The Powers and Obligations of National Courts with Regard to Unlawful State Aid control: Lessons Learned from *CELF I* and *CELF II*

Case C-199/06 *CELF* v *SIDE* ('*CELF I*') [2007] and Case C-1/09 *CELF* v *SIDE* ('*CELF II*') [2010]

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In *CELF I* and *CELF II* the Court of Justice clarifies the powers and obligations of national courts with regard to the role of the European Commission in State aid control. In light of a Commission decision declaring the aid in question compatible despite it having been granted unlawfully ('unlawful aid' due to lack of notification to the Commission), Union law does not oblige the national judge to order recovery of the unlawful aid but only of payment of interest for the period during which the aid had been unlawfully granted. By contrast, if the Commission's decision on compatibility is annulled when the national court is seized, it cannot stay proceedings pending a possible new positive decision. In that case, the national court is obliged to rule immediately and order the recovery, with interest, of the unlawful aid even if that aid is subsequently declared compatible by the Commission.

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In parallel to the procedures before the Commission and the General Court, there were several appeals introduced before the national court one of which included SIDE seeking the cessation of the granting of subsidies and the recovery of those which had been granted. After several national proceedings the Administrative Court of Appeal of Paris ordered the French State to recover the granted subsidies. The *Conseil d'État*, acting on points of law concerning the annulment of that judgment, stayed the proceedings and asked the two following questions to the Court of Justice:

1. Is it permissible under Article [108] [TFUE] for a State which has granted to an undertaking aid which is unlawful, and which the courts of that State have found to be unlawful on the ground that it had not previously been notified to the (...) Commission as required under Article [108](3) [TFEU], not to recover that aid from the economic operator which received it on the ground that, after receiving a complaint from a third party, the Commission declared that aid to be compatible with the rules of the common market, thus effectively exercising its exclusive right to determine such compatibility?
2. If that obligation to repay the aid is confirmed, must the periods during which the aid in question was declared by the ... Commission to be compatible with the rules of the common market, before those decisions were annulled by the Court of First Instance of the European Communities, be taken into account for the purpose of calculating the sums to be repaid?

1. On the First Question

The question requires the CJEU to articulate the respective roles of the Commission and the national court with regard to aid paid unlawfully.

Before *CELFI*, the Court of Justice's case law had created rules which showed that the Commission and the national courts exercise complementary yet distinct roles.[4]

According to the case law, the roles are defined as follows:

- on the one hand, the Commission examines the compatibility of the aid with the internal market, even if the Member State has failed to comply with the prohibition of implementing the aid before obtaining a positive decision of the Commission under laid down in Article 108(3) TFEU ('unlawful aid'): the Commission cannot, however, go so far as to declare aid to be incompatible merely because it has been granted unlawfully in breach of that provision;[5]
- on the other hand, the national court must 'safeguard, until the final decision of the Commission, the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by the last sentence of Article [108](3) [TFEU]':[6] in particular, it must, in principle, order recovery of unlawful aid; however, in *Saumon*, the Court held that the Commission's final decision on compatibility did not have the effect of regularising the implementing measures which were invalid because they had been taken in breach of the prohibition laid down in Article 108(3) TFEU.

4 Case C-301/87 *France* v *Commission* [1990] EU:C:1990:679 ('*Boussac*'); Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Others* v *France* [1991] EU:C:1991:440 ('*FNCE*' or '*Saumon*') and Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* (SFEI) [1996] EU:C:1996:285.

Without admitting it, in *CELFI*, the Court reverses the case law to say the exact opposite of what it said in *Saumon*. By reason of that judgment, the national court had been obliged to have the unlawful aid recovered even after a Commission decision on compatibility and now, since *CELFI*, the national court no longer has that obligation.

To avoid contradicting itself too directly, the Court refers to 'exceptional circumstances' which may justify the absence of recovery.[7]

Nevertheless, the Court considered that the these exceptional circumstances did not apply to case at hand:

> in a situation such that in the main proceedings, where a claim based on the last sentence of Article [108](3) is examined after the Commission has adopted a positive decision, the national court, notwithstanding the declaration of the compatibility of the aid in question with the common market, must adjudicate in the validity of the implementing measures and on the recovery of the financial support granted. In such a case, Community law requires that court to order the measures appropriate effectively to remedy the consequences of the unlawfulness. However, even in the absence of exceptional circumstances, Community law does not impose an obligation of full recovery of the unlawful aid. (paragraphs 45–46)

The Court opts for a teleological interpretation to show that failure to recover the principal amount of the unlawful aid in the event of a positive decision does not call into question the *raison d'être* of the prohibition in Article 108(3) TFEU. The Court notes that the last sentence of Article 108(3) has a preservative purpose of ensuring that incompatible aid will never be implemented.

