STATE AIDS: THE MIRABEL CASE

Subject: State aids
Recovery of illegal state aids

Industry: All industries

Parties: Commission of the European Communities
Kingdom of Belgium

Source: Judgment of the Court of Justice of the European Communities, dated

3 July 2001, in Case C-378/98, (*Commission of the European Communities v Kingdom of Belgium*)

(Note. This case illustrates well the difference between the "difficulty" experienced by a Member State's government in seeking the recovery of state aids declared illegal in a Commission Decision and the "absolute impossibility" of recovering the aid. Only the latter circumstance can be offered as a defence by the Member State concerned. In the present case, the Belgian Government had introduced a scheme, known as the Mirabel Scheme, for the reduction of social security contributions by undertakings employing manual workers. Since it was general and automatic, that measure was not deemed to constitute a prohibited form of state aid. However, it was followed by Mirabel bis and Mirabel ter, which extended the concession to undertakings facing competition from abroad. This was clearly illegal under the EC rules on competition. The Belgian Government therefore introduced Mirabel quarter in an attempt to rectify the position; but it failed to recover the amounts in question. Hence the present action.)

1. By application lodged at the Court Registry on 21 October 1998, the Commission of the European Communities brought an action pursuant to the second sub-paragraph of Article 93(2) (now Article 88(2)) of the EC Treaty for a declaration that, by failing to adopt within the periods prescribed the measures necessary to recover from the beneficiary undertakings the aid provided for under the Maribel bis/ter scheme which was declared unlawful and incompatible with the common market by Commission Decision 97/239/EC of 4 December 1996 concerning aid granted by Belgium under the Maribel bis/ter scheme, notified to it on 20 December 1996, the Kingdom of Belgium has failed to fulfil its obligations under the fourth paragraph of Article189 (now Article 249) of the EC Treaty and Articles 2 and 3 of the said decision.

Legal and factual background: Facts leading to Decision 97/239

2. In Belgium the "Maribel Scheme" introduced by the Law of 29 June 1981 laying down the general principles of social security for wage earners had accorded a reduction in social security contributions to undertakings employing manual workers. Since it was general and automatic, that measure was not

deemed to constitute aid falling within the scope of Article 92(1) (now, after amendment, Article 87(1)) of the EC Treaty.

3. The Royal Decree of 14 June 1993 amended that scheme with effect from 1 July 1993, introducing the Maribel bis scheme. This provided that the reduction in social security contributions would be increased where the employer carried on his principal activity in one of the sectors most exposed to international competition.

4. By Royal Decree of 22 February 1994, which introduced the Maribel ter scheme, the reduction in social security contributions was again increased, with effect from 1 January 1994. Its scope was also extended, first, with effect from 1 January 1994, to international transport, and second, with effect from 1 April 1994, to air and sea transport and to transport-related activities.

5. Since the Belgian Government did not give the Commission prior notice of the measures which made up the Maribel bis and Maribel ter schemes (Maribel bis/ter scheme), the Commission initiated the procedure provided for in the first paragraph of Article 93(2) of the Treaty. Following that procedure, on 4 December 1996, the Commission adopted Decision 97/239, which it notified to the Kingdom of Belgium on 20 December 1996.

6. In Article 1 of Decision 97/239, the Commission declared the increased reduction in social security contributions in respect of manual workers granted under the Maribel bis/ter scheme to employers who carry on their principal activity in one of the sectors most exposed to international competition incompatible with the common market.

7. Under the first sentence of Article 2 of Decision 97/239, "Belgium shall take appropriate measures to terminate forthwith the granting of the increased reductions in social security contributions ... and shall recover the illegal aid from the beneficiary undertakings".

8. Article 3 of Decision 97/239 provides that "Belgium shall inform the Commission of the measures it has taken to comply with this Decision within two months of the date of its notification".

9. By application lodged at the Court Registry on 19 February 1997, the Kingdom of Belgium asked the Court to annul Decision 97/239. By judgment of 17 June 1999 in Case C-75/97, *Belgium v Commission*, the Court dismissed that application.

[Paragraphs 10 to 19 cover the steps taken by the Kingdom of Belgium following Decision 97/239 and the discussions that took place before this action was lodged. Paragraphs 13 and 14 are quoted here, as they illustrate the difficulties experienced by the Belgian government and the government's proposal for a flat-rate scheme of repayment. Paragraphs 15 and 16, not quoted here, refer to the Belgian government's request, and the Commission's general agreement, that the de minimis principle should be applied.]

