Commission v MTU Friedrichshafen

*Andrés Martin-Ehlers and David Rabenschlag**

I. Introduction

A classic problem of procedural State aid law takes centre stage in the *MTU Friedrichshafen*-judgment of the Court of Justice of the European Union (ECJ).[1] The legal issue arose with regard to the Commission's competence to take a decision on the basis of the information available and to order a joint and several liability of alleged aid recipients. The ECJ dismissed the appeal brought by the Commission in its entirety. It confirmed the Court of First Instance's (CFI) ruling that the failure of a Member State to provide sufficient information does not release the Commission from its duty to positively establish that an undertaking has received incompatible aid.[2] Consequently, the Commission could not claim reimbursement from the applicant at first instance on the hypothetical basis that there was no evidence to the contrary. At the same time, however, the ECJ did not query in general the Commission's power to order a joint and several liability of undertakings. The judgment deserves attention, as its specific questions of law highlight the delicate balance established by procedural law between the effectiveness of supranational State aid supervision and the guarantees safeguarding the interests of Member States and potential recipients of State aid.

II. Background to the Dispute

1. Facts

As a result of the collapse of the German Democratic Republic, East-German undertakings were privatised upon the reunification of Germany. In many cases they received restructuring aid. This is also the background of the present dispute which relates to financial aid granted by the authorities of the Federal Republic of Germany to SKL Motoren- und Systemtechnik GmbH ("SKL-M"). This East-German developer and manufacturer of engines for ships and the energy sector was privatised in 1994. However, the first restructuring failed.

In 1997 the applicant at first instance MTU Friedrichshafen GmbH ("MTU"), a manufacturer of high-powered diesel engines for ships, intended to take over SKL-M. Since the Commission by then had not yet decided on the financial aid for SKL-M during the first restructuring, MTU refrained from acquiring legal ownership of SKL-M directly. Instead, MTU and the German authorities opted for an interim takeover solution: All SKL-M shares were sold for a symbolic price to a trustee for MTU and the German authorities giving them economic control. In addition, three contracts were agreed upon on the same day with a view to restructuring SKL-M. This included firstly a master agreement which was concluded between MTU, the German authorities, SKL-M and the trustee granting MTU an option to acquire SKL-M at a later date. Secondly, MTU and SKL-M entered into a joint venture agreement which governed the reciprocal use of their know-how. Finally, a finance agreement was concluded among the German authorities and SKL-M, which determined the granting of restructuring aid to SKL-M.

Germany notified the aid measures in favour of SKL-M to the Commission. In the meantime, the envisaged take-over by MTU did not materialise due to the unresolved aid situation. However, the joint use of know-how developed by MTU and SKL-M under the second agreement was continued until MTU in June 2000 acquired the know-how for a

* Dr. Andrés Martin-Ehlers, LL.M. (London) is a partner, Dr. David Rabenschlag is legal trainee at Orrick, Hölters & Elsing's Frankfurt office.

1 ECJ, Judgment of 17 September 2009, Case C-520/07 P, Commission v MTU Friedrichshafen [2009] ECR n.y.r.

2 CFI, Judgment of 12 September 2007, Case T-196/02, MTU Friedrichshafen v Commission [2007] ECR II-2889; for an analysis of the CFI's judgment see *Derenne*, Condamnation solidaire au remboursement d'une aide, Concurrences 2007, p. 115 et seq.; *Bielesz*, Judgment of 12 September 2007 in case T-196/02 – MTU Friedrichshafen v Commission, EStAL 2008, p. 621 et seq.; *Cheynel*, Insuffisance d'informations, récipiendaire hypothétique et obligation de restitution, Revue Lamy de la Concurrence 2008, p. 45 et seq. Following the entry into force of the Treaty of Lisbon, the CFI is called General Court (Article 19 EU-Lisbon; 254 Treaty on the Functioning of the EU/TFEU).

one-off payment. The following day SKL-M filed for insolvency.

