

CASE T-366/00

Scott SA v. Commission

CFI judgment of 10th April 2003
By George Peretz

Before 1999, one of the many unsatisfactory features of the EC State aids regime was that there was no limitation period that applied to the Commission's power to order recovery by a Member State of unlawful State aid. Recipients of unlawful State aid might therefore find themselves obliged to repay such aid – with interest – decades after the grant. That particular injustice was to some extent remedied by Article 15 of Council Regulation 659/99, which came into force in April 1999. That Article introduced a limitation period of 10 years; the period is interrupted by any action by the Commission or by the Member State at its request with regard to the unlawful aid.

In *Scott*, the Court of First Instance had to deal with two questions. First, how did Article 15 apply to aids granted before it came into force? And could an act by the Commission interrupt the limitation period as far as the recipient was concerned even if it was known only to the Member State concerned but unknown to the recipient?

Facts

In *Scott*, the alleged unlawful aid was granted to Scott (by the City of Orléans and by the Department of the Loiret) in August 1987. The Commission received a complaint about the alleged aid in 1996, and wrote to the French Government in January 1997. Correspondence was exchanged between the Commission and France over the next few months, but Scott was not informed of this and the Commission made no attempt to contact Scott or to ask France to do so. In May 1998 the Commission informed the French Government that it had decided to open an Article 88(2) procedure, and asked France to inform Scott of that decision. In fact, France failed to do so until September 1998, just before the appropriate notice was published in the Official Journal, and more than 10 years after the grant of the aid.

The Commission proceeded to order recovery of the alleged unlawful aid with compound interest in July 2000. Scott (and the Department of the Loiret in separate proceedings) challenged that decision before the CFI.

Retrospective application of Article 15

Scott argued that Article 15 prevented the Commission from ordering recovery of the alleged unlawful aid. In so doing, it argued that Article 15 applied to any recovery order made after Article 15 came into force; in the case of pre-Article 15 aid, one simply applied the relevant time limits whether the events in question occurred before or after Article 15 came into force. The CFI accepted that argument. It noted that the contested decision itself proceeded on the basis that Article 15 applied in principle even in the case of aid granted before it came into force. Although the CFI does not discuss the matter in any detail, it rejected the

Commission's argument that Article 15 did not apply to a pre-Regulation aid if before the Regulation came into force, although more than 10 years after the grant of the aid, the Commission had initiated a procedure in respect of the aid.

Interrupting act not known to the recipient

However, the Court rejected Scott's case that in order for an act to interrupt the limitation period vis-à-vis a recipient, the act must be known to that recipient (it will be remembered that the actions that occurred in this case before the expiry of the limitation period were known only to France and unknown to Scott, and that Scott learnt that a recovery order might be made only well after the expiry of the period). Scott argued that the purpose of Article 15, as reflected in the relevant recital of the Regulation, was to confer legal certainty. It was the recipient whose interests were most obviously prejudiced by a recovery order; it had to write a large cheque, while any grief felt by the Member State was to some extent assuaged by the receipt of that cheque. It was therefore the recipient who most obviously needed the legal certainty that Article 15 was designed to confer, and therefore it could not be right that the limitation period could be interrupted, as far as the recipient was concerned, by an act of which the recipient was unaware.

The CFI rejected that argument. It repeated the general proposition that State aid procedures are primarily between the Commission and the relevant Member State. According to the CFI, the recipient of the aid in State aid proceedings before the Commission is entitled to be warned and to put forward its arguments, but its role is in essence merely that of an information source for the Commission (although it should be noted that the cases cited by the CFI in support of that conclusion deal with the position of *complainants* rather than that of recipients). The Commission has no duty to warn the recipient that it is taking action at any time before it institutes an Article 88(2) procedure. Provided that the Commission takes interrupting action vis-à-vis the Member State within 10 years from the grant of the aid, the limitation period is also interrupted as far as the recipient is concerned even if the recipient was entirely unaware of the interrupting action.

Comment

The effect of *Scott* is that a recipient cannot safely rely on the expiry of the limitation period set out in Article 15. It may at any time thereafter learn that the 10 year limitation period was interrupted by an action by the Commission of which it knew nothing, and this despite the very severe financial consequences that a recovery order may have on a recipient. Moreover, as the *Scott* case shows, Member States cannot be relied on to keep recipients informed of what is going on. If the CFI is right, Article 15 has failed to confer much legal certainty on recipients of potentially unlawful State aids.

Scott can be seen as an example of a more general issue, namely the orthodoxy – repeated by the CFI – that recipients have very few procedural rights in State aid cases, which are seen as taking place almost entirely between the Commission and the Member State. But that orthodoxy is not obviously consistent with fundamental principle, notably Article 6 of the ECHR. The effect of a recovery order is to require the recipient to pay a very substantial amount of money to the Member State (in the case of *Scott*, at compound interest). In many cases (for example where the recipient has received aid in order to compensate it for building a factory in a commercially unattractive location) the recipient may not have received any significant net gain from the aid at all, so that an order for "repayment" is effectively penal. Yet the recipient is allocated only a walk-on part in the procedure that leads to a recovery order. On the other hand, the Member State – which has an interest, the interest in receiving a large cheque in repayment of the aid, that is directly opposed to that of the recipient – is closely involved throughout.

But even if that orthodoxy is as a general proposition good law, it does not follow that the CFI was right to conclude that the Article 15 limitation period can, as far as a recipient is concerned, be interrupted by an action of the Commission known only to the Member State. The CFI could have held that Article 15 creates an independent limitation period vis-à-vis recipients of aid, those most obviously adversely affected by a recovery order. However, unless and until the ECJ expresses a contrary view, the position appears to be that that Article 15 creates a limitation period only vis-à-vis Member States, albeit one on which a recipient has a derivative right to rely.