STATE AIDS (CEREALS): THE EPAC CASE

Subject: State aids
Repayment

Industry: Cereals
(Implications for all industries)

Parties: Commission of the European Communities
Portuguese Republic
Empresa para a Agroalimentação e Cereais SA (EPAC)

Source: Judgment of the Court of Justice of the European Communities, dated 27 June 2000 in Case C-404/97, (*Commission of the European Communities v Portuguese Republic*)

(Note. This case provides a clear illustration of what happens when a state aid is given illegally to a trader, to the detriment of the trader's competitors, and has to be recovered. The Court reviews the relevant case-law and addresses some of the typical problems arising from the Commission's demand that the Member State's government must recover from the trader the aid granted. A common argument by Member States is that recovery is impossible. The argument is stated in the present case in paragraphs 25 and 29 to 33 below. But the Court tackles this argument at length in paragraphs 34 to 55, which deal comprehensively with the legal and technical problems of recovery and provide an excellent guide to future cases of the kind.)

Judgment

1. By application lodged at the Court Registry on 2 December 1997, the Commission of the European Communities brought an action under the second sub-paragraph of Article 93(2) of the EC Treaty (now the second sub-paragraph of Article 88(2) (EC) for a declaration that, by failing to cancel and recover, within the prescribed period, the aid from which EPAC - Empresa para a Agroalimentação e Cereais, SA (hereinafter EPAC) unduly benefited, the Portuguese Republic has failed to fulfil its obligations under Commission Decision 97/762/EC of 9 July 1997 on measures taken by Portugal to assist EPAC (hereinafter the decision at issue).

2. According to the preamble to the decision at issue, before the accession of Portugal to the European Community, the marketing of cereals in Portugal was covered by EPAC as a public monopoly. After accession, this public monopoly was gradually dismantled. From 1991 the cereals market was liberalised and EPAC made into a limited company with public capital. However, EPAC remained responsible for ensuring cereal supplies to the country.

3. EPAC's assets situation was unbalanced, with an excess of fixed assets and insufficient capital of its own for financing current activity. Moreover, it was overstaffed and its financial situation was made worse by the failure of Silopor, a company with exclusively public capital, formed by Decree-Law No 293-A/86 of 12 September 1986 through the transfer of EPAC assets, debt and capital, to pay for the transfer of the port silos.

4. From April 1996 EPAC stopped making payments in respect of most of its financial commitments, since the level of indebtedness and the financial charges to be paid became so high that it could no longer shoulder the burden from its own resources.

5. By inter-ministerial decision of 26 July 1996, a plan for making EPAC viable and financially sound was adopted, as part of which EPAC was authorised to negotiate the terms of a loan up to a total of PTE 50 billion, PTE 30 billion of which would be covered by a State guarantee.

6. By Decision No 430/96-XIII of 30 September 1996, the Finance Ministry granted that guarantee in connection with a loan obtained by EPAC from a group of private banks with the purpose of restructuring EPAC's short-term bank debt into medium-term bank debt. The loan was granted for a period of seven years at an interest rate equal to six-month Lisbor for the guaranteed amount and six-month Lisbor +1.2% for the remainder.

7. Having become aware of that operation as a result of a complaint, the Commission decided, by a letter of 27 February 1997 addressed to the Portuguese authorities, to initiate the procedure under Article 93(2) of the Treaty. It considered that the State guarantee did not comply with the Commission letter to the Member States (SG(89) D/4328) of 5 April 1989 stating that guarantees were subject to specific obligations. Furthermore, it took the view that the interest rates on the loans, which were considerably lower than the reference rates, included an aid element since an undertaking in financial difficulties such as EPAC could not under normal market conditions obtain loans on more favourable conditions than those available to operators in a balanced financial situation. It pointed out, moreover, that the mechanism for consolidating the EPAC liabilities seemed to constitute an aid with substantial knock-on advantages for Silopor. Finally, the Commission stated that the State guarantee grantedto EPAC did not meet the conditions necessary to be compatible with the common market in the light of Community criteria for restructuring aid for undertakings in difficulty. In view of the effect on trade between Member States and the resulting distortion of competition, the Commission found that the aid fell within the scope of Article 92(1) of the Treaty (now, after amendment, Article 87(1) EC) without being able to benefit from any of the derogations provided for in Article 92(2) and (3).

