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The Pursuit of Effectiveness in the Recovery of Fiscal State Aid: Italy's Example

The fulfillment of illegal and incompatible State aid' recovery obligations is strictly linked to the effectiveness of national procedural laws of member States. In Italy, mainly in the fiscal aid field, this relation outlined the complexity of balancing the principle of equivalence with the principle of effectiveness.

In this work are described the main Italian legislative interventions aimed at guaranteeing an increased effectiveness of the recovery of fiscal State aid, both in the executive activity and procedural law. Particularly, it is highlighted the different legislative approach adopted before and after the L. 234/2012, which established the administrative exclusive jurisdiction over State aid' litigations. The article concludes by considering the need of adopting a uniform method to the issue, seeking coordination among the recovery activity and the procedural law. Those last must be reformed operating an appropriate balancing of both individual procedural guarantees and effectiveness.

I. Introduction

As stated in Article 14(3) of Regulation (EC) 659/1999, the recovery of an illegal and incompatible State aid must be accomplished by the Member State which estab-

lished it, without any delay and in accordance to its national procedural laws. The caveat is that those procedures are able to guarantee the immediate and effective execution of the Commission's decision that declared illegal and incompatible the State aid itself.

Therefore, in order to carry out this obligation, the Member State must act in compliance with the principle of effectiveness, by adopting any measure that could provide tangible and immediate restore of the previously existing situation. This result could be achieved even by setting aside any national procedural law, if it cannot guarantee the effectiveness of the recovery – whenever this might be the only regulation available.¹

That being said, the Italian jurisprudence showed tremendous difficulties in fulfilling the recovery obligation with effectiveness, especially in the fiscal State aid field. This is caused by the complexity of finding a proper balance between procedural guarantees accorded to the individual as a legal subject and procedures for the actual recovery of the aid. In order to solve this issue, the Italian legislator tried several regulatory interventions, primarily through a case-by-case method that not necessarily produced improvements in terms of effectiveness.

In this report, I intend to analyse the evolution of the Italian legal framework of fiscal State aid recovery, focusing my study on the legislation before and after the 2012 reform; in fact, the L. 234/2012 is currently the jurisdiction's keystone for the whole State aid litigation system, although the exact fringes of its operativity are still partially disputed.

The aim of such study is to track down the main causes of the lack of effectiveness of the recovery in the Italian legal system and, by observing how the legislator has intervened through the past decade or so, assessing the adequacy of its legislative action to properly enforce the Commission's decision. The Italian experience in the recovery of fiscal State aid could be useful as a basis for comparison for other Member States in evaluating how to improve the effectiveness of the recovery in their respective legal systems.

II. The Procedural Framework before the 2012 Reform

Before 2012, the Italian legal system lacked any general procedural law for recovery of State aid. At first, according to the executive recovery measures, in order to identify which administrative agency was responsible for the execution of the Commission's recovery order, it was necessary to look at the nature of the economic advantage granted by the State to the beneficiary firm. For this reason, in Italy, the public agency designated to recover fiscal aid was the *Agenzia delle entrate* (Agency of Revenues). This agency enforces Italian tax law and adopts acts which could be challenged by their subjects before the competent *Commissione tributaria provinciale*

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¹ Case C-232/05 *Commission v France (Scott)* [2006] ECR I-10071, [49-50].

(Provincial Tax Court). The Agency of Revenues recovery acts were equated to fiscal assessment notices. Therefore, any of the objections that could be raised toward the mentioned acts in a regular procedure, could also be raised toward the acts adopted by the Agency of Revenue to recover State aid. These objections - like the objection of decadence - rest on a relatively short timeframe for the Agency to exercise its authority to recover State aid, and eventually allow to engage the Agency in a long and uncertain trial.²

In order to pledge higher standards of effectiveness for the recovery of illegal and incompatible fiscal State aid, Italy adopted a case-by-case approach, almost implementing a specific legislation each time an order of recovery was issued by the Commission. Its first regulatory attempt, carried out through L. 62/2005, concerned the executive recovery procedure and aimed to provide for recovery cooperation between the Agency of Revenue and the *Ministero dell'Interno* (Ministry of Home Affairs). While the Agency had to estimate the State aid to recover, the Ministry of Home Affairs - in conjunction with the *Ministero dell'Economia e delle Finanze* (Ministry of Economy and Finance) and the *Ministero delle Politiche Comunitarie* (Ministry of the European policies) - had to define the procedural recovery activity.³

This complex system never faced any substantial implementation, primarily because, due to its inefficient nature, it would have exacerbated the preexisting state of affair described above. This situation eventually led to a breach of the effectiveness principle, as stated in a 2006 judgment by the Court

of Justice of the European Union, which declared Italy's failure to fulfil its recovery obligations.⁴

Therefore, the Italian legislator carried out a second regulatory attempt, with L. 46/2007, which returned the whole recovery of fiscal State aid to the Agency of Revenue. The legal nature of the acts implemented by the Agency for the recovery activity was questioned nonetheless. Part of the Italian case law and legal writings suggested that those were in fact civil law measures instead of tax law ones, increasing the uncertainty of the legal protection in this field.⁵ This situation led to a third intervention by the Italian legislator two years later, with L. 2/2009, which entirely equated the Agency of Revenue's recovery acts to the rest of tax law acts.⁶

