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COMMISSION NOTICE ON THE ENFORCEMENT OF STATE AID LAW BY NATIONAL COURTS

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On February 25, 2009, the EU Commission issued the *Notice on the Enforcement of State Aid Law by National Courts*.² The purpose of the notice is to aid national courts in state aid disputes and provide other relevant parties with a user-friendly manual on this issue. The present notice is largely based on the 2005 Commission State Aid Action Plan (“the SAAP”)³ and on a study that demonstrates there has been an increase in state aid disputes in national courts of the individual Member States,⁴ and comes to replace an earlier one from 1995 on the same topic.⁵

In reality, the Commission does not propose any procedural or substantive legal departure. Instead, relying heavily on the EC Treaty⁶ and relevant case law, it merely aims to support national courts and potential claimants of domestic state aid challenges by elucidating the process.

Amid the current financial crisis and the urgent measures adopted by a multitude of European capitals, the Commission’s clarification and reiteration of the applicable law appear to be opportune. National courts have been significant fora for the settlement of state aid claims, which include, for example, lawsuits by competitors against parties receiving state aid or lawsuits by parties defending against the imposition of allegedly discriminatory tax measure. State aid is defined in Article 87 EC as “any aid granted by a Member State . . . which distorts or threatens to distort competition.”⁷ Such aid is considered to be incompatible with the common market.

I. STATE AID LIFE-CYCLE

National authorities play a paramount role on the domain of state aid. State aid has direct effect in the Member States, and as such is directly applicable without incorporating legislative actions from the Member States. As a result, national courts are obliged to enforce the state aid provisions of the EC Treaty directly in any action on this issue.

¹ I would like to express deep gratitude to Jindrich Kloub without whom this piece would have not come to existence. Also, many thanks to Catherine Geddes for the repeated edits.

² Commission Notice on the Enforcement of State Aid by National Courts, 2009 O.J. (C 85) 1.

³ *Commission’s State Aid Action Plan: Less and Better Targeted State Aid: A Roadmap for State Aid Reform 2005–2009*, SEC (2005) 107 final (Jun. 7, 2005).

⁴ Press Release, State Aid: Commission Publishes Study on National Enforcement of State Aid Rules (Apr. 7, 2006), available at <http://europa.eu/rapid/> (search for Reference: IP/06/477).

⁵ *Commission Notice on Cooperation between National Courts and the Commission in the State Aid Field*, 1995 O.J. (C 312) 8 (Nov. 23, 1995).

⁶ Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 33 [hereinafter EC Treaty].

⁷ EC Treaty art. 87.

In the lifeline of a particular state aid scheme, the role of national authorities is also important. It can be broken down into four procedural phases. In the first instance, the national government creates the scheme of assistance. This assistance does not have to be monetary payments, as other amenities (such as tax breaks) amount to state aid. Second, if the Member State understands that the proposed plan is or might be state aid, it has to request the Commission's approval before implementing it. Alternatively, if the Member State believes that the plan is not state aid it can proceed to its implementation. Third, the Member State acts according to the Commission's response, which is based on an investigation conducted at the community level. A negative decision by the Commission does not preclude the Member State from altering a rejected plan and asking for a *de novo* approval. Last, once an assistance plan is in place, the Member State has to make sure that the payments and the due dates are followed according to the Commission's approval.

All state aid actions may give rise to civil action in the national courts of the Member State. Initially, lawsuits arise when Member States decide not to ask for the Commission's approval of a plan. In such a case, an individual may bring suit in the national courts for a violation of the standstill principle, according to which a Member State may not implement a state aid scheme prior to the Commission's approval. Alternatively, at this point an affected party may notify the Commission of the plan's existence, hoping that the Commission will condemn the plan, which will lead to recovery.

Despite their overall broad authority, national courts are precluded from dealing with actions that challenge the Commission's approval of the state aid. Such lawsuits have to be brought in front of the ECJ, which is the only court competent to review the Commission's decision.

