

Summary

This is the report on the comparative study that was commissioned by WODC, the Research and Documentation Centre of the Dutch Ministry of Justice, at the request of the Ministry of Justice, the Ministry of the Interior and Kingdom Relations, and the Ministry of Finance.

The study addressed alleged violation of European regulations on state aid. Article 88, paragraph 2, of the EC Treaty holds that 'if the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission'. After the Commission has issued such a decision, national authorities have to comply with that decision, using procedural means that are available in their national legal system. The recovery of such aid has to be carried out by national authorities in accordance with Article 14 of Regulation (EC) 659/1999. Important elements of this article are:¹

- the member state has the *obligation* to take all necessary measures to recover the aid (Art. 14, par. 1);
- the aid has to be recovered from *the beneficiary* (Art. 14, par. 1);
- the recovery by the member state has to be conducted *in accordance with the procedures under the national law* of the member state concerned (Art. 14, par. 3);
- there may be *no delay* in effectuating the decision; the execution of the decision must be *immediate and effective* (Art. 14, par. 3);
- the recovery decision has to include that *interest* has to be paid, at a rate fixed by the Commission (Art. 14, par. 2).

These requirements may be problematic, because instruments of the national law of the member state may not be equipped to comply with these requirements. Central questions in this study were: how is recovery carried out in other EC countries and what is the content of the national law that is involved? If national law is not in conformity with the EC requirements, what kinds of solutions have been found? The countries that were taken into account were Germany, France, Belgium, Sweden, and Malta.

Chapter 1

At the end of the first chapter of the study the topic of legitimate expectations is brought up. The conclusion is that EC law does not specify under what conditions the beneficiary may expect that the aid will not be recovered. However, the procedural autonomy the member states have in this matter is very limited, because EC law requires that recovery may not be made impossible. An exception can be made if *the Commission* has created the legitimate expectation that there was no ground for (further) recovery of the aid. As a rule, promises or commitments of *national*

¹ The full text of the article is cited, in English, in an appendix to this report: see *Bijlage 1*.

authorities cannot create the legitimate expectation that aid will not be recovered. However, under special circumstances, national authorities can be held liable for damage caused by any expectations these authorities have created.²

Chapter 2: The Netherlands

The second chapter of the report contains an analysis of features of Dutch Law that have relevance for the recovery of aid. Aid can be supplied in various forms: for instance, by an *administrative law* decision (e.g., subsidies), or via *private law* instruments (e.g., selling state property under the market value or financing a company on favourable conditions), or by means of *tax facilities*. These three fields were analysed as part of this study. As far as administrative law is concerned, Dutch Law does not hold a general statutory provision that regulates the withdrawal of an administrative decision that favours the addressee of the decision. Such a general provision does exist as far as subsidies are concerned (Art. 4:48 *et seq.* of the General Administrative Law Act (GALA; *Algemene wet bestuursrecht*)). The articles concerned are not tailored to the recovery of state aid in the case of a violation of Art. 88 of the EC Treaty. The situations in which a subsidy can be withdrawn do not include such a violation, and there is a five-year time limit for recovery of the money involved. What little case law there is about recovery of state aid granted in violation of the EC Treaty seems to indicate that the courts will apply the GALA, but ignore the limitations that would prevent the effectuation of EC law. One point of concern, however is that the courts tend to easily suspend the execution of decisions to recover state aid. This practice might be considered problematic in view of the duty 'to allow the immediate and effective execution of the Commission's decision', set out in paragraph 3 of Art. 14 of EC Regulation 659/1999.

Dutch private law holds as a basic rule that, to end legal obligations arising from a legal transaction, a new juridical act is needed. There is an exception to this rule for legal transactions that are void. Presumably, private law transactions that violate Art. 88 of the EC Treaty have to be considered as void, according to Art. 3:40 of the Dutch Civil Code (*Burgerlijk Wetboek*). It may have serious practical disadvantages to consider a legal transaction as partly or entirely void. To avoid these, the Dutch Civil Code holds the possibility to determine that the nullity is restricted to only a part of the legal obligations. It also holds the possibility of converting a void legal transaction into a valid one (Art. 3:41 and Art. 3:42 of the Civil Code).

There are two aspects of Dutch private law that may conflict with EC-law on state aid. There is a time limit of five years for recovering sums of money, and the Civil Code limits the obligation for corporate bodies to retain accounts and other specified documents to seven years.

² Chapter 1, section 7.2; Court of First Instance, 14 January 2004, Case T-109/01 (Fleuren Compost).

Both time limits are rather short, considering that the Commission can start recovery even ten years after the aid was granted (EC Regulation 659/1999, Art. 15).