13. The Belgian Government referred to difficulties such as the disappearance or bankruptcy of some undertakings, the merging of the reductions in contributions under the Maribel bis scheme with those under the Maribel ter scheme, the need to take account of the various forms of financing to which the undertakings would have been entitled if they had not benefited from those reductions, the difficulties of calculation linked to the possible deduction of further reductions in contributions provided for under the Maribel quater scheme from the sums to be reimbursed, the large number of beneficiary undertakings for which the reductions would have had to be calculated, for each quarter, on the basis of the number of workers employed and, in substance, the high cost and unacceptable burden of work that such a recovery operation would entail for the competent authorities.

14. The Belgian Government maintained that it was necessary to resort to a flat-rate calculation of the amount of aid to be recovered.

[Paragraphs 20 to 22 concern the continuation of discussions after this action was lodged and, in particular, the Belgian Government's proposals to change the Maribel rules.]

23. Some details of those rules have, however, been contested by the Commission, which indicated to the Belgian Government that changes would be required. Disagreement seemed to persist in particular on one aspect of the application of the *de minimis* rule and on the allegedly ambiguous nature of the Law inasmuch as it appeared to allow the undertakings concerned a double tax deduction on the sums to be repaid.

Substance

The relevant date for purposes of a declaration of infringement

24. The means of redress provided for by the second subparagraph of Article 93(2) of the Treaty is merely a variant of the action for a declaration of failure to fulfil Treaty obligations, specifically adapted to the special problems which State aid poses for competition within the common market (see Case C-301/87, *France v Commission (Boussac Saint Frères)*, paragraph 23).

25. In the context of proceedings under Article 169 of the EC Treaty (now Article 226 EC), the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (see, for instance, Case C-58/99, *Commission v Italy*, paragraph 17).

26. Because the second paragraph of Article 93(2) of the Treaty does not provide for a pre-litigation phase, in contrast to Article 169 of the Treaty, and therefore the Commission does not issue a reasoned opinion allowing Member States a certain period within which to comply with its decision, when the former

provision is applied the reference period can only be that provided for in the decision failure to implement which is denied or, where appropriate, that subsequently fixed by the Commission.

27. With regard to the period prescribed in this case, Article 3 of Decision 97/239 allows a period of two months from the date of its notification for the Belgian Government to inform the Commission of the measures taken to comply with that decision, including the measures taken for the purpose of recovering the aid granted. After long discussions between the parties on the difficulties experienced by the Belgian Government, in its letter of 4 May 1998 the Commission fixed a new period expiring a fortnight after the date of that letter.

28. In view of the difficulties in fact encountered and given the case-law concerning the duty imposed on the Member States and the Community institutions to cooperate genuinely with each other (see Case C-261/99, *Commission v France*, paragraph 24), it cannot be disputed that the period fixed in Article 3 of Decision 97/239 was replaced by that which resulted from the letter of 4 May 1998. That latter date must be regarded as the pertinent one and it must be held that initiatives and measures taken by the Belgian authorities after the date when that period expired cannot be taken into consideration.

The supposed impossibility of recovering the amounts granted

29. It is not disputed that the Belgian authorities did not recover the aid unlawfully paid under the Maribel bis/ter scheme within the prescribed period, as defined in paragraph 28 of this judgment.

30. According to consistent case-law, the only defence available to a Member State in opposing an application by the Commission under Article 93(2) of the Treaty for a declaration that it has failed to fulfil its Treaty obligations is to plead that it was absolutely impossible for it to implement the decision properly (see Case C-348/93, *Commission v Italy*, paragraph 16; Case C-280/95, *Commission v Italy*, paragraph 13; and *Commission v France*, cited above, paragraph 23).

31. The fact that a Member State can only plead in its defence against such an action that implementation was absolutely impossible does not prevent a State which, in giving effect to a Commission decision on State aid, encounters unforeseen and unforeseeable difficulties or becomes aware of consequences overlooked by the Commission, from submitting those problems to the Commission for consideration, together with proposals for suitable amendments to the decision in question. In such cases, the Commission and the Member State must, by virtue of the rule imposing on the Member States and the Community institutions a duty of genuine cooperation which underlies, in particular, Article 5 (now Article 10) of the Treaty, work together in good faith with a view to overcoming the difficulties while fully observing the Treaty provisions and, in particular, the provisions on aid (see Case 94/87, *Commission v Germany*, paragraph 9; *Commission v Italy*, cited above, paragraph 17; Case C-404/97, *Commission v Portugal* , paragraph 40; and *Commission v France*, cited above, paragraph 24).

