Misuse of restructuring aid in the steel sector – or some remarks on the monitoring of Polish and Czech steel restructuring from the point of view of State aid control

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Cases of improper implementation of a restructuring plan after restructuring aid has been approved by the Commission were recently addressed by the Commission. In two cases the Commission adopted negative decisions for misuse of aid, ordering recovery of unduly paid aid. The cases occurred in the context of the restructuring of the Polish and Czech steel sector sectors as outlined below (point 1). These examples of misuse must be distinguished from cases where the Commission has accepted a change of the restructuring plan (point 2) and the reasoning of the decisions illustrates that a finding of misuse is not always straightforward (point 3). On this basis some observations can be made which might be of importance for future restructuring cases (point 4).

1. The restructuring of the steel sector in Poland and the Czech Republic

The EC allowed Poland and the Czech Republic, through protocols to the Accession Treaty (2), to support in the context of their accession — companies included in their national steel restructuring programmes (NRP) with State aid. This exceptional approval was necessary as restructuring aid to the steel sector is banned in the EU (3). However, new entrants are usually given a one-off chance to restructure their steel industry with State aid. The protocols allow for a maximum of €850 million for Poland, but also set several conditions. The restructuring must lead to viability of the benefiting companies in 2006, the restructuring must be of importance for future restructuring cases (point 4).

The Commission monitored the restructuring process with the support of an independent consultant. In the end, the restructuring was completed successfully and most of the existing beneficiary companies were able to abide by the main conditions set out in the protocols concerning viability, capacity reductions and the maximum amount of aid, while three out of eight companies in Poland became insolvent. It should be noted that all the companies that achieved viability had amended their individual business plans during the restructuring period.

2. Amendment of restructuring plans

The Commission encouraged the companies to adapt their plans during the course of the restructuring process if this was necessary to restore viability. In the end, all the companies submitted updated plans for their steel mills. Most of these plans have been approved by the Commission.

For example, the individual business plan (IBP) for Mittal Steel Poland, the biggest aid recipient in this country, was approved by the Commission in July 2005 (4). Modifications concerned a change of investments without however changing the overall restructuring purpose, costs and timing.

The critical issue was one investment which turned from modernisation into replacement, so that the Commission had to seek assurance by way of a commitment that the replaced capacity would be dismantled.

Also, in the Mittal Steel Ostrava (MSO) case, which involved the biggest Czech steel producer, the Commission approved the change of the IBP in September 2006 (5). Here, the Commission accepted the non-implementation of certain investments contained in the original IBP. This IBP allowed for about €200 million of State aid.

3. Initiating recovery of aid

The Commission initiated recovery procedures in both cases. In the Polish case, the recovery procedure was based on the finding of misuse of aid following the decision to discontinue objections to the Polish steel industry’s restructuring (point 4).

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Note

(1) Directorate-General for Competition, unit E-3. The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.


(3) Communication from the Commission on Rescue and restructuring aid and closure aid for the steel sector OJ 2002 C 70, page 22.


aid. The Commission noted that MSO was able to achieve viability with only 68% of its originally planned investments. Therefore, MSO was required to reimburse the amount of State aid received with respect to those investments which turned out not to be necessary for its restructuring (€30 million of aid, whereas the amount of omitted investments was multiplied by a ratio of the overall restructuring costs against the State aid). However, as the company had received less State aid than originally envisaged, and this shortfall corresponded to the aid attributable to the investments not realised, the Commission found that no recovery would be necessary and approved the change of plan.

3. Misuse of aid

In some cases the Commission could not accept a change of the restructuring plan since it found a misuse of aid.

3.1 The case of Technologie Buczek

In its decision of 23 October 2007 (9), the Commission found that Technologie Buczek (TB) had not implemented the measures in the restructuring plan properly and in the end filed for insolency in 2006. Therefore the Commission ordered recovery of around €1 million of State aid, which TB had received under its 2002 IBP for restructuring purposes (9).

