According to an opinion issued by Advocate General M. Wathelet, Member States are obliged to recover unlawful state aid even if the European Commission has not taken a decision on recovery. The reason given for that opinion is the EU legal principle of "loyal cooperation".

Opinion of 25 September 2018 in case C-349/17 (Eesti Pagar AS vs Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium)

By attorney Sonny Gaarslev and assistant attorney Anna Haldbo Michelsen

Background

In October 2008, the Estonian company Eesti Pagar was granted state aid by the national foundation for the promotion of entrepreneurship (EAS). The state aid was to be invested in the purchase of a pan and toast bread production plant and was granted under the authority of the Block Exemption Regulation, according to which aid can be granted without the European Commission's prior approval.

However, at a subsequent inspection in December 2012, the EAS discovered that the Estonian company had already in August 2008 signed a contract about purchase of the production plant. Thus, the contract had been concluded prior to the company's application for state aid. EAS therefore found that there was no longer any proof of fulfilment of the requirement of a so-called "incentive effect" as set out in the Block Exemption Regulation.

In January 2014, EAS therefore decided to recover the aid inclusive of interest and compound interest. The company subsequently complained of the decision – first administratively and subsequently before the national courts. The case is now pending in the Tallinn court of appeal.

Reference for a preliminary ruling

The Tallinn court of appeal has referred five questions to the European Court of Justice for a preliminary ruling. The questions concern:

• interpretation of the concept of "incentive effect";
• Member States' obligation to recover unlawful aid;
• the concept of "legitimate expectation" and the question whether unlawful aid gives rise to such expectation on the part of the recipient;
• limitation period applicable to recovery of unlawful aid;
• Member States' obligation to demand payment of interest on the unlawful aid.

Accordingly, the case concerns two general issues:

1. the interpretation of the concept of "incentive effect"; and
2. what Member States should do in case aid has been granted unlawfully.
Opinion of the Advocate General

According to the opinion of Advocate General M. Wathelet, the interpretation of the concept of "incentive effect" will require a detailed analysis of the relevant contract and the facts behind the contract. A project or an activity is considered to have been initiated when the contract has been signed.

The Advocate General argues, however, that it is not decisive for the concept of "incentive effect" whether you have entered into a formal contract about the project or activity before applying for aid. Member States must therefore instead consider whether the contract is conditional upon the grant of aid, or whether it is possible to cancel the contract in case of a refusal to grant the aid. If it is not possible to cancel the contract, the aid may be unlawful because in that case it does not meet the block exemption requirement of an "incentive effect". In such cases, the aid must be approved individually before granted.

The Advocate General also states that if a Member State has more than a simple doubt about the lawfulness of the aid, the Member State is obliged to recover the aid as soon as possible, also in situations where the European Commission has not yet issued a decision about recovery.

According to the Advocate General, the obligation of the Member States originates from the EU legal principle of "loyal cooperation". Add to this that unlawfully granted aid – in the opinion of the Advocate General – does not create a legitimate expectation for the recipient, because aid recipients are expected to examine themselves whether they meet the block exemption requirements. Consequently, Member States must recover the aid within four years and – in connection with the recovery – charge interest on the aid in accordance med national legislation. This will ensure, according to the Advocate General, that the company's benefit of the unlawful aid is "rolled back".

What can be derived from the Opinion of the Advocate General?

The Opinion of the Advocate General is interesting because it implies – if upheld by the European Court of Justice – that authorities granting aid will in future be required to carry out a much more detailed substantive analysis of an underlying contract. By way of example, in order to be certain that the aid meets the block exemption requirements, the authorities must examine the circumstances surrounding the conclusion, and the possibility of cancellation, of the contract.

Furthermore, the Opinion emphasizes the relevance of the aid recipient having an independent and substantial interest in carrying out an independent legal and financial compliance assessment, because a claim for repayment may have considerable consequences for the recipient.

Read the Opinion of the Advocate General (in Danish).