authorities themselves, the beneficiary was, at least at the time the second aid was granted, a large undertaking.

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furthermore located in a non assisted area, having subsidiaries all around the world, among others established in almost all EU Member States.

**Assessment**

As concerns the qualification of the subsidies under examination as State aid, irrespective of the fact whether the aid in question supported exports to other Member States of the EU or outside the EU, they have been considered potentially able to affect trade between Member States, therefore subject to Article 87(1) of the Treaty.

As far as the assessment of their compatibility is concerned, and to the extent that presumed unlawful aid is at stake, the Commission based its assessment upon the rules in force at the moment the aid was granted, according to the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (1).

In addition, in the light of the first sub-paragraph of the above mentioned notice, where, at the time of a decision, guidelines have been replaced by a regulation, the Commission considers that the rules set out in the regulation apply to the extent that they are more favourable than those of the guidelines.

This resulted in a double assessment being made, both under the rules in force at the moment the aid was granted and those applicable at the time the decision was adopted. Its outcome is as follows.

As the wording of the ‘de minimis’ rule of 1992 (2), in force at the time the first aid was granted, did not explicitly exclude export aid, an amount not exceeding 50,000 ECU (now EUR) was considered not to fall under the provision of Article 87(1) of the Treaty, thus not subject to recovery, to the extent that no other ‘de minimis’ aid had been allowed to the same beneficiary, during the relevant three-year period. Moreover at that time the beneficiary still fell within the category of medium-sized enterprises.

On the contrary the Commission declared the remaining part of the first aid and the second aid to be incompatible, on the grounds they constituted aid to export-related activities.

Accordingly, a negative decision with recovery of the incompatible aid was adopted.

**Complying with multiple rules: EU State aid and WTO subsidy rules**

The Commission has assessed the aid in question in the light of Articles 87 to 89 of the EC Treaty.

Nevertheless, when assessing certain types of aid, international agreements binding for the EU are also susceptible to come at stake, and, among them, in particular, the WTO Agreement on subsidies and countervailing measures’ (ASCM) (3).

Export aid is defined, according to ASCM, as: a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I; b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods (4).

These subsidies, according to Article 3 thereof, are prohibited, except as provided in the WTO Agreement on Agriculture.

**Conclusion**

In its decision the Commission confirmed the applicability of Article 87(1) of the Treaty also to aid granted for activities to be carried out by EU firms outside the EU, the EEA and the acceding countries.

Moreover, the Commission’s unfavourable attitude towards aid to export-related activities, in particular in favour of large enterprises, was confirmed on the grounds that any kind of public support to commercial penetration, is indeed able to adversely affect trading conditions to an extent contrary to the common interest.

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(1) Published in OJ C 119, 22.5.2002, p. 22.
(4) In this context it should be noted that a rather wide notion of ‘de facto’ export contingency has been developed. A first guidance, even if not exhaustive, of what is considered to fall under that notion is provided by the definition laid down at Article 1 (b) and (c) of the ‘de minimis’ regulation 69/2001 (published in OJ L 10, 13.1.2001, p. 30).