Court of Justice: A twenty-year duration of a State aid case does not amount to an “exceptional situation” under the State aid rules.

Kluwer Competition Law Blog
July 30, 2010

Till Mueller-Ibold

Please refer to this post as: Till Mueller-Ibold, ‘Court of Justice: A twenty-year duration of a State aid case does not amount to an “exceptional situation” under the State aid rules.’, Kluwer Competition Law Blog, July 30 2010, http://competitionlawblog.kluwercompetitionlaw.com/2010/07/30/court-of-justice-a-twenty-year-duration-of-a-state-aid-case-does-not-amount-to-an-exceptional-situation-under-the-state-aid-rules/

On March 11, 2010, the Court of Justice of the European Union (the “**ECJ**”) rendered a judgment (preliminary ruling) in response to two State aid questions referred to it by the French Conseil d’État (France’s highest administrative Court). The case involves French book and media exporter Centre d’exportation du livre français (CELF), which received non-notified State aid from the French government between 1980 and 2002 to offset the extra costs of handling small orders placed by booksellers established outside France. [Judgement of March 11, 2010] Case C-1/09, *Centre d’exportation du livre français (CELF) and others v. Société internationale de diffusion et d’édition (SIDE).* This judgment relates to probably the longest, running State aid case in the history of Community law. The CELF “saga” can be summarized as follows.
In 1992, Société internationale de diffusion et d’édition (SIDE), a competitor of CELF, lodged a complaint against the granting of the aid with the European Commission (the “**Commission**”). The aid granted to CELF formed the subject matter of three subsequent Commission decisions between 1993 and 2004, all three of which found the aid to be compatible with the common market under Article 87(3)(d) EC (now 107(3)(d) TFEU), which provides for a derogation for aid to promote culture and heritage conservation [Commission decision of May 18, 1993 (OJ 1993 C 174/6); Commission decision of June 10, 1998 (OJ 1999 L 44/37); Commission decision of April 20, 2004 (OJ 2005 L 85/27)]. However, the General Court (ex-CFI) (the “**GC**”) overturned each of these decisions [Case T-49/93, *SIDE v. Commission*, judgment of 18 September 1995, 1995 ECR II-2501; Case T-155/98, *SIDE v. Commission*, judgment of 28 February 2002, 2002 ECR II-1179; Case T-348/04, *SIDE v. Commission*, judgment of 15 April 2008, 2008 ECR II-625.]

Simultaneously with the proceedings at Community level, SIDE brought actions before the national authorities and courts seeking that payment of the aid granted to CELF be stopped and that the aid already paid be recovered. Whereas the French Courts of first and second instance allowed the application, the Conseil d’État in 2006 decided to stay proceedings and requested a first preliminary ruling regarding – *inter alia* – the question as to whether the fact that the Commission had recognized the compatibility of the (non-notified, *i.e.,* unlawful) aid with the common market precluded the recovery obligation which follows, as a rule, from the breach by the Member State of its duty to notify the aid to the Commission under Article 88(3) EC (now 108(3) TFEU). In a well known Grand Chamber ruling of February 12, 2008 [Case C-199/06, *Centre d’exploitation du livre Français (CELF) v. Société internationale de diffusion et d’édition (SIDE)*, (“**CELF I**”), 2008 ECR I-469], the ECJ, on the one hand, reaffirmed its consistent case law according to which a breach of the standstill obligation is not cured retroactively by a subsequent Commission decision declaring the aid to be compatible with the common market and any premature payments therefore remain illegal [Joined Cases C-261/01 and C-262/01, *Van Calster and Cleeren*, 2003 ECR I-12249.]. On the other hand, however, the ECJ limited the consequences of a breach of the standstill obligation under such circumstances to the payment of interest for the period of illegality (rather than, *e.g.*, full recovery including interest and any quantifiable additional benefits obtained from the premature granting of the aid). The Grand Chamber ruling has seen mixed reviews [*See, e.g.,* Piet Jan Slot, Common Market Law Review, No. 2, April 2009, pp. 623-639; Benjamin Cheynel “*Arrêt CELF: une victoire à la Pyrrhus pour la Commission*”, Revue Lamy de la Concurrence, April-June 2008, pp. 40- 46]. On the basis of the ECJ’s answers in *CELF I*, the Conseil d’Etat ordered CELF to pay interest for the period of illegality. In 2008, following the GC’s (third) annulment of the Commission’s decision authorizing the aid, the Conseil d’Etat considered that additional explanations were necessary to address the issue of full recovery from CELF. Accordingly, the Conseil d’Etat referred to the ECJ a second request for a preliminary ruling, asking (1) whether a national court, before which proceedings have been brought on the basis of Article 88(3) EC (now 108(3) TFEU) for repayment of unlawful aid, *i.e.,* aid granted in breach of the obligation to notify any proposed aid to the Commission, may stay proceedings until the Commission has decided on the compatibility of the aid with the common market, when a first decision of the Commission declaring the aid to be compatible has been annulled by the GC; and (2) whether the adoption of three successive Commission decisions declaring a given aid compatible with the common market, which were subsequently annulled by the GC, may constitute an exceptional circumstance justifying a limitation of the recipient’s obligation to repay the unlawfully granted aid within the meaning of the case law.