2. The Contested Decision

In its decision issued on 9 April 2002 the Commission found the amount of € 34,26 million granted to SKL-M to be incompatible with the common market.[3] Consequently, Germany should recover the aid from the recipient SKL-M. The decision was contested by MTU only insofar as it ordered in addition that out of the total amount a portion of € 2.71 million had to be recovered jointly and severally from MTU and SKL-M.[4]

At the outset of its reasoning the Commission criticised that MTU was chosen as the investor on the basis of a procedure falling short of an open bidding procedure. Thereupon it considered three ways by which MTU might have benefited from the aid granted to SKL-M. As neither a purchase of assets nor a direct transfer of cash had taken place, the Commission focused on the agreement between MTU and SKL-M on the joint use of their know-how. In this regard the Commission stated that Germany had failed to provide "sufficient information to enable the Commission to rule out the possibility" [5] that MTU had benefited from the aid.

Therefore, the Commission deemed it necessary to take a decision on the basis of the information available to it. This possibility is provided for in the third sentence of Article 13 (1) of the "Procedural Regulation" No 659/1999, laying down detailed rules for the application of Article 88 EC (=108 Treaty on the Functioning of the EU),[6] if a Member State fails to comply with an information injunction. In the contested decision the Commission referred to an information injunction according to Article 10 (3) of Regulation (EC) No 659/1999 as well as to several requests for information holding out the application of Article 13 (1).

With regard to the available information the Commission considered that MTU acquired the know-how developed under the cooperation agreement for a price that did not cover the development costs for SKL-M. Losses of € 2.71 million were compensated by the restructuring aid. MTU disputed this view arguing that the transferred know-how had not been marketable yet. According to the Commission, however, the incomplete information on the market value led to the conclusion that the aid "might have been used in the interests of MTU rather than in the interests of SKL-M."[7]

III. Judgments of the CFI and the ECJ

The part of the decision concerning MTU was successfully challenged by the investor in an action brought under Article 230 EC. The CFI annulled in part the contested decision insofar as it imposed the obligation to repay on a joint and several basis. First it examined, whether the Commission was entitled to take a decision on the basis of the information available at all. As the CFI found Germany to have failed to provide the necessary information within an appropriate time limit despite several requests and the information injunction, it acknowledged that the administrative conditions of Article 13 (1) of Regulation No 659/1999 were satisfied. The provision thus applied, however, did not empower the Commission to order a recovery from an undertaking where the alleged benefit is purely hypothetical. In the Court's view the Commission had relied in its decision solely on a presumption that did neither allow a positive nor a negative finding with regard to MTU.

In its appeal the Commission claimed that the CFI erroneously interpreted Article 13 (1) of Regulation No 659/1999 too restrictively by holding that the Commission was not entitled to identify the actual beneficiary of aid on the basis of the information available. The ECJ quickly dismissed this first ground of appeal as unfounded, because the CFI had not even made the challenged finding. Secondly, the Commission complained that the CFI had committed an error of law in requiring complete certainty when taking a decision pursuant to Article 13 (1) of Regulation No 659/1999. Furthermore, the CFI had wrongly found that the decision was based only on a presumption. After having recalled that the appeal is limited to points of law,

3 Commission Decision of 9 April 2002 on the State aid implemented by Germany for SKL Motoren- und Systembautechnik GmbH, OJ L 314/75 ("SKL-M decision").

4 SKL-M decision, points 68 et seq.

5 SKL-M decision, points 77.

6 See in general *Bacon*, European Community Law of State Aid, 2009, p. 444 et seq.

7 SKL-M decision, point 85.

the ECJ found the second ground of appeal only insofar admissible as it concerned the interpretation of Article 13 (1) of Regulation No 659/1999. In this context the ECJ denied that the CFI had required complete certainty. It had rather correctly concluded that even with the power to take a decision on the information available the Commission may not extrapolate from the lack of evidence to a presumed benefit.

IV. Comments

The strict reading of Article 13 (1) of Regulation No 659/1999 by both the CFI and the ECJ is convincing. What is lacking, however, is an explanation as to how far a joint and several liability is appropriate in State aid law at all and under what conditions it may be ordered.