8. The Commission, in the same letter, gave the Portuguese Government formal notice to submit its comments and asked it to take all measures necessary to suspend with immediate effect the guarantee granted to EPAC for any new business activity by that undertaking on the cereals market.

9. By letter of 21 March 1997, the Portuguese Republic argued that there had been no intervention by the State administration in the negotiation of the loans granted to EPAC by the banks. By letter of 8 April 1997 the Portuguese Government submitted its comments, summarised in points 6 to 8 of the decision at issue, on the contested measures.

10. On 30 April 1997 the Commission adopted Decision 97/433/EC requiring the Portuguese Government to suspend with immediate effect the grant of the State guarantee to the undertaking EPAC. On 7 July 1997, two actions for annulment were brought against that decision, one by the Portuguese Government (C-246/97) and another by EPAC (T-204/97).

11. By letter of 21 May 1997, the Portuguese authorities, without mentioning any measure taken to implement such suspension, challenged the characterisation as aid of the guarantee granted which did not, in their opinion, constitute financial operating aid to the undertaking and did not therefore distort the conditions of competition. Moreover, it had not been demonstrated how and to what extent granting the State guarantee to EPAC would affect trade between Member States. They again indicated that the State had not taken part in the negotiation of the bank loans contracted by EPAC from financial institutions as part of its routine business.

12. Following the replies from the Portuguese authorities, the Commission decided to close the procedure provided for by Article 93(2) of the Treaty and adopted the decision at issue in which it found that the State guarantee granted to EPAC constituted aid to that undertaking, since it had enabled it to obtain loan conditions which were more favourable than it would have been able to obtain without that guarantee, in view of its difficult financial situation (point 13(d) of the decision at issue). It also considered that the State guarantee granted to EPAC constituted indirect aid to Silopor, since it enabled EPAC not to demand payment of the debt owed to it (point 13(c) of the contested decision).

13. The Commission, observing, first, that the monetary value of the trade in cereals, so far as Portugal was concerned, in 1996 was around 5.8m ECUs for exports and 310m ECUs for imports and, secondly, that EPAC was an operator active in both intra- and extra-Community trade in cereals, concluded that the guarantee granted affected trade between the Member States and distorted or threatened to distort competition (point 11 of the decision at issue).

14. Next, it found that the derogations provided for in Article 92(2) of the Treaty were manifestly not applicable in the present case nor was there any justification for a claim that the aid concerned met the conditions required for the application of any of the derogations provided for in Article 92(3) of the Treaty (point 12 of the decision at issue).

15. In particular, the Commission found that the guarantee did not fulfil the criteria laid down in the Community guidelines on State aid for rescuing and restructuring firms in difficulty on the ground that the interest rates on the loans

obtained by EPAC are low thanks to the guarantee, that the planned duration of the credit operation is seven years (greatly exceeding the established general rule of six months), that furthermore, it is difficult to argue that a State guarantee on such a large scale is the amount strictly necessary for keeping the firm in business and that, finally, no serious social situation requiring the undertaking to be kept in business such as to justify granting the aid has been cited by the Portuguese Government or found by the Commission (point 13(b)).

16. It is in those circumstances that Articles 1, 2 and 3 of the decision at issue provide:

Article 1

The aid granted by the Portuguese Government to EPAC is illegal since it was granted in contravention of the procedural rules referred to in Article 93(3) of the Treaty. Furthermore, it is incompatible with the common market pursuant to Article 92(1) of the Treaty and does not meet the conditions for derogations provided for in Article 92(2) and (3) of the Treaty.

Article 2

1. Portugal must cancel the aid referred to in Article 1 within 15 days of the date of notification of this Decision.

2. Within two months of the date of notification of this Decision, Portugal shall take the measures necessary to recover the aid referred to in Article 1.

3. Recovery of the aid shall be carried out in accordance with the procedures laid down in Portuguese legislation, with interest due from the date on which the aid was paid. The interest rate to be applied must be the reference rate used to calculate subsidy equivalents in the context of regional aid.

Article 3

1. Portugal shall keep the Commission regularly informed of the measures it adopts to meet the requirements of this Decision. Its first communication shall be made not later than one month from the notification of this Decision.

2. Not later than two months after the expiry of the period provided for in Article 2(2), Portugal shall send the Commission information to enable it to verify without any additional investigation that the obligation to recover the aid has been met.

17. The Portuguese Republic and EPAC, by applications lodged at the Registry of the Court of Justice on 23 September 1997 (C-330/97) and at the Registry of the Court of First Instance on 14 October 1997 (T-270/97) respectively, brought two actions for annulment against the contested decision.