The ECJ answered both questions referred to it by the Conseil d’Etat in the negative. Regarding the first question, the ECJ recalled that Article 88(3) EC (now 108(3) TFEU) entrusts national courts with the task of preserving, until the final Commission decision, the rights of individuals prejudiced by a breach of the prior notification requirement laid down by that provision. Consequently, national courts must take the necessary measures to remedy the unlawfulness of the implementation of the aid, in such a way that the aid does not remain at the disposal of the recipient during the period between its unlawful granting and the Commission decision. Depending on the circumstances of the case, potential measures a Member State can take to remedy a breach of the standstill obligation range from full recovery including interest to a freezing of the funds on a blocked account. The ECJ added that a decision to stay proceedings would *de facto* amount to a decision to refuse the application for interim measures by maintaining the benefit of the aid during the period in which implementation is prohibited. This, according to the ECJ, would be inconsistent with the purpose of Article 88(3) EC (now 108(3) TFEU) and would render this provision ineffective. The ECJ concluded that, in these circumstances, a national court cannot stay the proceedings pending before it until the Commission has ruled on the compatibility of the aid with the common market following the annulment of a previous positive decision, without rendering Article 88(3) EC (now Article 108(3) TFEU) ineffective.

Regarding the second question, the ECJ took the position that a positive decision of the Commission cannot give rise to legitimate expectations on the part of the aid recipient, where that decision has been challenged before the GC, which annulled it, and/or so long as the period for bringing an action for annulment has not expired or, where an action has been brought, so long as the courts have not delivered a definitive ruling. In this particular case, the Commission took three positive decisions, each of which was subsequently annulled by the GC. The ECJ held that this succession of three appeals leading to three annulments – although amounting to a *“very unusual situation”* [judgment, paragraph 52] – was not an exceptional situation that may justify a limitation of the aid recipient’s obligation to repay any such aid in the case where it was implemented by the Member State in breach of the standstill obligation. On the contrary, according to the ECJ, this situation being rather unusual *a priori* reflected the difficulty of the case and, far from giving rise to legitimate expectations, should have increased the aid recipient’s doubts with respect to the compatibility of the aid received.

The judgment can be seen as reflecting a certain lack of sensitivity on the part of the Court relating to the fact that the duration of the procedure before the Community Courts in one of the main elements causing proceedings to take such an inordinate amount of time. The Commission itself has recognized that inactivity on the part of the Commission for periods of one or two years may create expectations (albeit not “legitimate expectations”) on the part of the aid recipient. A twenty-year duration of State aid proceedings conducted by the European Union (to which the Commission and EU Courts have contributed) would appear to exceed any reasonable limit. The excessive duration is attributable to the Union, which (contrary to the Court or the Commission individually) has legal personality and which is responsible for the inordinate duration vis-à-vis the recipient and the Member State.