1. Article 13 (1) of Regulation No 659/1999, the Burden of Proof and the Right to be heard

With regard to Article 13 (1) of Regulation No 659/1999 the rulings are consistent with previous case-law which preceded the provision and was codified therein.[8] The ECJ developed this case-law in the context of State aid granted in breach of the duty to notify and the failure of a Member State to provide complete information despite of an order by the Commission. In those circumstances the Court held that "the Commission is empowered to terminate the procedure and make its decision, on the basis of the information available to it, on the question whether or not the aids are compatible with the common market."[9] The *MTU Friedrichshafen*-judgments uphold this rule developed by case-law by interpreting the codified procedural provisions in the same manner. In contrast, the Commission's approach would have altered the legal position by reading Article 13 (1) of Regulation No 659/1999 almost as a kind of rebuttable presumption.

The Courts adequately justified their reasoning. Both conduct the same line of argument for the partial annulment of the contested decision: First, the decision with regard to MTU was found to be based on pure hypothesis. Secondly, the power to adopt a decision on the information available does not entail a negative presumption or even a shift in the burden of proof.[10] This twofold reasoning does justice to the procedural function of Article 13 (1) of Regulation No 659/1999. This secondary law provision cannot materially release the Commission from its obligation under Article 87 (1) EC (now Art. 107 TFEU) to positively substantiate that a particular undertaking has been favoured. It rather affects the balance between the effectiveness of State aid supervision on the one hand and the right to be heard on the other hand.[11]

2. Joint and several Liablity

The question of a joint and several liability was dealt with by the CFI and the ECJ only in close connection with the particular conditions of the case.[12] Since the contested part of the decision was found to be based on a mere presumption, neither court examined any further if the Commission may at all – under specific circumstances – order a joint and several recovery.

The SKL-M decision continues the series of a couple of decisions in the context of insolvency procedures by which the Commission extended the obligation to repay beyond the original recipient of State aid.[13] In its decision *"System Microelectronic Innovation"*, for example, the Commission included in the term beneficiaries in Article 3 para. 3 "any other firm to which [...] assets have been or will be transferred in order to evade the consequences of this decision." All decisions have not stood up in court, besides *"Gröditzer Stahlwerke"*, where the

8 E. g. ECJ, Case C-310/87, France v Commission [1990] ECR I-307 para. 22; *Bacon*, European Community Law of State Aid, 2009, p. 445.

9 ECJ, Case C-324/90, Germany and Pleuger Worthington v Commission [1994], ECR I-1173 para. 26.

10 A shift in the burden of proof is considered by *Keppenne*, Une vue d'ensemble des règles de procédure de l'article 88 CE et commentaires sur leur application depuis l'entrée en vigueur du règlement 659/1999, in: European Competition Law, 2001, 205 et seq.

11 AG Trstenjak, MTU Friedrichshafen, para. 48.

12 CFI, MTU Friedrichshafen, para. 51; ECJ, MTU Friedrichshafen, para. 37.

13 Decision of 8 July 1999, Gröditzer Stahlwerke, OJ 1999 L 292/27; Decision of 2 June 1999, Seleco, OJ 2000 L 227/24; Decision of 11 April 2000, System Microelectronic Innovation, OJ 2000 L 238/50; Decision of 21 June 2000, CDA Compact Disc Albrechts, OJ 2000 L 318/62.

extension of liability was not examined.[14] It is remarkable, however, that these decisions were annulled only because of insufficient reasoning.

Given that these rulings did not query the extension of responsibility itself and taking into account the MTU judgments' silence on the subject, it appears that the judges do not object to the order of a joint and several responsibility in principal.[15] The MTU judgment only makes it plain that the Commission at least may not order a joint liability based on presumptions. Benefits by way of an asset deal or a direct cash flow were not examined as the SKL-M decision itself had excluded these options. Therefore, the courts unfortunately did not clarify if and under what conditions the order of a joint recovery was possible at all.

In this regard the Commission had drawn an analogy to the law of cartels.[16] In this area the CFI had indeed found that even though Article 85 EC (now Art. 105 TFEU) did not expressly provide for a joint responsibility, the Commission was entitled to order a joint and several liability, if the unlawful act could have been established with regard to either undertaking.[17] It is doubtful, however, that this approach can be applied to State aid law without any reservations. The concept of joint and several liability serves the effectiveness of the recovery only at first glance. Taking a closer look, it appears to be inconsistent with the objectives of State aid law. According to the ECJ's constant jurisdiction, the recovery of unlawful aid is the logical consequence of a finding that it is unlawful and seeks to re-establish the status quo ante.[18] The previously existing situation of competition is to be attained by recovering the recipient's unlawful advantage over its competitors. The principal objective of State aid law to eliminate the distortion of competition, though, can be thwarted by an order of a joint and several responsibility.[19] The second undertaking will have to pay back the entire amount of aid it never received, while the first recipient can keep the aid and will not lose its competitive advantage.

