



BRITISH AGGREGATES ASSOCIATION
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RECOVERY OF AID – THE UK'S OBLIGATIONS

1. INTRODUCTION

- 1.1 In its decision of 31 July 2013 ("**Opening Decision**"), the European Commission opened an in-depth investigation into most of the AGL exemptions for material used as aggregate. The Commission's preliminary conclusion was that these exemptions constitute unlawful State aid which is not compatible with the EU Treaty.
- 1.2 If these preliminary conclusions are maintained in the Commission's Final Decision, the Commission will require the UK Government to recover the unlawful aid (i.e. the amount of the unpaid AGL, together with compound interest for the full period of the operation of the AGL) from the beneficiaries of these exemptions.
- 1.3 However, we understand that the UK Government has recently assured aid beneficiaries that, in the event that the Commission maintains its preliminary stance in its Final Decision, the UK Government will **not** proceed to recover this aid,
- 1.4 This note demonstrates why such an approach would not be open to the UK Government under EU law. Admittedly, the UK may face practical difficulties in certain circumstances but the European Commission routinely resists any attempts by Member States to frustrate Commission decisions ordering recovery of aid.

2. LEGAL PROVISIONS

- 2.1 The European Commission is becoming increasingly sophisticated in its efforts to prevent the grant of unlawful State aid to beneficiaries. In 2013, the Commission investigated more than 350 State aid cases, including capital injections, loan guarantees, grants, and tax exemptions. Where unlawful aid has been provided to beneficiaries, it is the Commission's general policy that it should be recovered by Member States without delay. This limits the effect on competition and maintains the Commission's authority in the State aid sphere.
- 2.2 The State aid Procedural Regulation ("**Procedural Regulation**")¹ sets out the obligations incumbent on Member States regarding the recovery of aid.
- 2.3 The Procedural Regulation provides that "*[w]here negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State shall take all necessary measures to recover the aid from the beneficiary*"². Recovery of unlawful aid by a Member State must include interest at a rate to be determined by the Commission³. The Procedural Regulation also states that recovery must take place "*without delay*" and requires

¹ Council Regulation (EC) No 659/1999. See also, Notice from the Commission on the Recovery of unlawful and incompatible aid.

² Emphasis added. A very limited exception to this principle applies under which the Commission may not order recovery where this would be contrary to a general principle of EU law. However, this exception is applied very restrictively and, in any event, does not arise in this case. The Commission has stated clearly at paragraph 142 of the Opening Decision, that aid recipients under the AGL cannot entertain legitimate expectations as to the lawfulness of the implementation of the aid, since the Commission decision not to raise objections to the measure was challenged in due time before the General Court.

³ Article 14(2), Procedural Regulation.



immediate and effective execution of the Commission's decision⁴. If national legislation impedes the effective execution of the recovery decision, it should be set aside.

2.4 A Commission Decision ordering recovery will specify that (i) within two months of its entry into force, a Member State must inform the Commission of the measures which it plans to take, or has taken to ensure recovery; and (ii) within four months following the entry into force of the decision, the Commission Decision must have been executed i.e. the aid and interest must have been recovered.

2.5 There are only two exceptions to a Member State's obligation to implement a recovery decision which has been addressed to it, namely:

2.5.1 Exceptional circumstances exist that would make it **absolutely impossible** for the Member State to execute the decision properly; or

2.5.2 The ten year **limitation period** for the recovery of aid has expired.

2.6 Neither of these exemptions is available to the UK government in the case of the AGL.

2.6.1 First, the concept of **absolute impossibility** is interpreted in a very restrictive manner and represents an exceptionally high threshold for a Member State to meet. The European Courts have consistently refused to accept that a failure by a Member State to execute a recovery decision can be justified by administrative or technical difficulties (e.g. a very high number of beneficiaries)⁵, financial difficulties of the beneficiaries⁶ or even an apprehension by the Member State that recovery will cause insurmountable internal difficulties⁷.

2.6.2 Secondly, the ten year **limitation period** for the recovery of the aid under the AGL has not expired. This is because the limitation period has been interrupted by Commission proceedings in this case.