5 The Court refused to grant the Commission this power despite the position defended by the Commission's Legal Service in C-301/87 *Boussac*.

6 See C-354/90 *Saumon*.

7 See C-39/94 *SFEI*; Case C-5/89 *Commission* v *Germany* [1990] EU:C:1990:320; art 14 of Regulation 659/1999 (now art 16 of Regulation 2015/1589).

In light of the above, the French *Conseil d'État* asked whether the obligation resulting from the final sentence from Article 108(3) TFEU, to remedy the consequences of the aid's unlawfulness extended also, for the purposes of calculating the sums to be paid by the recipient, to the period between the Commission declaring the aid to be compatible with the internal market and the annulment of that decision by the General Court.

The Court finds that

> the obligation, arising from the last sentence of Article [108](3) [TFEU], to remedy the consequences of the aid's unlawfulness extends also (...) to the period between a Commission decision declaring the aid to be compatible with the common market and the annulment of that decision by the Community court (paragraph 69).

With regard to the third decision which was the subject of an action for annulment before the Court, the latter specifies that

> so long as the Commission has not taken a decision approving aid, and so long as the period for bringing an action against such a decision has not expired, the recipient cannot be sure as to the lawfulness of the proposed aid which alone is capable of giving rise to a legitimate expectation on his part (...). It must be held, likewise, that where an action for annulment has been brought, the recipient is not entitled to harbour such assurance so long as the Community court has not delivered a definitive ruling (paragraphs 67–68).

In this case, CELF, which was the beneficiary of the unlawful but compatible aid, could not escape the obligation to pay the interest for the period of unlawfulness, since the Commission's decision had not yet been annulled at the time of that judgment.

It is the annulment of the Commission's third positive decision which led to the judgment in *CELF II*.

IV. *CELF II* Judgment

Following the Court of Justice's judgment, the French *Conseil d'État* duly took note of the judgment to evaluate the case on its merits. However, only months after the judgment in *CELF I*, the *Conseil d'État* was confronted with the annulment for the third time of the Commission's decision declaring the contested aid compatible. In the absence of a positive decision justifying a derogation from the obligation to recover under *CELF I*, the *Conseil d'État* considered itself deprived (arguably wrongly, as discussed below) of the means to recover the unlawful aid which was no longer considered compatible but which had now become 'merely' unlawful aid.

By a judgment of 19 December 2008, taking into account *CELF I*, which required the payment of interest for the period of unlawfulness, the *Conseil d'État* held that that period, in the present case, included the period between the Commission's decision finding the aid compatible and the judgment annulling that decision and between 1980, the year in which the aid began to be paid, and the ate of the decision making reference.

However, as regards the question of recovery of the main amount of aid unlawfully paid, the *Conseil d'État* considered that the situation was somewhat 'exceptional' due to the annulment of the Commission's decision in the meantime. Accordingly, it referred two new questions to the Court of justice for a preliminary ruling:

1. May the national court stay proceedings concerning the obligation to recover State aid until the Commission ... has ruled, by way of a final decision, on the compatibility of the aid with the rules of the common market, where a first decision of the Commission declaring that aid to be compatible has been annulled by the Community judicature?
2. Where the Commission has on three occasions declared the aid to be compatible with the common market, before those decisions were annulled by the Court of First Instance (...), is such a situation capable of being an exceptional circumstance which may lead the national court to limit the obligation to recover the aid?

1. Commentary as to the Reaction of the *Conseil d'État*

If one takes into account the real situation in which the *Conseil d'État* found itself at the time of the General Court's judgment annulling the Commission's third positive decision, it is difficult to understand why the national court did not draw the proper conclusions from that judgment; ie that the decision (decisions) is (are) annulled and is (are) supposed to have never existed.

The situation is clear: there was no Commission decision. The aid was never compatible. This stems from the retroactive effect of an annulment decision. Thus, the *Conseil d'État* found itself in a classic case of aid unlawfully granted with regard to which the Commission had not yet taken a decision. In terms of legal principle, nothing distinguished this case from the *SFEI* case where the Court held:

> (...) the initiation by the Commission of a preliminary examination (...) cannot release national courts from their duty to safeguard the rights of individuals in the event of a breach of the requirement to give prior notification. (...) Any other interpretation would have the effect of encouraging the Member States to disregard the prohibition on implementation of planned aid. Since the Commission can do no more than order further payments to be suspended so long as it has not adopted its final decision on the substance of the matter, the effectiveness of Article [108](3) would be weakened if the fact that the Commission

> a positive decision of the Commission cannot give rise to a legitimate expectation on the part of the aid recipient, first, where that decision has been challenged in due time before the Community judicature, which annulled it, or, secondly, so long as the period for bringing an action has not expired or, where an action has been brought, so long as the Community judicature has not delivered a definitive ruling (paragraph 45).