The Commission concluded that TB had misused its previously obtained restructuring aid, even though some measures were originally implemented according to the plan. To this end the Commission pointed out that ‘even if certain measures were considered as compatible restructuring aid in the context of a comprehensive restructuring project ensuring the restoration of viability, the failure to implement the entire restructuring plan successfully and to restore viability implies in principle that any part of the restructuring project failed and that any measures that have been granted for this purpose have lost their object.’ (9) The Commission thus emphasised that partial implementation of the restructuring plan cannot make sense, as long as it does not lead to the restoration of viability.

However, some aid actually provided for R&D purposes was nevertheless found compatible. This followed from the interpretation that Protocol No 8 does not in principle exclude the compatibility of measures which are in line with other frameworks (10). Here, the R&D subsidies were given under a programme which had been accepted by the Commission as existing aid and included in Annex IV(3)(2) of the Accession Treaty.

The recovery was based on Protocol No 8, which states in point 18 that, if a company does not implement its IBP properly as indicated in the protocol, the aid received for this has to be reimbursed. The Commission had established a practice which allowed it to request the reimbursement of illegal aid under Protocol No 8 in the context of Article 88 EC even if aid was granted before accession (11).

3.2 The case of Arcelor Huta Warszawa

In its decision of 11 December 2007, the Commission approved the modified IBP of Arcelor Huta Warszawa (11). However, some State aid originally provided seemed not to have been used for its intended purpose and the Commission ordered its recovery.

Arcelor Huta Warszawa (AHW), formerly Huta Lucchini Warszawa (HLW), had produced an IBP in 2001 in order to overcome its difficulties. The core of the plan was an investment programme of about €40 million, with an emphasis on modernisation of the company’s hot rolling mills. These investments and some necessary short-term financial restructuring measures were endangered by the fact that the company was unable, for administrative reasons, to carry out an asset restructuring which was intended to generate required funds. Poland therefore granted HLW a guarantee for a bridging loan of €75 million to finance the investments and to pay some short-term debts.

Of this amount, approved in the NRP, the company obtained about half. Most of it was used by HLW for repaying a long-term loan instead of carrying out the investments. Nevertheless, as the Commission’s consultant in charge


of monitoring the Polish and Czech steel restructuring confirmed, the company still restored viability at the end of 2006.

The monitoring indicated that the aid was used for purposes not foreseen in the restructuring plan. Instead of being used strictly to restore the company’s viability (as required by the EC State aid rules), the funds were used for expenditure which a company in difficulty is normally not able to make. The Commission failed to see how the measures, i.e. repayment of the long-term debt, which was not due until after the end of the restructuring period, should help the company to restore viability. From an ex ante point of view, the company, by omitting investments originally assumed to be necessary for the restoration of viability and using aid for other purposes, endangered the viability restoration. The fact that viability was in the end restored might indicate either that the assumption regarding the necessity of investments was not correct (i.e. the financial gap, for coverage of which the aid was intended, might have never existed) or that better market conditions led to a situation where aid was no longer necessary. In any case, the aid thus gave the company additional liquidity leading to undue distortion of competition. Therefore, the Commission concluded that the aid had been misused given that there were no grounds for finding compatibility of the measure for which the aid was used.

The fact that in the AHW case certain investments turned out not to be necessary, might indicate an analogy with the MSO case, where the Commission approved the non-implementation of certain investments contained in the original IBP. However, in the AHW case the non-implementation of investments was accompanied by usage of the aid for purposes not covered by the restructuring plan. As the Commission found that the aid was used in an incompatible manner, it decided that the aid needed to be repaid. This decision would not have been influenced by any subsequent commitment on the part of AHW to make all the investments originally envisaged in the plan, because this could not ‘heal’ the earlier misuse (12).