In case a state aid scheme is rejected by the Commission and aid has already been granted, the aid given out under its auspices is to be recovered. Recovery, as discussed below, may often be an issue, as Member States may violate the standstill principle and grant aid before notifying the Commission.

II. MAIN REASONS

There are two guiding purposes behind the Commission's action. First, the notice aims to inform all relevant parties about the available remedies in case of a breach of the EU state aid rules. This objective targets a wide array of actors, as the affected parties in state aid issues encompass national courts and anyone directly and individually involved in the scheme,⁸ which expands the category well beyond the state-aid-granting authority and the recipient. Second, the notice purports to give the national courts guidance on the practical application of the state aid rules, since these courts have proved to be of central importance in the enforcement of community state aid rules, which includes proceedings regarding the recovery of illegal state aid. As a result, the Commission provides explicit methods of help to national courts.

⁸ This phrase stems directly from Article 230 EC.

III. AREAS OF PRIMARY CONCERN

The notice covers three interrelated areas: the relevant limits for bringing a state aid claim (i.e. the issue of standing), the role of national courts in recovery of illegal state aid, and forms of cooperation between national courts and the Commission in the field of state aid.

A. *Significant Limits on Standing for a State Aid Claim*

The main limits placed upon the powers of a national court have to do with standing of individual challenges. Standing refers to the right of an individual to bring forth a certain legal action. The notice highlights that, on the issue of state aid, national courts are only competent to determine whether a particular plan falls under an approved aid scheme and have no power to deal with the validity of a Commission decision.

Under Article 230 EC, the Commission's decision can be challenged only by the addressees of the Commission's decision or persons, real and legal, directly and individually concerned by the state aid scheme.⁹ The latter category has received significant elaboration by the ECJ case law, culminating in the recent decision of the "Regie Networks" case.¹⁰ In *Regie Networks*, the ECJ opined that in case of doubt as to the direct and individual involvement of a person in the state aid scheme, the ambiguity should be resolved in favor of granting standing to that person, even if the prescribed period, which consists of two months after person has knowledge,¹¹ has expired.¹² This recent decision consists of an important broadening of judicial power in the field of state aid, as it significantly modifies the "Deggendorf" case, which denied standing to parties that did not bring their claim within the prescribed period of two months.¹³

Persons who have locus standi under Article 230 EC must bring challenges to the Commission's decision directly to the ECJ.¹⁴ These persons cannot challenge the validity of the Commission's decision through the preliminary ruling procedure under Article 234 EC.¹⁵

B. *Recovery of State Aid*

The national courts possess significant power in ordering the recovery of unlawful aid and interest accrued thereon. Indeed, the notice spells out how the national courts are central in enforcing decisions adopted under Article 14 (1) of the Procedural Regulation¹⁶ when the Commission has assessed that the grant is unlawful and incompatible with the common market. Due to the direct effect of Article 88 EC,¹⁷ national courts have to ensure that the recovery of

⁹ EC Treaty art. 230.

¹⁰ Case C-333/07, *Régie Networks v. Direction de Contrôle fiscal Rhône-Alpes Bourgogne*, 2 C.M.L.R. 20 (2009).

¹¹ EC Treaty art. 230.

¹² *Regie Networks*, 2 C.M.L.R. 20, ¶ 129 (2009).

¹³ Cases T-244/93 and T-486/93, *TWD Textilwerke Deggendorf GmbH v. Comm'n of the European Cmtys.*, 1995 E.C.R. II-2265 ¶ 11.

¹⁴ EC Treaty art. 230.

¹⁵ EC Treaty art. 234.

¹⁶ Council Regulation 659/1999, Laying down Detailed Rules for the Application of Article 93 of the EC Treaty, art. 14, 1999 O.J. (L 83). 1 (EC).

¹⁷ EC Treaty art. 88.

unlawful aid is immediate. As such, the power to order recovery has its basis in directly applicable community law and does not require further actions at the level of the European Union. For the recovery determination, the notice underscores that the Community, and hence the national courts, applies a very strict standard, and that a beneficiary of unlawful aid cannot assert the creation of an expectation's interest since a diligent enterprise would have sought to clarify the lawfulness of the aid before depending on it.

