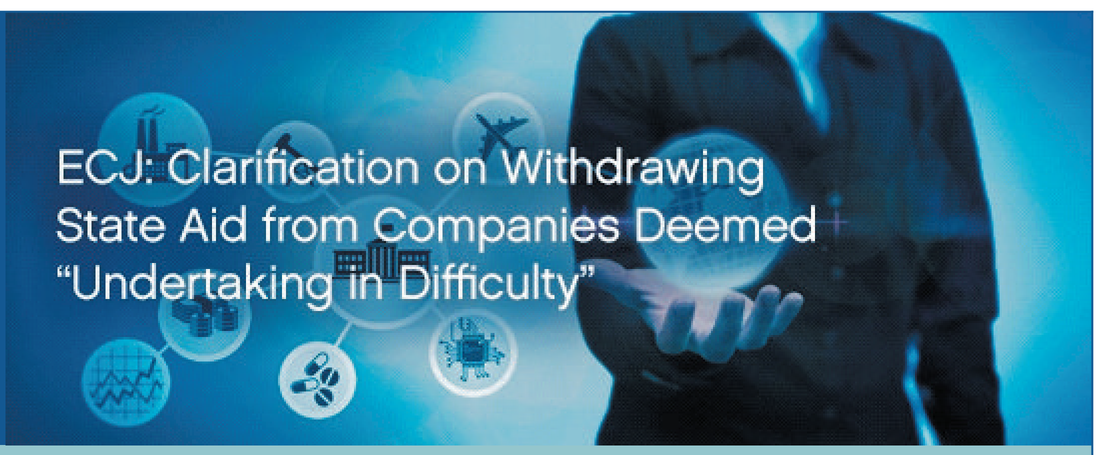
JONES DAY

COMMENTARY

JULY 2017



ECJ: Clarification on Withdrawing State Aid from Companies Deemed "Undertaking in Difficulty"

IN SHORT

The Situation: On July 6, 2017, the European Court of Justice ruled that a Member State could not request reimbursement of aid that had been granted to an undertaking in compliance with the General Block Exemption Regulation solely because that undertaking later became the subject of collective insolvency proceedings.

The Result: This ruling clarifies the concepts of "undertaking in difficulty" and "collective insolvency proceedings" and their interplay with the old General Block Exemption Regulation.

Looking Ahead: This judgment has important practical consequences for future cases under the new General Block Exemption Regulation.

The notion of "undertaking in difficulty" is a key element in State aid law because undertakings in difficulty can receive State aid only under the restrictive conditions for so-called rescue and restructuring aid. Any other form of State aid is excluded, even when competing companies that are not in difficulty can receive such aid. Accordingly, the General Block Exemption Regulation (Regulation No 800/2008, "old GBER"), which sets out the conditions under which aid is deemed compatible with the internal market and can therefore benefit from an exemption from the obligation to notify, explicitly excludes undertakings in difficulty from its scope in Article 1(6)c. Other State aid instruments contain similar provisions, in particular the new General Block Exemption Regulation (Regulation No 651/2014, "new GBER") in Article 1(4)(c).

Therefore, Article 1(7)c of the old GBER states that a company that "fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings" will be considered to be an undertaking in difficulty for the purposes of Article 1(6) c. The new GBER contains the same definition in Article 2(18)(c).

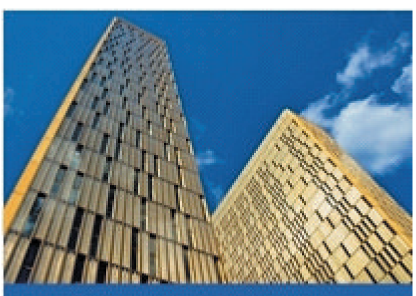
The Issue

In the case at hand, Nerea, an Italian small and medium-sized enterprise, had been granted aid in compliance with the old GBER. In 2012, Nerea received an advance and, in 2013, requested that the other half of the aid be settled. This demand was denied on the grounds that Nerea no longer satisfied the conditions for eligibility, as it had applied for the opening of an arrangement with creditors as a going concern, a request granted by a local Italian court.

The authorities argued that such an arrangement constituted a type of collective insolvency proceeding, which excluded Nerea from receiving financial assistance in accordance with Article 1 (7)c of the old GBER. Thus, in 2015, the *Regione Marche* withdrew the aid granted and requested the reimbursement of the advance, plus interest. Nerea brought an action before the referring court, which decided to stay the proceedings and to refer two questions to the court for a preliminary ruling.

The first question considered whether a procedure that was opened at the request of the economic operator could qualify as a "collective insolvency proceeding" under the old GBER. The second question pertained to the notion of "undertaking in difficulty" for the purposes of Article 1(6)c of the old GBER, and asked when that condition should be appraised for the granting of aid.

Both questions are also relevant for future cases under the new GBER.



What is an "Undertaking in Difficulty?"

An Undertaking in Difficulty, within the context of EEC guidelines on State aid for the rescue and restructuring non-financial undertakings in difficulty, is a large entrepreneur which meets one of the following criteria:

- In the case of a joint-stock company, a limited liability company or a limited joint-stock partnership, where the amount of uncovered losses exceeds the supplementary capital and 50 percent of the share capital.
- In the case of other companies, where the amount of uncovered losses exceeds 50 percent of the value of all shares in that company.
- If, within the last two years, the ratio of debt to equity exceeded 7.5 and the ratio of operating profit plus depreciation to interest was lower than 1.

— Official Journal of the European Union
C 249 of 31 July 2014

The Outcome

Regarding the first question, the European Court of Justice ("ECJ") noted that Article 1(7)c of the old GBER refers to national law to determine the relevant conditions under which a company is subjected to collective insolvency proceedings. However, the ECJ insisted that there are no specific dispositions in the GBER to establish a distinction between procedures that are the result of a request from economic operators and those that economic operators are subjected to by the authorities of their Member State. Therefore, the ECJ concluded that the notion of "collective insolvency proceedings" covers all relevant procedures, regardless of where the initiative originated.

As to the second question, the ECJ asserted that even though the old GBER excludes firms in difficulty from its scope, this assessment must be conducted when the legal right to receive the aid is conferred on the beneficiary. The ECJ also stressed that, in practice, Member States do not have to appraise the financial situation of applicants but, simply, to refrain from granting assistance to those that are the object of collective insolvency proceedings at the moment when their eligibility is being considered.

In this case, if the referring court confirms that Nerea fulfilled the conditions of the old GBER when the aid was granted—meaning that it was not subjected to collective insolvency proceedings—then it should not be considered to be a firm in difficulty for the purposes of Article 1(6)c. Hence, even if Nerea has subsequently become a firm in difficulty, the aid that was given cannot be withdrawn solely on those grounds, and neither can the authorities demand the reimbursement of the advance.

TWO KEY TAKEAWAYS

1. The notion of "undertaking in difficulty" follows national law: If an economic operator is the object of collective insolvency proceedings in its Member State, then it is considered to be an undertaking in difficulty for the purposes of European law.
2. Undertakings in difficulty cannot receive any State aid other than rescue and restructuring aid. Whether or not an economic operator is to be considered as an undertaking in difficulty should be assessed when eligibility for State aid is considered. Later changes in the economic situation of the undertaking are irrelevant.

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