However, in this case the Commission recovered merely the aid actually misused and not the entire restructuring aid granted. In this respect the findings are different from the Buczek decision, where the Commission objected to the compatibility of the measure for which the aid was used.

implemented in full and the company did not become viable. The difference is that AHW managed to restore viability and TB did not. In a case where viability is restored, it can be argued that the implementation of some of the measures was sufficient to achieve the goal of the restructuring aid and therefore aid for these measures, if looked at in isolation, might still be considered compatible. This is not so where viability is not restored if this is combined with partial non-implementation of the plan.

For the recovery of the aid the Commission did not calculate the aid element at the rate of 100 % of the guarantee for the loan (as would normally be considered in the case of a company in difficulties). It instead took account of the fact that aid was granted at a time when the company was still able to obtain some financing from the markets and agreed to calculate the interest rate subsidy which the company obtained by replacing the existing loan (13).

Finally, given the reimbursement of the misused aid and the fact that the updated plan notified by the company had a positive effect on the company’s restoration of viability and did not require any new aid, the Commission accepted the change of plan by AHW.

4. Conclusion

The present cases illustrate four important points:

First, the restoration of viability ex post alone in a restructuring case is not sufficient to make the use of State aid compatible. What counts is whether the restructuring plan would be apt to restore viability and whether it is then properly implemented. In fact, although this was not mentioned in the above decisions, it seems safe to assume that if the company sticks to its restructuring plan, it will be difficult to recover any aid even if in the end viability was not restored.

Second, finding a misuse of restructuring aid requires not only that the restructuring plan is not implemented but also that the aid cannot be found compatible otherwise. In fact, aid not implemented according to the plan can still be held compatible as restructuring aid, if it is used in a manner that helps to restore viability and if it was earmarked for a specific task. Such use should then be considered compatible.

(12) Indeed, an analysis of the necessity of the original investments and their related commitment becomes relevant only if the aid would not have been spent or would have been spent in a compatible manner, as was the issue in the MSO case.

(13) The interest rate subsidy was calculated as the difference between the actual interest rate and the reference rate plus at least 400 basis points, because the company, although being in difficulty, still had some security to offer. As the loan was in euro, the reference rate for the euro zone, and not for Poland, was used. The interest rate subsidy was thus 4.57 % per annum, which was equivalent to a misused amount of around €1.5 million.
ideally be the subject of an amendment decision in respect of the original restructuring aid. (This also ‘saves’ the company later if it does not restore viability, as then the first point applies). Moreover, it can also be compatible under any other provision of Article 87 EC, including other horizontal frameworks, as long as they do not exclude companies in difficulty from their scope.

Third, if a plan is only partly implemented, the restoration of viability is crucial, as it provides the presumption that not all aid has been improperly used. Consequently, if a plan is not properly implemented and viability is not restored, a presumption exists that non-implementation of all the measures impeded the process of restoring viability and every aid measure has lost its objective and can thus not be held compatible but should be recovered.

Fourth, the dividing line between amendment of a plan and misuse of aid, which can lead to recovery, is not always evident. It is accepted that the Commission can exempt a company from making some investments, if this does not affect the viability prognosis at the time when a change of plan is requested and if the State aid provided to implement these investments is reimbursed. It does not, however, seem possible that the Commission can accept the use of aid outside the restructuring plan as it seems to redirect resources away from what was envisaged to restore viability. In such a situation the Member State would need to demonstrate that the redirection supported the restoration of viability (which is from a point of view *ex ante* in contradiction to the restructuring plan), otherwise recovery needs to be ordered.

Finally, it should be pointed out that steel restructuring is not a typical restructuring case. In fact, the restructuring of the steel industry in Poland and the Czech Republic was accompanied by intensive monitoring. This put more pressure on the companies to indicate to the Commission at an early stage a change of plan, which was in almost all cases accepted and ensured that the companies properly implemented their plan as well as executed the necessary investments. These efforts, combined with the positive market trends, ensured that the steel restructuring in Poland and the Czech Republic was an overall success.