18. By two orders of 15 December 1998, the Court of Justice decided to stay proceedings in Cases C-246/97 and C-330/97 pending judgments of the Court of First Instance in Cases T-204/97 and T-270/97.

19. Taking the view that, despite the expiry of the prescribed time-limit, the Portuguese Republic had not complied with the decision at issue and that it had not claimed that it was absolutely impossible for it to comply or put forward any other difficulties relating to its implementation, the Commission brought the present action.

20. The Commission states, first of all, that, even if the Portuguese Republic considered the decision at issue to be unlawful and brought an action seeking its annulment, it was obliged to comply with it within the prescribed period. Under the fourth paragraph of Article 189 of the EC Treaty (now the fourth paragraph of Article 249 EC), a decision is to be binding in its entirety upon those Member States to which it is addressed until the Court decides otherwise.

21. Next, it submits that the only argument on which a Member State may rely as a ground for not implementing a decision of the Commission ordering it to cancel and recover State aid declared incompatible with the Treaty is that it is absolutely impossible to implement that decision. However, the Portuguese Republic has not, in this case, claimed any such impossibility.

22. In response to the argument raised by the Portuguese Government, alleging the need for a decision of the Tribunal Administrativo Supremo annulling the above-mentioned Decision No 430/96-XIII, the Commission again points out that, according to settled case-law, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations under Community law (Case C-74/89, *Commission v Belgium*).

23. It points out moreover that, in cases of unforeseen difficulties, the Commission itself and the Member State must, in accordance with the duty of cooperation under Article 5 of the EC Treaty (now Article 10 EC), cooperate in good faith in order to overcome any difficulties. However, in the present case, the Portuguese Republic has, according to the Commission, neither attempted to implement the decision at issue, attempted to prove the existence of unforeseen or unforeseeable difficulties relating to its implementation, nor discussed the methods for its implementation; it has merely brought two actions for annulment against Decision 97/433 and the decision at issue.

24. The Portuguese Government states first of all that the guarantee could not constitute State aid within the meaning of Article 92 of the Treaty in view of the conditions under which it was granted to EPAC's creditors.

25. Although it acknowledges that, where an action is pending against a contested decision, failure to comply with such a decision can amount to an infringement of Community law, it argues that that is not the case here, because it found it absolutely impossible to implement the decision at issue.

26. In that connection, it states, first, that the decision at issue contains a number of contradictions making it materially impossible to implement.

27. The Portuguese Government submits, first of all, that, while, in the statement of the reasons on which the decision at issue is based, the Commission refers to a single measure as constituting State aid, namely the guarantee given by the Portuguese Republic to EPAC's creditors, Articles 1 and 2 [in the Portuguese version of the decision] refer to aid in the plural.

28. Next it claims that the meaning of the orders in Article 2 of the decision at issue to cancel and recover the aid is incomprehensible, having regard to the statement of the reasons for that decision and to the fact that the Commission admits that the guarantee granted in favour of EPAC does not involve any payment or direct or indirect transfer to EPAC of State resources. Accordingly, the Portuguese Republic states that it does not understand what form recovery of the guarantee could take.

29. The Portuguese Government maintains, secondly, that implementation of the contested decision is also legally impossible.

30. In that connection, it states first of all that it cannot unilaterally withdraw the guarantee accorded by contract. Unilateral withdrawal of that guarantee would lead the creditor banks not only to require immediate payment by EPAC of its entire debt, which would bankrupt EPAC, but also to put in issue the State's liability.

31. The Portuguese Government further contends that unilateral withdrawal as sought by the Commission would amount to a breach of the principle of proportionality, on the ground that withdrawal of the guarantee would seriously undermine competition by eliminating from the market the main Portuguese operator which holds a 30% share of the market.

32. It also states that withdrawal of the guarantee can be brought about only by agreement with EPAC's creditor banks, which is clearly out of the question since those banks would not agree, in the absence of a sufficient guarantee, to waiving a guarantee which had had a decisive influence on their willingness to enter the contract, or by a judicial decision annulling the State measure granting the guarantee. The Portuguese Republic states in this respect that it has brought an action before the Tribunal Supremo Administrativo seeking the annulment of the abovementioned Decision No 430/96-XIII. It explains that the reason for which judgment has not yet been given in that case is because the action for annulment is still pending before the Court of Justice in Case C-330/97.

