The Commission notice on the enforcement of State aid law by national courts

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1. Introduction

On 4 April 2009, the Commission adopted its new Notice on the enforcement of State aid law by national courts ("the new Notice") (2). The new Notice replaces the former cooperation Notice dating back to 1995 ("the 1995 Cooperation Notice") (3) and was preceded by extensive consultations with Member States, national courts and other stakeholders (law firms, business associations, etc.).

The main purpose of the new Notice is to inform national courts and third parties of the remedies available in the event of a breach of State aid rules and to provide them with guidance as to the practical application of those remedies. In addition, the Commission is seeking to develop its cooperation with national courts by introducing more practical tools to support national judges in their daily work. This consists of requests for the transmission of information in the possession of the Commission and/or requests for Commission opinions on the application of State aid rules.

2. Background of the new Notice

In its roadmap for State aid reform, known as the 2005 State Aid Action Plan ("the SAAP") (4), the Commission already highlighted the need for better targeted enforcement and monitoring of State aid granted by Member States. The SAAP stressed that private litigation before national courts can contribute to this aim by ensuring increased discipline in the area of State aid.

In 2006, the Commission then published a study on the enforcement of State aid law at national level ("the Enforcement Study") (5), which concluded that State aid litigation at Member State level had increased significantly during the period between 1999 and 2006. However, the Enforcement Study also revealed that a large number of these legal proceedings were not aimed at genuine private enforcement. This was because almost two thirds of the judgments analysed for the Study concerned actions brought by taxpayers who were seeking relief from the allegedly discriminatory imposition of a (tax) burden and actions brought by beneficiaries to challenge the recovery of unlawful and incompatible State aid.

In addition to this issue, the Commission took the view that the content of the 1995 Cooperation Notice was no longer up to date.

On the one hand, since the publication of the 1995 Cooperation Notice the EU courts have defined the role of national courts in the State aid field much more precisely. This recent case-law had to be taken into account.

On the other hand, the role of national Courts has been affected by significant legislative developments. These include not only the introduction of the Procedural Regulation (6) but also the introduction of the block exemption system (most recently extended through the adoption of the General Block Exemption Regulation (7)), which has given national courts an even more prominent role.

Finally, the content of the 1995 Notice was predominantly focussed on cooperation between the Commission and national courts (e.g. through the exchange of information). Whilst the new Notice also naturally addresses this issue, the Commission considered that a much broader Notice was needed to address the different aspects of private State aid enforcement. The need for such a broader Notice had also been highlighted in the conclusions of the Enforcement Study.

(1) 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) Notice on cooperation between national courts and the Commission in the State aid field (OJ C 312, 23.11.1995, p. 8).
3. Role of national courts in dealing with illegal aid

One of the most important novelties of the new Notice is that, compared to its predecessor, it contains much more detailed guidance on the role of national courts in dealing with unlawful State aid (i.e. aid which, contrary to Article 88 (3) EC, has not been notified and approved by the Commission prior to its implementation). This guidance is based on the detailed jurisprudence of the Community courts on the division of roles between the Commission and national courts in the State aid field. This jurisprudence, and thus also the new Notice (iv), addresses the role of national courts in different scenarios, namely:

- actions aimed at preventing the payment of unlawful aid
- actions aimed at the recovery of unlawful aid already granted
- actions for the compensation of damage suffered as a result of the unlawful aid
- actions aimed at interim measures against unlawful aid

The recovery action, the action for damages and the possibility to obtain interim measures are of particular practical importance for claimants and national judges. The position of the new Notice on these topics is therefore briefly summarised below.

3.1. Recovery of unlawful State aid by national courts

The far-reaching competences of national courts in relation to unlawful aid should be seen in comparison with the relatively limited competences of the Commission in this respect. The EC courts have repeatedly stated that the Commission cannot adopt a final decision ordering recovery merely because the aid was not notified in accordance with Article 88(3) EC. A full compatibility assessment thus has to be conducted, whether the standstill obligation has been respected or not (v).

The ECJ has made it clear that these restrictions do not apply in relation to national courts. National courts are able, and usually also obliged, to order the recovery of unlawful State aid solely because of the violation of the notification obligation (vi). The new Notice explains the practical application of this recovery obligation.

That being said, the ECJ has also recognised that there can be unusual circumstances in which the recovery of unlawful aid by the national court is not mandatory under Community law. Although there is as yet no precise ECJ case law on the requirements in this respect (vii), the new Notice applies a similar standard to the one which applies under Articles 14 and 15 of the Procedural Regulation. Circumstances which would not stand in the way of a recovery order by the Commission can therefore normally not justify a national court to refrain from ordering recovery (viii).

The recovery obligation of the national court is not limited to the nominal amount of aid; it also includes interest. This is because the beneficiary in any event obtains a financial advantage resulting from the premature implementation of the aid, whether the aid is ultimately approved by the Commission or not. The new Notice provides practical guidance on the calculation of this illegality interest and time period for which it is to be applied (ix).

3.2. Damages actions

The role of national courts in the application of the State aid rules is not limited to the recovery of aid granted unlawfully, but also includes compensation where the illegal aid has created damages (e.g. for competitors of the beneficiary). The ECJ has made it clear that such damages actions can often be brought under national law (x). In addition, the new Notice underlines that the granting of illegal State aid can also give rise to a damages claim directly under Community law as a result of the ‘Francovich’ (xi) jurisprudence of the ECJ (xii).