2.7 The UK Government's position on recovery is therefore not supported by EU law.

3. **WHAT HAPPENS IF A MEMBER STATE DOES NOT EXECUTE A RECOVERY DECISION?**

3.1 Where a Member State refuses to recover unlawful and incompatible aid from beneficiaries, the Commission is permitted to refer the matter immediately to the European Court of Justice. If the Member State fails to comply with a Court of Justice judgment ordering recovery, it can be referred to the Court of Justice a second time, at which point significant financial penalties can be imposed.

3.2 In the last 15 years, the Commission has referred more than 30 cases against Member States to the European Court of Justice for failure to recover unlawful and incompatible aid. In most cases, it appears that Member States have complied with Court of Justice judgments ordering recovery. However, where Member States have failed to comply with such judgments, the Court of Justice has imposed substantial penalties.

3.3 By way of example, in December 2012, the European Court of Justice imposed a lump sum penalty of €20 million on Spain for failure to recover unlawful aid of €23 million over a period of more than 10 years, as required by a Commission decision and an ECJ

⁴ Article 14(3), Procedural Regulation.

⁵ Case C-280/95, *Commission v. Italy*, [1998] ECR I-259.

⁶ Case C-52/84, *Commission v. Belgium*, [1986] ECR 89, para. 14.

⁷ Case C-6/97 *Italy v. Commission*, [1999] ECR I-2981, para. 34.



judgment. A daily penalty of €50,000 was also imposed for each additional day that elapsed before the Spanish Government ensured recovery. Even though the aid recipient had been insolvent for several years and the Spanish Government listed the unrecovered aid on the company's schedule of liabilities, Spain was still found in breach of its obligation to recover the aid. This was because the company's assets had been transferred to another company which was still active in the market and which continued to have a competitive advantage linked to the unlawful aid⁸.

- 3.4 In July 2009, the European Court of Justice fined Greece a lump sum of €2 million and €16,000 per day for failure to recover illegal State aid of €23 million over a period of four years from the airline Olympic Airways⁹. In this case the Court rejected arguments by the Greek State that recovery had been hampered by the complexities of the Greek repayment system.
- 3.5 Just last week, on 23 January 2014, an advisory opinion to the European Court of Justice recommended the imposition of a fine of €50 million, the highest fine to date, on Spain for its failure to recover aid amounting to €358 million over a period of almost seven years. This aid had been granted unlawfully to a large number of firms in the Basque Country under various tax measures and tax credits. This demonstrates that even in cases involving a large number of beneficiaries and complex tax arrangements the Courts will not be deterred from imposing fines where a Member State has failed to fulfil its obligations to recover aid. No daily penalty was recommended in this case as all aid had been recovered by the date of the Opinion¹⁰.

4. NORTHERN IRELAND

- 4.1 It is also useful to comment briefly on the situation regarding the AGL in Northern Ireland. It should be recalled that the Commission's investigation into the AGL in Northern Ireland is on-going (and that no one has encouraged the Commission to conclude it). Therefore, no negative decision regarding unlawful aid in Northern Ireland has yet been taken and there is (as yet) no final obligation on the UK Government to recover aid from beneficiaries in Northern Ireland. This situation is therefore of no relevance to an obligation of the UK Government to recover aid from beneficiaries of the AGL in this case, in the event that this is mandated by the European Commission's Final Decision.

5. CONCLUSION

- 5.1 It is clear that, if the Commission upholds its preliminary findings in respect of the relevant exemptions under the AGL, the UK Government will be required to ensure the recovery of aid from beneficiaries of those exemptions. While this is likely to be practically difficult in a number of cases, the UK has no basis to claim that it can simply refrain from recovering the aid granted. None of the very limited exemptions from the requirement to ensure recovery can assist the UK Government in this case.
- 5.2 Furthermore, any attempt by the UK to circumvent a decision ordering recovery of aid can result in the imposition of significant fines by the European Court.

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⁸ Case C-610/10 *European Commission v. Kingdom of Spain*, Judgment of 11 December 2012.

⁹ Case C-415/03 *European Commission v. Hellenic Republic*, [2005] ECR I-3875.

¹⁰ Case C-184/11 *European Commission v. Kingdom of Spain*, Opinion of Advocate General Sharpston, 23 January 2014.