33. Finally, the Portuguese Government claims to have attempted to seek together with the Commission a solution which was acceptable to each of the parties, in accordance with the duty to cooperate in good faith incumbent upon them under Article 5 of the Treaty. It points out, in particular, that it informed

the Commission, by letter of 10 December 1997, of the fact that EPAC had withdrawn from the tendering procedures for the importation of cereals.

Court's Opinion

34. First of all, it must be borne in mind that the system of remedies set up by the Treaty distinguishes between the actions under Articles 169 and 170 of the EC Treaty (now Articles 226 and 227 EC), which are directed to obtaining a declaration that a Member State has failed to fulfil its obligations, and those under Articles 173 of the EC Treaty (now, after amendment, Article 230 EC) and Article 175 of the EC Treaty (now Article 232 EC), which are directed to obtaining judicial review of measures adopted by the Community institutions, or of failure to act on their part. Those remedies have different objectives and are subject to different rules. In the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot, therefore, properly plead the unlawfulness of a decision addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision (Case 226/87, *Commission v Greece*, paragraph 14, and Case C-74/91, *Commission v Germany*, paragraph 10).

35. The position could be different only if the measure in question contained particularly serious and manifest defects such that it could be deemed non-existent (Case 226/87, *Commission v Greece*, cited above, paragraph 16, and Case C-74/91, *Commission v Germany*, cited above, paragraph 11).

36. That also applies to an action for failure to fulfil obligations based on the second subparagraph of Article 93(2) of the Treaty.

37. In this connection, it must be stated that, although the Portuguese Government has, on the basis of various points of fact, challenged the characterisation as aid of the guarantee granted to EPAC it has not pleaded any defect of a nature such as to call in question the actual existence of the act.

38. It must next be borne in mind that it is settled case-law that recovery of unlawful aid is the logical consequence of the finding that it is unlawful and that that consequence cannot depend on the form in which the aid was granted (see in particular Case C-183/91, *Commission v Greece*, paragraph 16).

39. The Court has also held that 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 (Case C-348/93, *Commission v Italy*, paragraph 16).

40. However, where a Member State, when implementing a Commission decision relating to State aid, encounters unforeseen and unforeseeable difficulties or becomes aware of consequences not contemplated by the Commission, it must submit those problems for consideration by the Commission, together with proposals for suitable amendments to the decision in question. In such a case the

Commission and the Member State concerned must respect the principle underlying Article 5 [now Article 10] of the Treaty, which imposes a duty of genuine cooperation on the Member States and the Community institutions, and must work together in good faith with a view to overcoming difficulties while fully observing the Treaty provisions, and in particular the provisions on aid (see, in particular, Case 94/87, *Commission v Germany*, paragraph 9).

41. So far as concerns the alleged material impossibility of implementing the decision because, in the submission of the Portuguese Government, its operative part is impossible to understand, it must be pointed out that the operative part of an act is indissociably linked to the statement of the reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (Case C-355/95 P, *TWD v Commission*, paragraph 21).

42. Accordingly, it must first be ascertained whether, as the Portuguese Government claims, the use of the plural instead of the singular in the [Portuguese version of the] operative part of the decision at issue was, in view of the statement of reasons, incomprehensible and therefore such as to render implementation of the decision impossible.

43. In that respect, it should be observed that the decision at issue in fact concerns the guarantee granted by the Portuguese Republic by way of the above-mentioned Decision No 430/96-XIII. The operative part of the decision at issue does indeed refer to the aid granted to EPAC in the plural [in the Portuguese version]; however, that looseness of language is not such as to render the contested decision incomprehensible and prevent its implementation, since the national measure under challenge is clearly identified in the decision. Moreover, it was open to the Portuguese Government, if necessary, to take up the matter with the Commission upon receipt of the decision at issue.

44. So far as concerns the allegedly incomprehensible nature of the orders in Article 2 of the decision at issue on the ground that there had been no transfer of resources, it should be recalled that the Court has consistently held that the concept of aid embraces not only positive benefits, such as subsidies, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see, to that effect, Case C-387/92, *Banco Exterior de España*, paragraph 13, and Case C-6/97, *Italy v Commission*, paragraph 16).

45. It follows that, without prejudging the question as to the legality of the aid, which is to be examined in the context of the action for annulment, it is sufficient to point out that, in order for a measure to constitute aid within the meaning of Article 92(1) of the Treaty, it is not necessary for there to have been a transfer of resources from the State to the beneficiary.

