

State Aid

The application of compound interest to orders for the recovery of State aid declared incompatible before the entry into force of EU Regulation no. 794/20014 has been declared lawful

17 September 2015

With a decision bound to have important consequences on State aid matters, on 3 September 2015, the Court of Justice of the European Union (“CJEU”) acknowledged the lawfulness of a national law providing for the application of compound interest to State aid sums to be recovered, even if the latter were received and declared incompatible before the entry into force of EU Regulation no. 794/20014 (the “Regulation”).

With such Regulation the EU legislator had ordered, for the purposes of calculating the interest in relation to the recovery of illegal or incompatible State aid, the application of the compound interest method (whereby interest accrued in one year is capitalized and bears interests in every year that follows).

In particular, the CJEU decided that a national law providing for the application of compound interest to the recovery of State aid declared incompati-

ble with the common market, by making reference to the EU laws on compound interest which entered into force after the decision by which the EU Commission declared the same aid incompatible, is compliant with EU law.

The decision affects an issue that has been on the table since the beginning of the 90s, when two publicly owned local service suppliers, ASM Brescia S.p.A. (“ASM”), AEM S.p.A. (“AEM”) – whose merger led to the birth of A2A S.p.A. (“A2A”) in 2008, supplier of electricity, gas and district heating, and a party to the proceedings against the Italian Revenue Agency (Agenzia delle Entrate) which have led to the decision under examination – were granted by Italy certain tax exemptions and subsidized loans. In particular, such companies had been exempted, for 3 years, from paying corporate income tax and could obtain loans at reduced interest rates.

In 2002, the European Commission defined such concessions

as incompatible State aid, and ordered that they be recovered by Italy. Subsequently, ASM and AEM filed an appeal before the General Court of the European Union, but all attempts at obtaining the annulment of the Commission’s decision proved unsuccessful.

Later, in 2009, the Italian Revenue Agency sent A2A tax assessments to recover the amounts owed as corporate income tax which ASM and AEM had not paid thanks to the exemption granted by Italy. On top of 170 million euro in capital, such tax assessments also demanded the payment of 120 million euro in interest calculated on a compound basis.

At that point, A2A filed an action against the tax assessments before the Court of Cassation in relation to the applicability of the provision on compound interest, considering that EU Regulation no. 794/20014, which had, in the meantime, introduced the

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compound interest regime, had entered into force after the declaration of incompatibility and the Commission's notification of the order for the recovery of the aid.

When questioned on the above issue, the Court of Cassation decided to refer the matter to the CJEU.

The CJEU first of all stated that, since the decision for the recovery of aid had been adopted before the entry into force of the Regulation, **at the time there were no EU provisions requiring the application of a specific regime based on (simple or compound) interest.** Furthermore, according to the CJEU, it had been the Commission's practice at the time to refer such matters to national legislation.

Therefore, according to the CJEU, **it is solely up to the Italian judicial system to determine whether the interest rate ought to be calculated based on simple or compound interest.**

Moreover, in the case at hand, the tax assessments providing for the application of compound interest had been notified to A2A after the entry into force of the Italian provision which provides for the calculation of interest on a compound basis (art. 24, para. 4 of Law Decree no. 185/2008, the so-called "anti-crisis decree"). Therefore, as underlined by the CJEU, **the Italian provision which admits compound interest on the recovery of State aid simply applies a new rule to situations that arose while the previous legislation was in force.**

Given the considerable amount of time between the Commission's order for the recovery in 2002 and the order for the recovery issued by the Italian authorities in 2009 against A2A, the CJEU has concluded that, in the case at hand, the application of compound interest represents an adequate means of neutralizing the competitive advantage unlawfully granted to the companies who benefitted from State aid.

As a result of this judgment, the company A2A shall have to reimburse the State of 290 million euro in total, i.e., not just 170 million euro in capital, but also 120 million euro in compound interest.

To sum up, in line with the guidelines adopted over the last couple of years in relation to the recovery of State aid, the judgment under examination has confirmed a certain degree of inflexibility in the application of compound interest.

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