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BERGEN CENTER FOR COMPETITION LAW AND ECONOMICS

Recovery of aid

Selected issues

EU/EEA State aid rules and Tax law – workshop
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Why the topic: Recovery of aid?

- ❑ **NEW Commission Notice on the recovery of unlawful and incompatible State aid**, OJ C 247, 23.7.2019, p. 1–23
- **ESA – the previous Recovery Notice**, OJ 2007 C 272, 15.11.2007, p. 4.
  - Updated notice, more clarity…?
- ❑ **National rules on recovery**
- ❑ **Fiscal aid - more difficult to recover?**
- ❑ **GBER and recovery**
- ❑ **The Norwegian case of SkatteFUNN**
- ❑ **Norway as an EEA champion in granting fiscal aid (74%!)**

Recovery of aid – introduction

- As a rule, any new aid must be notified
- Unnotified aid or notified, but put into effect without approval (standstill clause) – **unlawful aid**
- Unlawful v incompatible aid
- Only the **Commission and ESA** may assess **compatibility of aid**
- **Incompatible aid must be repaid (with interest).**

The purpose and scope of recovery

- The purpose: **restore the situation** which existed in the internal market before the aid was paid
- By paying back the unlawful aid its **recipient forfeits the advantage** which it has enjoyed over its competitors
- **Aid plus interest** (the recovery interest - from the date it was put at the disposal of the beneficiary until it is paid back)
- **Not a penalty**
- **The Commission/ESA has no discretion as regards the recovery order** when aid found to be incompatible, unless contrary to general principles of EU law (strict interpretation).

Aid granted under the GBER

- Notification as a rule, but…
- **Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty**
- If conditions set out in GBER met, aid may be granted **without notification**
- **No compatibility assessment by the Commission or ESA, rather a presumption of compatibility**
- **But what if the GBER conditions were misapplied…?**
- **Is aid automatically incompatible?**
- **Must such aid be recovered even though the state confirmed the correctness of the application of GBER?**

SkatteFUNN

- SkatteFUNN decreases firms' R&D investment costs through **tax credit** up to set caps
- **SMEs** may receive a tax credit of **up to 20% of the eligible R&D costs** for approved projects, **large firms - up to 18%**
- If the tax credit for R&D expenses is greater than the amount for which a firm is liable in tax, the remainder is received through a tax settlement
- Undertakings with a permanent establishment in Norway and liable to pay corporate tax to Norway.
- All industries and types of undertakings, irrespective of geographic location
- Introduced in 2002, currently under **GBER Articles 25-30**
- Duration: **1 January 2015 to 1 January 2025**
- Last evaluation by Samfunnsøkonomisk analyse AS - 2 July 2018.

Aid to undertakings in difficulty and GBER

GBER Article 1(4)(c):

- **GBER shall not apply to undertakings in difficulty**, with the exception of aid schemes to make good the damage caused by certain natural disasters, start-up aid schemes and regional operating aid schemes, provided those schemes do not treat undertakings in difficulty more favourably than other undertakings.

Undertaking in difficulty – Art. 2 (18) GBER

'undertaking in difficulty' means an undertaking in respect of which at least one of the following circumstances occurs:

(a) In the case of a limited liability company (other than an SME that has been in existence for less than three years or, for the purposes of eligibility for risk finance aid, an SME within 7 years from its first commercial sale that qualifies for risk finance investments following due diligence by the selected financial intermediary), where more than half of its subscribed share capital has disappeared as a result of accumulated losses. This is the case when deduction of accumulated losses from reserves (and all other elements generally considered as part of the own funds of the company) leads to a negative cumulative amount that exceeds half of the subscribed share capital. For the purposes of this provision, 'limited liability company' refers in particular to the types of company mentioned in Annex I of Directive 2013/34/EU ([4]) and 'share capital' includes, where relevant, any share premium.

(b) In the case of a company where at least some members have unlimited liability for the debt of the company (other than an SME that has been in existence for less than three years or, for the purposes of eligibility for risk finance aid, an SME within 7 years from its first commercial sale that qualifies for risk finance investments following due diligence by the selected financial intermediary), where more than half of its capital as shown in the company accounts has disappeared as a result of accumulated losses. For the purposes of this provision, 'a company where at least some members have unlimited liability for the debt of the company' refers in particular to the types of company mentioned in Annex II of Directive 2013/34/EU.

(c) Where the undertaking is subject to collective insolvency proceedings or fulfils the criteria under its domestic law for being placed in collective insolvency proceedings at the request of its creditors.

(d) Where the undertaking has received rescue aid and has not yet reimbursed the loan or terminated the guarantee, or has received restructuring aid and is still subject to a restructuring plan.

(e) In the case of an undertaking that is not an SME, where, for the past two years:

(1) the undertaking's book debt to equity ratio has been greater than 7,5 and

(2) the undertaking's EBITDA interest coverage ratio has been below 1,0.