From a practical perspective, one of the most important issues in connection with damages actions is how to demonstrate and calculate the actual damage suffered. The new Notice addresses this point and gives detailed guidance to national courts and to

(iv) See paragraphs 24 to 62 of the new Notice.
(v) See only Case C-501/87, France v Commission, (‘Boussac’), [1990], ECR I-307, paragraphs 17 to 23.
(x) A request for a preliminary ruling on this issue in the CELF case is currently pending before the ECJ, Case C-1/09.
(xii) See paragraph 32 of the new Notice.
(xii) See paragraph 41 of the new Notice.
(x) See only Case C-199/06, CELF and Ministre de la Culture et de la Communication, [2008] ECR I-469, paragraphs 53 and 55.
(xii) The fact that violations of the State aid rules can give rise to Member State liability directly on the basis of Community law has been confirmed in case C-173/03 Traghetti del Mediterraneo v Italy, [2006] ECR I-5177, paragraph 41.
potential claimants on the calculation of damages in different scenarios (17).

Whilst a direct damages action against the recipient of the aid may be a viable option under national law, the Notice clarifies that, based on the current ECJ jurisprudence, such damages claims do not have a sufficient legal basis directly under Community law.

3.3. Interim measures

National courts are also well placed to deal with cases where urgent action is required in order to protect the rights of competitors and other parties. As part of their role under Article 88(3) EC, national courts are required to take interim measures where this is appropriate to safeguard the rights of individuals and the effectiveness of the standstill obligation (18).

The primary obligation of the national court when faced with unlawful aid is, of course, to order its recovery (including illegality interest). Where the final judgment of the national court in this regard is delayed, the court must at least use the interim measures available to it under national law to terminate provisionally the anti-competitive effects of the aid (‘interim recovery’) (19).

The most practical way to achieve such an interim recovery will, in the author’s view, be to order the unlawful aid to be placed in a blocked account for the duration of the national court proceedings. Depending on the outcome of the case, the national court can then order the funds either to be returned to the State or to be released to the beneficiary.

The new Notice contains detailed guidance on the conditions under which such interim measures are necessary and the detailed rules/procedures for their implementation (20).

4. Role of national courts in dealing with negative Commission decisions

The new Notice also addresses the role of national courts in scenarios where the Commission has already adopted a negative decision obliging the Member State to recover the aid from the beneficiary. In such circumstances, beneficiaries frequently ask national courts to review the legality of recovery orders issued by the national authorities or to suspend their implementation. As regards such legal actions, the new Notice in essence repeats the main principles already set out in the Commission’s 2007 Recovery Notice (21).

Most importantly, the new Notice recalls the general principle that an action at national level cannot be used to question the validity of the Commission’s negative decision where this decision could have been challenged before the Community courts (22).

The new Notice also recalls that, where a challenge at Community level would have been possible, the national Court may not suspend the implementation of the national recovery order for reasons related to the validity of the underlying Commission decision (23).

5. Cooperation between the Commission and national courts

The new Notice introduces two distinct mechanisms for the Commission’s cooperation with national courts. National courts can either ask the Commission to provide information in its possession (24) or ask for a Commission opinion on the application of the State aid rules (25). Both types of support are largely based on the established practice in the anti-trust area, and similar rules apply (26).

5.1. Transmission of information to national courts

The Commission’s duty to assist national courts in the application of State aid rules involves the transmission of relevant information in its possession to national courts upon request.

In order to ensure efficiency in its cooperation with national courts, such requests for information will be processed as quickly as possible. An indicative deadline of one month (27) applies. The new Notice also defines the strict conditions under which information protected by the obligation of professional secrecy can be transmitted to a national court.

(17) See paragraph 49 of the new Notice.
(18) See paragraphs 57 to 60 of the new Notice.
(19) See paragraph 60 of the new Notice.
(20) See paragraphs 57 to 62 of the new Notice.
(21) Notice from the Commission towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible aid (OJ C 272, 15.11.2007, p. 4), paragraphs 55 to 59.
(22) See paragraphs 64 to 68 of the new Notice.
(23) See paragraph 66 of the new Notice.
(24) See paragraphs 82 to 88 of the new Notice.
(25) See paragraphs 89 to 96 of the new Notice.
(26) Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ C 101, 27.04.2004, p. 54-64).
(27) Where the Commission needs to ask the national court for further clarifications, this one-month period starts to run from the moment the clarification is received. Where the Commission has to consult third parties who are directly affected by the transmission of the information, the one-month period starts from the conclusion of this consultation.
5.2. Opinions on questions concerning the application of State aid rules

In addition, the new Notice introduces the possibility for national courts to request the Commission’s opinion on relevant issues concerning the application of State aid rules. Such Commission opinions may, in principle, cover all economic, factual or legal matters which arise in the context of the national proceedings. The possibility to ask for such an opinion is, of course, without prejudice to the courts’ right/obligation (28) to request a preliminary ruling under Article 234 EC.

In the interest of making the Commission’s cooperation with national courts as effective as possible, requests for Commission opinions will also be processed as quickly as possible. The applicable indicative deadline for the Commission’s response is four months (29).

6. Conclusion

The key aim of the new Notice is to increase the awareness of national judges and potential claimants with regard to private State aid enforcement. The Commission’s intention is to follow up on the introduction of the new Notice with a series of advocacy measures, including dedicated State aid training for national judges.

(28) Under Article 234 EC, the highest ranking courts are obliged to ask for such a preliminary ruling.
(29) Where the Commission needs to ask the national court for further clarifications concerning its request, this four-month period starts to run from the moment when the clarification is received.