

Antitrust & Competition practice

Client Alert

Payday for Unlawful State Aid?

On 5 February 2009 the Advocate-General (the “AG”) of the European Court of Justice (“the ECJ”) delivered his opinion that Greece should pay a daily penalty of €15,768 and a lump sum penalty of €2 million for its persistent failure to recover unlawful State aid granted to Olympic Airlines.¹ This is the first time that the European Commission (the “Commission”) has used powers, under Article 228(2) of the EC Treaty, to request the ECJ to impose such penalties in a State aid case.

At a time when vast amounts of State aid are being granted by Member States, and consented to by the Commission, this case is a telling indicator that when the storm is over, unlawful State aid granted without the Commission’s consent, will be tracked down by the Commission, who will doggedly seek its recovery.

The judges of the ECJ must ultimately rule on this case, and while they are not bound to follow the AG’s opinion, commonly they do. However, the Commission appears confident of the ultimate outcome. If the ECJ ruling does follow the AG’s opinion, from Greece’s perspective, there seems very little room for manoeuvre. If it does not recover the unlawful State aid, it will have to pay significant sums of taxpayers’ money, on an ongoing basis, to the EU. Ultimately, this suggests Olympic Airlines might have to repay the unlawful State aid.

1. Opinion of the Advocate General Mengozzi of 5 February 2009, in Case C-369/07, Commission/Hellenic Republic.

The Case Against Greece

In 2002, the Commission found that restructuring aid from Greece to its airline incumbent, Olympic Airways, that had been previously authorised, was not compatible with the Common Market anymore, as the conditions it was subject to had not been fulfilled. The same was true for certain other measures that constituted operating aid. The Commission, therefore, ordered Greece to recover unlawful state aid that was estimated at EUR 41 million.

In 2003, the Commission initiated infringement proceedings before the ECJ against Greece for non compliance with its recovery obligation. In 2005, the ECJ declared in its judgment that Greece had indeed failed to fulfil its obligations under the Treaty.² In 2007, in light of Greece's constant failure to comply with the ECJ judgment, the Commission lodged an additional action, requesting the ECJ to declare that Greece had failed to fulfil its obligations under the EC Treaty, and to impose on Greece a penalty payment for each day of delay to comply with the ECJ judgment and a lump sum payment to penalise Greece's failure to comply.

The AG in the present case agreed that, indeed, Greece should be called to pay penalty payments and a lump sum for its failure to recover the unlawful aid, although he reduced the amounts proposed by the Commission.

In his calculation, he took into consideration that the recovery decision of the Commission had been partially annulled in separate proceedings brought before the Court of First Instance by the operative branch of the beneficiary of the aid,³ and that the Commission did not produce sufficient evidence to demonstrate that Greece did not recover certain parts of the aid, that Greece alleged was recovered.

2. Judgment of the European Court of Justice of 12 May 2005 in Case C-415/03, Commission/Greece, Rec 2005, I-3875.

3. Judgment of the Court of First Instance of 12 September 2007, in Case T-68/03, Olympiaki Aeroporia Ypiresies / Commission.

4. See, Commission press release of 26 June 2008, "State Aid: Commission requests Spain to respect the judgment of the European Court of Justice on recovery of incompatible state aid" IP/08/1039.

Implications

Corporations that benefit from State aid must confirm that the aid is lawfully granted, either from the application of block exemptions or from prior consent obtained from the Commission. Where consent is not obtained, or is perhaps later withdrawn, the Member State concerned is obliged to recover the State aid. As this case shows, the Commission has stepped up its determination to sanction Member States that fail to recover unlawful state aid. Another case might be in the wings, because in June 2008 the Commission informed Spain that it will also use the Article 228(2) EC Treaty penalty powers if Spain does not recover unlawful State aid in the form of fiscal measures in the Basque region.⁴ The Commission intends to compel Member States to execute recovery decisions immediately.

At a time when vast amounts of State aid are being granted by Member States, corporations should be particularly vigilant about being the beneficiary of — or buying a corporation that has been the beneficiary of — unlawful State aid. Ultimately the corporation will have to repay the unlawful State aid, potentially many years later. And in the meantime, the Commission has the right to refuse to authorise new aid for that beneficiary for as long as the recovery obligation is not fulfilled.

For inquiries related to this Client Alert, please contact your usual antitrust contact or the authors of this Client Alert: Kiran Desai at kdesai@mayerbrown.com, or Margarita Peristeraki at mperisteraki@mayerbrown.com.

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4. See, Commission press release of 26 June 2008, "State Aid: Commission requests Spain to respect the judgment of the European Court of Justice on recovery of incompatible state aid" IP/08/1039.

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