Dutch Tax Law provisions specify similar time limits. There is a five-year time limit to imposing additional taxes after the duty to pay the taxes arose and relevant documents must be retained for seven years. Since the Commission can issue an order to recover state aid until ten years after the aid was granted, similar problems may arise here.

Dutch Tax Law contains explicit statutory provisions in case too little tax has been imposed. The authorities can impose additional tax but, as far as important categories of taxes are concerned, only if a 'new fact' emerges. It is unclear whether the fact that tax facilities appear to be illegal can be acknowledged as such a 'new fact'.

An extra complication in tax law could be that, according to Art. 14, par. 1 of EC Regulation 659/1999, the aid has to be recovered from 'the beneficiary' of the aid. This is not necessarily the same entity as the addressee of the tax facilities. It is not clear whether or how fiscal instruments can redress such a situation.

Chapter 3: Comparative study

In the third chapter, the situation in five EC countries is set out, starting with GERMANY. According to German law, a juridical act supplying state aid and performed in violation of the EC Treaty has to be undone or nullified before an order to recover the aid can be issued. If the aid was granted in an administrative law decision, there has to be an authority that has the public law power to undo the decision. There are general statutory provisions in administrative law and in tax law for such a power. However, these provisions hold limitations that are not compatible with the EC law on state aid. These limitations concern the following aspects.

- As far as cases of illegal state aid are concerned, there seems to be no ground to undo an administrative act (*ex tunc*).
- Under national law, recovery of the aid would be considered a discretionary power, whereas EC law stipulates that it is an obligation.
- There are time limits to the recovery of sums of money.
- National law would stand in the way of recovery if legitimate expectations have to be recognised.

German private law considers legal transactions that are performed in violation of Art. 88, paragraph 3, of the EC Treaty as transactions that should be declared void. This approach eliminates the complications encountered in administrative law. But considering a transaction void brings about other problems of a legal and practical nature, especially if the legal transaction has a complicated structure (do *all* elements have to be considered void?). These problems increase as time passes, and most cases in which state aid has to be recovered are protracted affairs.

In FRANCE, there is at least one general statute that has recently been adapted expressly to the state aid regulations of the European Community: the 'Local and regional Collectivity Code' (*Code général des collectivités territoriales*), a general code on decentralised bodies. In this Code the responsibilities of the decentralised bodies in respect to 'state' aid are stressed. On the other hand, the Code contains a power for central government to act if a decentralised body fails to do so. This possibility of 'substitution' has been criticised by the French Council of State on principal and on practical grounds.

As in German law, the doctrine in French law is that an illegal juridical act has to be undone or nullified before recovery can take place. French administrative law contains a time limit (based on case law) to withdraw a favourable decision and it contains time limits to the recovery of sums of money. But French administrative law does not recognise the principle that the administration has to live up to legitimate expectations.

A difficulty in French administrative law appears to be the fact that the beneficiary of the aid can get a decision to recover aid suspended just by lodging an appeal against the decision. This may prove to go against the EC-requirement that there may be no delay in effectuating the decision; the execution of the decision must be 'immediate and effective' (Art. 14, par. 3).

As for private law in France, there is little case law as yet, but it indicates that the ordinary courts do not consider juridical acts that violate EC law on state aid void. At least, if the aid originates from an administrative law contract, the ordinary court holds that the contract must be undone. If the beneficiary does not cooperate, this can be done by court order or even by a unilateral act of the public authority.³

In BELGIUM, there is no general statute that regulates the withdrawal of administrative law decisions that grant subsidies, but there are many different special regulations for specific areas of government activity. However, although these regulations clearly apply to EC law, they do not consider the situation that aid has to be recovered because of violations of the EC regulations.

We found no administrative case law on the recovery of state aid. The ordinary courts take the position that a juridical act granting state aid that violates the requirements of the EC Treaty is null and void. This goes for juridical acts of a private law nature as well as for acts of an administrative law nature (which are then considered 'invalid'). According to Belgian private law, the court has the possibility to determine that the nullity is restricted to only a part of the legal obligations.

As for SWEDEN and MALTA, both countries do have general statutes that explicitly take the EC requirements on state aid into account. Both countries have such a short history as EC member states that there is no case law concerning the recovery of state aid.

³ Cour administrative d'appel de Nancy 18 décembre 2003, n^o 03NC00864, Ryanair.

The SWEDISH statute holds an explicit power for the government to nullify a decision by a decentralised body that violates EC regulations on state aid. Likewise, the administrative court can nullify such a decision, regardless of whether the government has taken action.