32. The condition of absolute impossibility is not satisfied where the defendant government merely informs the Commission of the legal and practical difficulties involved in implementing the decision, without taking any step whatsoever to recover the aid from the undertakings in question, and without proposing to the Commission any alternative arrangements for implementing the decision which would have enabled the alleged difficulties to be overcome (see *Commission v Germany*, cited above, paragraph 10; Case C-183/91, *Commission v Greece*, paragraph 20; and *Commission v Italy*, cited above, paragraph 14).

[Paragraphs 34 to 39 set out the arguments of the parties.]

Assessment by the Court

40. It should be borne in mind that the Court held, in paragraph 90 of the *Belgium v Commission* judgment cited above, that, despite the undeniable existence of difficulties, there was nothing to show that it was absolutely impossible for recovery of the aid in question to be carried out and that that was already the case when the Commission adopted Decision 97/239.

41. In this case, as the Advocate General noted in point 25 of his Opinion, the Belgian authorities in practice confined themselves to raising the difficulties of a technical and administrative nature which such recovery presented; those difficulties resulted essentially from the large number of undertakings concerned and from the need to determine the amount of aid - for each quarter - on the basis of the number of workers actually employed in those undertakings.

42. In connection with that type of difficulty, in a similar case the Court dismissed the argument that the large number of undertakings concerned could result in absolute impossibility (Case C-280/95, *Commission v Italy*, cited above). The Court pointed out in particular, at paragraph 23 of that judgment, that even if recovery of the tax credit did present difficulties from an administrative point of view, that fact was not such as to enable recovery to be deemed to be technically impossible.

43. Up to the relevant date for a finding of infringement, the Belgian Government had taken no steps towards recovering the aid from the undertakings concerned. It does not, however, appear to have been absolutely impossible to begin by recovering aid from certain undertakings chosen in compliance with the principle of equal treatment, while safeguarding the undertakings concerned from the disadvantages resulting from the particularities of the Belgian social security system.

44. It must also be noted that the Kingdom of Belgium did not cooperate sufficiently with the Commission in order to find a solution to the problem of the recovery of the aid in question.

45. The Belgian Government did, it is true, propose a set-off model based essentially on a flat-rate calculation of the amounts to be paid by each undertaking.

46. Nevertheless, the Commission was well-founded in its observation that the proposal to make a flat-rate calculation of the aid to be recovered was formulated in vague terms.

[Paragraphs 47 to 50 elaborate the point that the Commission's observation was well-founded.]

51. Given the absence of Community provisions relating to the procedure for recovering undue payments, the recovery of unlawfully paid aid must in principle take place in accordance with the relevant procedural provisions of national law (see Case C-24/95, *Alcan Deutschland*, paragraph 24). The Member State is therefore in the best position to determine the appropriate means for such recovery.

52. In the circumstances, the Commission cannot be said to have failed to cooperate. Moreover, the Commission accepted application of the *de minimis* rule without any delay and stated on several occasions during the negotiations that it was ready to accept a concrete proposal based on a flat-rate calculation. It therefore applied itself to active cooperation by accepting the few proposals made which were acceptable.

53. It follows from all the foregoing considerations that, by failing to adopt within the period prescribed the measures necessary to recover from the beneficiary undertakings the aid provided for under the Maribel bis/ter scheme which was declared unlawful and incompatible with the common market by Decision 97/239, the Kingdom of Belgium has failed to fulfil its obligations under the fourth paragraph of Article 189 of the EC Treaty and Articles 2 and 3 of the said decision.

[Paragraph 54 covers the question of costs.]

Court's Ruling

The Court hereby:

1.Declares that, by failing to adopt within the period prescribed the measures necessary to recover from the beneficiary undertakings the aid provided for under the Maribel bis and Maribel ter schemes which were declared unlawful and incompatible with the common market by Commission Decision 97/239/EC of 4 December 1996 concerning aid granted by Belgium under the Maribel bis/ter scheme, the Kingdom of Belgium has failed to fulfil its obligations under the fourth paragraph of Article 189 of the EC Treaty (now the fourth paragraph of Article 249 EC) and Articles 2 and 3 of the said decision;

2.Orders the Kingdom of Belgium to pay the costs. ■