An additional area of primary responsibility highlighted in the notice is the "standstill" principle. Accordingly, under Article 88(3) EC¹⁸ and the relevant case law,¹⁹ aid of which the Commission has not been notified or which have been implemented before the Commission's approval is unauthorized. As such, national courts have to, in most cases, proceed to its recovery.

Recovery, however, has some narrow limits. Under the "SFEL" case, exceptional circumstances can make recuperation inappropriate.²⁰ Furthermore, under the "CELFF" case, the national court's obligation to order full retrieval ceases the moment that the Commission has already decided that the aid is compatible with the common market.²¹ On the contrary, the notice interestingly clarifies that a national court's obligation to order recovery and protect individual rights under Article 88(3) EC remains unaffected where the Commission has not yet taken a decision, regardless of whether a Commission procedure is pending or not.²²

Apart from repossession of the given amount, the national court may also properly order the recovery of interest. When the national court orders the full recovery of the given sum, interest needs to be added. However, even if the entire sum should not be recovered (for example, when the aid has been ex post approved by the Commission), "CELFF" allows for a national court to recover the interest after a positive decision by the Commission when doing otherwise (not regaining the accrued interest) would distort the common market.²³ This situation is clearly illustrated by the "CELFF" case, in which the aid granted by the French government in violation of the standstill principle was afterwards approved and the national court deemed it unnecessary to order the recovery of the given sum. The court, however, ordered the recovery of the accrued interest, as it opined that the latter acted proactively in favor of the recipient in violation of the free market during the years preceding the Commission's approval.²⁴

C. Community Cooperation

In two ways, the Commission is trying to help national courts in making decisions on the issue of state aid. First, the state court may ask the Commission to transmit relevant information in its possession, subject to the Commission's guarantee of professional secrecy and independent

¹⁸ *Id.*

¹⁹ *See, e.g.*, Case C-199/06, *Centre d'exportation du livre francais (CELFF), Ministre de la Culture et de la Communication v. Societe international de diffusion et d'edition (SIDE)*, 2008 E.C.R. I-469.

²⁰ Case C-39/94, *Syndicat Francais de l'Express International (SFEL) v. La Poste*, 1994 E.C.R. I-3547.

²¹ *Centre d'exportation du livre francais (CELFF)*, 2008 E.C.R. I-469.

²² EC Treaty art. 88.

²³ *Centre d'exportation du livre francais (CELFF)*, 2008 E.C.R. I-469.

²⁴ *Id.* ¶ 70.

functioning. Second, the national courts may ask the Commission for an opinion concerning the application of state aid rules.

Both measures are meant to help national courts with an ever-increasing docket on state aid issues, while not sacrificing the Commission's neutrality and objectivity as a guarantor of the public interest of the Union. Indeed, while the Commission appears ready to participate in the national procedure with the goal of facilitating the state aid procedures at the Member State level, it remains bound by both the duty of professional secrecy and the safeguard of its own functioning and independence.²⁵

IV. CONCLUSION

The notice issued by the Commission is a document of significant importance. It comes at the appropriate time, as state aid schemes appear attractive again to many Member States in the midst of the global economic downturn.

The notice emphasizes the crucial role that national jurisdictions have in the decentralized enforcement scheme of Community state aid rules. It not only accomplishes a considerable legal synopsis of current EU law on state aid, but it also extends the field of inter-institutional cooperation, notably between the Commission and the national courts.²⁶

²⁵ For an analysis of these themes, see Case C-2/88, *Imm., J. J. Zwartveld and Others*, 1990 E.C.R. I-3365.

²⁶ The Commission has issued a press statement with more information on this notice. Press Release, EU Commission, *State Aid: Commission Issues Guidance on State Aid Enforcement by National Courts* (Feb. 25, 2009), available at <http://europa.eu/rapid/> (search for Reference: IP/09/316).