Undertakings in difficulty according to Tax Authorities

- As explained by the Norwegian Institute of Public Accountants (Revisorforening), **«undertaking in difficulties» used to be defined as:**
  - **an undertaking that requested debt settlement proceedings or meets the conditions for being out into liquidation under Law on debt settlement ad liquidation.**
- In a handbook on taxes (Skatte-ABC 2018/2019), **one added that the definition also covers:**
  - **undertakings where more than half of its subscribed share capital has disappeared as a result of accumulated losses**
  - **undertakings being subject to insolvency proceedings.**

What next?

- (Officially) unknown number of beneficiaries of SkatteFUNN that did not qualify for aid under GBER
- Following questions from journalists: in 2017 around 600 undertakings, that is 13% of beneficiaries
- Questions…

Questions (I)

- How many undertakings were in difficulties, but received aid?
  - The task of the national authorities
- **In difficulties WHEN they received aid:**

➢ When the project was approved by the Research Council?

➢ When it was approved by the accountant?

➢ When the tax authorities received an application?

➢ When the money were paid to the recipient?

- **When is aid granted?**
- Assessment of presence of aid and its compatibility
- Limitation period for recovery – 10 years.

When was aid granted? Recovery Notice 2019

- The **limitation period** begins on the day on which the unlawful aid is awarded to the beneficiary **(10 years)**
- An aid scheme: the limitation period does not run from the date of adoption of its legal basis but from **the moment the individual aid is granted under that scheme**
- For a multiannual scheme entailing payments or other financial advantages granted on a periodic basis, for the purpose of calculating the limitation period the aid must be regarded as not having been awarded to the beneficiary **until the date on which it was actually received by the beneficiary** (**Case C-81/10 P, France Télécom, para. 82).**
- This also applies to an **aid scheme entailing fiscal measures granted on a periodic basis** (for instance, tax reliefs on every annual or biannual tax declaration) for which the limitation period starts running for each fiscal exercise on the date on which the tax is due.

Case C-81/10 P, *France Télécom*, para. 81 et seq

- Business tax – a local tax, tax bases voted by municipality councils (yearly)
- In the case of a multi-annual scheme, entailing payments or advantages granted on a periodic basis, ... for the purpose of calculating the limitation period, the aid must be regarded as not having been awarded to the beneficiary until the date on which it was in fact received by the beneficiary (para. 82)
- The Commission: the **limitation period** started to run each year on the date on which the business tax was due from FT (para. 83).

Joined Cases T-427/04 and T-17/05 *France v Commission*

- Since business tax is charged annually (see para. 202), the existence of an advantage for FT depended each year on whether the special tax regime had the effect of making FT have to pay a business tax contribution which was lower than that which it would have had to pay under the general law. That question itself depended on circumstances unrelated to the special tax regime and, in particular, on the level of the tax rates voted annually by the local authorities in the territory in which FT had premises (para. 323)
- Not when the law enabling lowering the tax was adopted, but on an annual basis, which is…? **and does it answer the question of WHEN - the date on which it was in fact received by the beneficiary?**

Questions (II)

- If – in some cases - SkatteFUNN aid did not meet the GBER, it is not automatically incompatible and ESA must assess its compatibility in case of notification

➢ **So, may it be considered compatible following a notification**…?

- Do the beneficiaries have a chance to **avoid recovery (the state "authorised" aid)**?

➢ Who's to blame?

➢ Who's to pay?

➢ Lessons to be learnt (by the Commission, the state and the beneficiaries)

GBER and recovery of aid

Aid did not meet the GBER conditions & not notified:

- Case C-349/17 *Eesti Pagar*: **the MS must 'recover on their own initiative aid which they have unlawfully granted, including where the GBER has been misapplied**' (paras 90 and 94)

- rather than wait for the Commission/ESA or national courts.

Why (maybe) not wait for the Commission/ESA?

- **The rate for interest**: based on the Commission's formula (base rate for the MS + 1%) or on national rules?
- The CJEU: **national rules apply**, but the beneficiary must be ordered to pay **interest for the whole of the period** over which it benefited from aid and at a **rate equivalent** to that which would have been applied if the beneficiary had had to **borrow the amount of the aid at issue on the market within that period.**

Why (maybe) not wait for the Commission/ESA? (II)

- **The limitation period:** the **ten-year limitation** period in Regulation 659/1999 **could not be applied directly or by analogy**, since it **was not 'sufficiently foreseeable by a litigant' in a national recovery action based on misapplied and unlawful aid under GBER.** Since the aid was co-financed by EU structural funds, the limitation period was therefore 4 years, if the conditions for the applications of structural fund Regulation 2988/95 were satisfied, **or the period laid down by national law.**
  - According to Section 3 of the Act on Limitation Period for Claims, the general limitation period is three years.

Moreover, lack of clarity as regards Norwegian rules on recovery…

- ESA has commissioned a study on private enforcement of state aid rules by national courts in the EEA EFTA States.
- The study covers the first 25 years of the lifetime of the EEA Agreement
- Study on private enforcement of state aid rules by national courts in the EEA EFTA States (2019)
- http://www.eftasurv.int/da/DocumentDirectAction/outputDocument?docId=5023

- **Yet, more on that next time… Any best practices in the EU?**