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European Court of Justice Clarifies Conditions for Withdrawal of State Aid from Undertaking in Difficulty

Philipp Werner, Sarah Bouchon (Jones Day) · Thursday, July 27th, 2017

Background

The notion of ‘undertaking in difficulty’ is a key element in State aid law because undertakings in difficulty can only receive any State aid under the restrictive conditions for so-called rescue and restructuring aid. Any other form of State aid is excluded, even when competing companies that are not in difficulties can receive such aid. Accordingly, the old GBER, which sets out the conditions under which aid is deemed compatible with the internal market and can therefore benefit from an exemption from the obligation to notify, explicitly excludes undertakings in difficulty from its scope in Article 1(6)c. Other State aid instruments contain similar provisions, in particular the new GBER in Article 1(4)(c).

Therefore, Article 1(7)c of the old GBER states that a company which “*fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings*” shall be considered to be an undertaking in difficulty for the purposes of Article 1(6)c. The new GBER contains the same definition in Article 2(18)(c).

The Issue

In the case at hand, Nerea, an Italian SME, had been granted aid in compliance with the Old GBER. In 2012, Nerea received an advance and, in 2013, requested that the other half of the aid was settled. This demand was denied on the grounds that Nerea no longer satisfied the conditions for eligibility, as it had applied for the opening of an arrangement with creditors as a going concern, a request granted by a local Italian court.

The authorities argued that such an arrangement constituted a type of collective insolvency proceedings, which excluded Nerea from receiving financial assistance, in accordance with Article 1(7)c of the old GBER. Thus, in 2015, the Regione Marche withdrew the aid granted and requested the reimbursement of the advance, plus interest. Nerea brought an action before the referring court, which decided to stay the proceedings and to refer two questions to the Court for a preliminary ruling.

The first question related to the definition of ‘collective insolvency proceedings’ in the

sense of the old GBER, precisely on whether a procedure that was opened at the request of the economic operator concerned could qualify as such. The second question pertained to the notion of ‘undertaking in difficulty’ for the purposes of Article 1(6)c of the old GBER, and on the time when that condition should be appraised for the granting of aid.

Both questions are also relevant for future cases under the new GBER.

The Outcome

Regarding the first question, the CJEU noted that Article 1(7)c of the old GBER refers to national law to determine the relevant conditions under which a company is subjected to collective insolvency proceedings. However, the CJEU insisted on the fact that there are no specific dispositions in the GBER to establish a distinction between procedures which are the result of a request from economic operators, and those that they are subjected to by the authorities of their Member State. Therefore, the CJEU concluded that the notion of ‘collective insolvency proceedings’ covers all relevant procedures, regardless of where the initiative originated.

As to the second question, the CJEU asserted that, even though the old GBER excludes firms in difficulty from its scope, this assessment must be conducted when the legal right to receive the aid is conferred on the beneficiary. The CJEU also stressed that, in practice, Member States do not have to appraise the financial situation of applicants, but simply to refrain from granting assistance to those that are the object of collective insolvency proceedings at the moment when their eligibility is being considered.

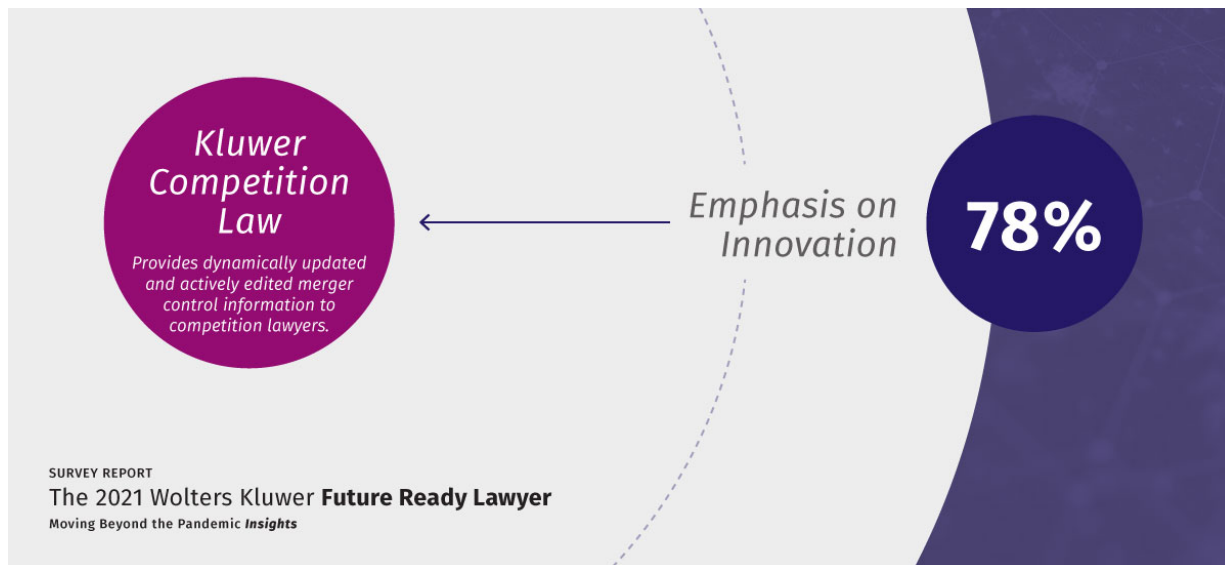
In this case, if the referring court confirms that Nerea fulfilled the conditions of the old GBER when the aid was granted, meaning that it was not subjected to collective insolvency proceedings, then it should not be considered to be a firm in difficulty for the purposes of Article 1(6)c. Hence, even if Nerea has subsequently become a firm in difficulty, the aid that was given cannot be withdrawn solely on those grounds, and neither can the authorities demand the reimbursement of the advance paid.

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