The *Conseil d'État* therefore already had all the necessary information in *CELF I* to conclude that in the present case there was no 'exceptional circumstance' which altered the obligation to recover unlawful aid. The Court, nonetheless, adds that

> [I]t may, admittedly, be acknowledged that a succession of three actions leading to three annulments amounts to a very unusual situation. Such circumstances, however, arise as part of the normal operation of the judicial system, which grants individuals who believe that they have suffered as a result of the unlawfulness of aid the possibility of bringing proceedings for the annulment of successive decisions which they consider to be the cause of that situation (paragraph 52).

The Court of Justice has surely not seen the end of questions from national courts on the scope of their obligations as to the recovery of unlawful aid. The lesson to be drawn from Union case law is that the national judge must always be a judge of Union law and a 'European thinker': he must thus uphold the principle of effectiveness of European law and adjust national procedures in such a way as to always allow the teleological interpretation of Union law prevail.

V. Post Cases Developments at National Level

The *Conseil d'État* therefore had all the cards on the table before it to apply in an appropriate manner the conclusions of this case and the interpretation of Union law by the Court of Justice.

It appears to have done so in its judgment of 20 December 2011 whereby it held that the French State must proceed with the recovery of the aid and the interest of the aid that had been granted to CELF from 1982 to 25 February 2009 (this date was fixed by the Commission in its last decision of 14 December 2010 as the last date of enjoyment of the aid by CELF, at which time CELF was placed into bankruptcy).[14]

The ultimate paradox, however, was CELF's bankruptcy in 2009, an element likely to make recovery rather difficult. It in fact did since the most recent judgment in this saga was given in June 2020, eleven years later.

14 *Conseil d'Etat*, 30 December 2011, n° 274923.

Since the CJEU's judgment in CELF II, the French Minister for Culture issued a first order for recovery to *Mandataires Judiciaires Associés*, CELF's liquidator, which was annulled for failure to indicate the basis of recovery and a second order which was again contested by the liquidator. The latter was ultimately rejected by the Administrative Court of Appeal of Paris on 28 June 2017.[15]

This is the last episode thus far which should finally result in the actual liquidation of CELF unless another appeal is made to the *Conseil d'État*. It should be noted that in the last case, the Administrative Court of Appeal of Paris held that the annulment of an order for recovery for an error on the form, since that can be rectified by the administrator, does not result in the discharge of the liquidator's obligation to pay the debt in that order. Furthermore, the Administrative Court of Appeal of Paris also held that the fact that CELF was placed into bankruptcy does not in itself affect CELF's obligation to repay the debt resulting from the State's obligation to pursue the recovery of unlawful aid and related interest. *Mandataires Judiciaires Associés* have therefore not been relieved of their obligation to repay the French State in their capacity as CELF's liquidator and its seems likely that recovery of the aid and the interest will proceed.

Mandataires Judiciaires Associés contested this decision of the Administrative Court of Appeal before the *Conseil d'État*. However, in a 2019 decision,[16] the latter maintained their obligation to reimburse the French State. Indeed, it noted that even if the enforcement order could be cancelled for reasons relating to the formalism of the order, this could not lead to the extinction of the debt. Moreover, the *Conseil d'État* underlines that the EU case law by virtue of which the closure for lack of assets of a liquidation procedure of an undertaking benefiting from unlawful State aid is likely, depending on the particular situation of the undertaking, to allow a Member State to demonstrate that it is absolutely impossible to recover this aid,[17] cannot be extended to the case at hand.

In the case of CELF, the opening of the liquidation procedure and the registration of the State's debt within the list of receivables prevents this impossibility from being demonstrated. Hence, the fact that the beneficiary of the unlawful aid has been placed in judicial liquidation has no effect on the State's obligation to pursue the recovery of the unlawfully granted aid and the related interest and has no effect on the validity of the claim.

In another part of this case, *Mandataires Judiciaires Associés* had argued that CELF suffered damages linked to the obligation to reimburse the aid, which led to a shortfall in assets and then to bankruptcy, and that this had led to a loss of

15 Administrative Court of Appeal of Paris, 28 June 2017, n°16PA01735.

16 *Conseil d'État*, 5 April 2019, *CELF*, n° 413712.

17 Case C-610/10 *Commission v Spain* [2012] EU:C:2012:781.