V. Implications for the Commission Procedure

What are the consequences for the procedure of investigating and recovery of State aid? To begin with, the judgment's interpretation of Article 13 (1) of Regulation No 659/1999 appears less far-reaching, if placed in its specific context. The Commission is still entitled to order a recovery if it is able to positively establish on the information available that aid has been granted, although the Member State had delivered only fragmentary information on its compatibility. As long as the information was subject to an information injunction, the Member State cannot challenge this decision by stating that the Commission had relied on facts which were not correct.[20] Furthermore, it is up to the Member State to decide how to fully inform the Commission. The Commission is under no responsibility "to consider, of its own motion and on the basis of prediction, what information might have been submitted to it" during the investigation procedure.[21] Finally, once the Commission has initiated the formal procedure, it is for the Member State concerned and the potential recipient to submit information with regard to possible exceptions of the State aid prohibition.[22]

In case the delivered information is not sufficient, the judgments seem to leave the Commission in a catch-22 situation: it may neither rely on the incompleteness of the information, nor sacrifice the effet utile of supranational State aid supervision to the sabotage of a Member State. However, there are more than these two bad solutions. An escape can only be found if one respects the multi-level system for the supervision and enforcement in State aid law. Notwithstanding that the Commission in a particular case cannot specify any other beneficiary and lay down a joint and several liability in a decision, the authorities of the Member States stay

14 For references see *Lübbig/Martín-Ehlers*, Beihilfenrecht der EU, 2nd edition 2009, 391 et seq.; *Bacon*, European Community Law of State Aid, 2009, p. 483 et seq.

15 *Bielesz*, EStAL 2008, p. 625.

16 Commission in CFI, MTU Friedrichshafen, para 38.

17 CFI, joined Cases T-339/94 to T-342/94 *Metsä-Serla and Others* v *Commission* [1998] ECR II-1727, para. 42 et seq.

18 See e. g. ECJ, C-382/99, Netherlands v Commission [2002] ECR I-5163, para. 89.

19 *Derenne*, Concurrences 2007, p. 116.

20 CFI, T-318/00, Freistaat Thüringen v Commission [2005] ECR II-4179, para. 88.

21 CFI, T-109/01, Fleuren Compost v Commission [2004] ECR II-127, para. 49.

22 TFI, T-176/01, Ferriere Nord v Commission [2004] ECR II-3931, para. 93; ECJ, C-49/05 P, Ferriere Nord v Commission [2008], ECR I-68.

obliged to determine the respective amount of aid and to extend recovery to any benefiting undertaking whatsoever.[23] This division of competences is stressed by the Commission itself in its notice on the implemention of recovery decisions.[24] This decentralised identification of the real beneficiaries is supervised by the Commission, of course.[25]

Interpreted correctly, the procedural provisions hereby ensure that the structure of legal obligations between the EU, the concerned Member State, the recipient and third undertakings is not mixed up. Only the Member State is the formal addressee of the Commission's decisions according to Article 25 of Regulation No 659/1999. Therefore, the failure of the authorities of a Member State to deliver sufficient information should only bring about consequences in the relationship between the Commission and the Member State. The next step after an information injunction might be an infringement proceeding according to Article 226 EC (now Article 258 TFEU) regarding the duty to deliver information in aid proceedings and the principle of loyal cooperation Article 10 EC (now Article 4 (3) EU-Lisbon).[26] However, the Member State's failure to cooperate must not be detrimental to third undertakings. This would be especially problematic if the Member State concerned and the third undertaking have opposing interests.

23 CFI, MTU Friedrichshafen, para 50.

24 Notice from the Commission – Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ 2007, C 272/4.

25 CFI, MTU Friedrichshafen, para 50; *Cheynel*, Revue Lamy de la Concurrence 2008, p. 46.

26 *Bielesz*, EStAL 2008, p. 623.