MALTA has regulated state aid – in great detail – in the Business Promotion Act (2004). A national State Aid Monitoring Board has been created. The Board has to be notified of new initiatives for state aid and, after such notification, the Board has to investigate the proposals concerned. The Board can also investigate potential cases of state aid of which it has not been informed. The Board has powers to have aid suspended or ask for an order that the aid has to be paid back provisionally. The Business Promotion Act further holds an explicit power for the Malta Development Corporation (the government agency responsible for promoting and supporting direct investment into Malta) to nullify a decision of the Corporation that grants aid if the conditions under which the grant was given are violated. In addition, it holds a power for the President of Malta to stop state aid that ‘is or would be against public policy’. From an EC law point of view, this power does not seem adequate because the article in the Business Promotion Act stipulates that ‘where such an order is made, it shall have effect as from the date therein specified but in no case shall an order have retrospective effect’. All in all, although the Business Promotion Act contains several instruments to put an end to illegal state aid, the scope as well as the effects of these instruments are limited. The Act does not include an explicit provision for cases in which the European Commission decides that state aid has to be recovered.

Chapter 4: Evaluation and conclusions

In none of the countries involved in the research project, with the exception of Sweden, there is a general, explicit statutory basis to withdraw or nullify administrative decisions that violate EC regulations on state aid. The general provisions on withdrawal or nullification in the national law of the member states tend to fall short in several respects. Some of these deficiencies can be overcome by the national courts, at least as an *ad hoc* solution, by putting aside the national standards, and thus giving priority to EC law requirements. This goes, for instance, for

- time limits to the withdrawal of an administrative law decision;
- time limits to the recovery of sums of money;
- a national law principle that holds that legitimate expectations are to be met;
- cases in which national law would consider a power to recover aid as a discretionary power.

Other deficiencies provide more difficulties. For instance, if national law prescribes that corporate bodies have an obligation to retain accounts and other specified documents for only seven years, this may cause problems in recovery cases.

Another example is the situation in which national law requires a withdrawal before a decision to recover can be issued, but the national law does not provide the legal competence for such a withdrawal, or limits such a competence to other situations than cases of recovery of

illegal state aid. The latter seems to be the case with Art. 4:49 of the Dutch GALA. This leaves a national court with only two options: concluding that the power to withdraw must be derived directly from the EC law obligation or interpreting a statutory provision in such a way that it is in conformity with EC law.

Points of special interest if a statute on state aid is considered

A statute on state aid could take away obstacles in national law that hinder the recovery of illegal state aid.

- A first remark should be, however, that the national regulations we have studied (the Business Promotion Act of Malta; the specific regulations in Belgium) do not seem to eliminate all obstacles. One of the main drawbacks appears to be that these regulations contain too few provisions for cases in which the EC-regulations (or the national regulations) are violated, in spite of the national regulations that try to prevent this.
- Could a national statute (or national orders of a different nature) stipulate that state aid is granted under the provision that the Commission approves the aid? Article 88, paragraph 3 casts doubts on the acceptability of such a solution, because it stipulates that a member state cannot put its proposed state aid measures into effect until the procedure before the Commission has resulted in a final decision.
- Would it be advisable to adopt, explicitly or otherwise, the theory that any transaction, whether it is of a private law or of a public law nature, is void if it does not respect the EC regulations on state aid? As far as legal transactions are concerned that are based on private law, the national systems of private law tend to assume that if such a transaction comes down to supplying illegal state aid, the transaction concerned is either void or can be nullified. Basically, the declaration that a transaction is void is rather a blunt instrument. Provisions to give courts the possibility to mitigate the consequences of the nullity (as in Belgium and the Netherlands) seem welcome.
- There are several different regulations about claiming and calculating interests in Dutch law. Art. 14, par. 2 of EC Regulation 659/1999 stipulates that the aid to be recovered pursuant to a recovery decision must include interest at an appropriate rate *fixed by the Commission*. It also contains a method for calculating the interest, where it reads: 'interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery'. Although it is not certain that a provision in national law is necessary, a provision in a national statute on state aid that declares that interest will be claimed by the national authorities that are responsible for the recovery of the state aid, and that the interest will be calculated according to the EC Regulations, could put the matter beyond doubt.

- A provision holding that, in cases that may be considered to entail state aid, books have to be kept until the time limits specified in Art. 15 of the EC Regulation 659/1999 could prevent parties from invoking the shorter time limits under national law.

Our last remark, concerning considerations whether or not to create a statute on state aid, has to do with the kind of conflicts between national law and EC-law that courts can solve relatively easily, by putting aside national statutory provisions to give priority to EC requirements. There seems to be a limit to what courts can do, to tailor national law to conformity with EC law, in setting aside requirements of national law. The national legislator should not accept a continuing divergence between statutory provisions and EC law. In the long run, such a divergence might be labelled a failure to 'fulfil an obligation under the Treaty' (cf. Art. 226 EC Treaty).