46. Moreover, as the Court has pointed out in paragraph 38 above, the obligation to cancel unlawful aid by way of its recovery cannot depend on the form in which the aid was granted.

47. Next, it must be observed that the statement of the reasons for the decision at issue makes it possible to identify with precision the aid which is considered to be unlawful and which requires to be cancelled, namely the State guarantee granted by way of the above-mentioned Decision No 430/96-XIII.

48. The financial advantage which is to be recovered is defined in the fifth paragraph of point 15 of the decision as represented by the difference between the market financial cost of bank loans (represented by the reference rate) and the financial cost actually paid by EPAC in the financial operation (taking account of the cost of the guarantee), calculated on a six-monthly basis.

49. The decision at issue further states, in the sixth paragraph of point 15, that interest is due from the date on which the unlawful aid in issue was granted and that the interest rate to be applied must be the reference rate used to calculate subsidy equivalents in the context of regional aid.

50. It follows from that examination that the terms of the decision at issue are clear and easily understandable and that the Portuguese Republic could not have misunderstood either their meaning or their scope.

51. As regards the assertion that it was legally impossible to implement the decision at issue, the Portuguese Government stated, with regard to the cancellation of the guarantee, that an agreement with EPAC's bank creditors was clearly out of the question since they would never agree to it, in the absence of a guarantee, but it made no mention of any attempt at negotiating with them.

52. It is settled case-law that apprehension of even insuperable internal difficulties cannot justify a failure by a Member State from complying with its obligations under Community law (see, to that effect, Case C-52/95, *Commission v France*, paragraph 38, Case C-265/95, *Commission v France*, paragraph 55, and Case C-280/95, *Commission v Italy*, paragraph 16).

53. So far as concern the reasons which are said to make it impossible to withdraw the guarantee unilaterally, it must be pointed out that the financial difficulties with which undertakings in receipt of aid could be confronted as a result of its withdrawal do not make it absolutely impossible to implement the Commission's decision finding that the aid is incompatible with the common market and ordering that it be repaid (Case 63/87, *Commission v Greece*, paragraph 14). That finding also applies, for the reasons set out in paragraph 52 above, with regard to the risk allegedly run by the Portuguese Republic of incurring liability.

54. In so far as it calls in question the actual principle, laid down in the decision at issue, of cancellation of the guarantee, the argument based on breach of the principle of proportionality must also be rejected in the context of the present action for failure to fulfil obligations.

55. As regards the need to await a decision of the Tribunal Administrativo Supremo annulling the above-mentioned Decision No 430/96-XIII, while that court is itself awaiting the outcome of the action for annulment pending before the Court of Justice against the decision at issue, it must be observed that although, in the absence of Community provisions relating to the procedure applicable to the recovery of illegal aid, such recovery must take place, in principle, in accordance with the relevant provisions of national law, such provisions must however be applied in such a way that the recovery required by Community law is not rendered practically impossible and the interests of the Community are taken fully into consideration (see, in particular, Case 94/87, *Commission v Germany*, cited above, paragraph 12).

56. In any event, in reply to the written questions which had been sent to it, the Portuguese Government admitted that a judgment of the Tribunal Administrativo Supremo annulling the above-mentioned Decision No 430/96-XIII was not necessary in order to recover the financial advantage referred to in the decision at issue.

57. It must moreover be borne in mind in that respect that the decision at issue is presumed to be lawful and that, despite the existence of the action for annulment, it remains binding in all respects on the Portuguese Republic.

58. Finally, so far as concerns EPAC's withdrawal from tendering procedures for cereals, it need merely be observed that the Commission was not informed until December 1997, that is to say after the time-limit prescribed in Article 2 of the decision at issue had expired and the present action for failure to fulfil obligations had been brought.

59. In view of the foregoing, it must be held that, by failing to comply with the decision at issue, the Portuguese Republic has failed to fulfil its obligations under the Treaty.

Costs

60. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Portuguese Republic has been unsuccessful, the latter must be ordered to pay the costs.

Court's Ruling

The Court hereby:

1. Declares that, by failing to comply with Commission Decision 97/762/EC of 9 July 1997 on measures taken by Portugal to assist EPAC - Empresa Para a Agroalimentação e Cereais, SA, the Portuguese Republic has failed to fulfil its obligations under the Treaty;

2. Orders the Portuguese Republic to pay the costs. ■