As stated above, the appeal proceedings against the recovery activity made before Italian Tax Courts delayed the immediate execution of Commission recovery orders. The Italian legislator identified the suspension of the recovery acts, usually granted by national judges as a precautionary measure during litigation, as the main factor paralysing the effectiveness of the recovery itself.⁷

Hence, the *Codice del Processo Tributario* (Tax Procedure Rules) was amended by introducing Arti-

cle 47bis with L. n. 101/2008, which established that the suspension of any recovery act must be granted only under strict conditions. In addition to a genuine concern for a serious and irreparable damage, the suspension was now subject also to the existence of serious pleas of unlawfulness against a Commission decision on the State aid recovery, or an obvious error about both the identification of the subject of the recovery or the amount of aid that must be recovered.

Also, if the application for the suspension was based on the unlawfulness of the Commission decision, then the Tax Court had to reject the application if, despite it being legitimate, the Commission decision was not previously challenged before the Court of Justice. Furthermore, the suspension had to be denied if, during the litigation before the Court of Justice, the plaintiff did not apply for the suspension of the recovery or its application was rejected.⁸

The regulatory framework just described led to a severe limitation of taxpayers' procedural rights, particularly if compared to the same procedural rights granted to those who faced recovery acts toward non-fiscal State aid. In these cases, no similar limitations of the requirements needed to demand the suspension of a recovery act

2 A De Stefano, 'Le controversie sul recupero degli aiuti illegali e incompatibili dinanzi al giudice tributario prima della riforma della l. 234/2012' in LF Pace (ed), *Dizionario Sistematico del Diritto della Concorrenza* (Jovene Editore 2013), 767.

3 L Del Federico, 'Le Controversie sul Recupero degli Aiuti di Stato nella Giustizia Tributaria Italiana: Profili Critici, Orientamenti Giurisprudenziali e Linee Evolutive' (2012) 3 *Rivista Trimestrale di Diritto Tributario* 591, 606.

4 Case C-207/05 *Commission v Italian Republic* [2006] ECR I-00070.

5 C Ciampolillo, 'Le Commissioni Tributarie Tornano sulla Problematica del Recupero degli Aiuti Fiscali nei Confronti delle c.d. "Ex Municipalizzate"' (2008) 4 *Giustizia Tributaria* 733.

6 Del Federico (n 3) 606-607.

7 *ibid* 615.

8 *Ibid* 614-616; A De Stefano (n 2).

were implemented. Despite the intent of guaranteeing further effectiveness to the Commission's order of recovery, this uneven treatment of alike legal situations produced a remarkable breach in the principle of equivalence.

III. The Legal Framework after the 2012 Reform

In 2012, the Italian legislator reformed the legal framework by introducing the L. n. 234, whose Article 49 established the administrative exclusive jurisdiction over every litigation concerning State aid; therefore, the administrative courts are now the only competent bodies to judge over both acts and measures granting illegal State aid, as well as acts and measures executing the Commission's recovery order. The reform did not introduce a specific procedure on the matter, so the trial must be started

according to the ordinary procedures.⁹

In order to guarantee the recovery effectiveness, the 2012 reform also modified the Article 119 of the *Codice del Processo Amministrativo* (Administrative Procedural Code), which regulates the administrative summary judgement, by including in its area of application any State aid litigation.

The main outcome of this intervention is a marked reduction in the time required to obtain a final decision over the execution of the recovery, as the administrative summary judgment is characterised by shorter procedural time-limits. Furthermore, it should be mentioned the decrease of situations in which the suspension of the execution of the recovery order is granted.

Indeed, whenever this procedure is adopted to judge over a litigation about the recovery, the tri-

al judge must grant the suspension as a precautionary measure only if there is a tangible and particularly severe threat of a serious and irreparable harm to the beneficiary firm. Instead, while the mentioned threat is not clearly serious, but the trial judge observes *prima facie* that the requirements for granting the suspension are met,¹⁰ it is possible to reduce the time for the adoption of the final decision by setting shortly a date for the judicial hearing.¹¹

The new regulation seemed to have repealed the previous legal regime, even in the fiscal State aid field.¹² However, there is not a consensus on this position in the few Italian legal writings on this topic.

Indeed, authors as Enrico Altieri questioned both Article 49's constitutionality as well as the administrative jurisdiction itself over litigations related to fiscal State aid. Those criticisms however do not concern the conferment to the administrative courts' jurisdiction of the litigations on the execution of Commission's recovery order; instead, those critiques are mainly related to the nature of the acts granting the fiscal State aid.¹³

Although there is still no Constitutional Court ruling on those topics, the Italian *Consiglio di Stato* (Council of State) rejected a motion to raise the procedure for the review of constitutionality of the whole Article 49 L. 234/2012. The motion assumed its unconstitutionality on the breach of Articles 3, 24, 25, 101 and 111 of the Italian Constitution. The decision of the Council of State could be useful to define some fundamental coordinates that underpin the constitutionality of the exclusive administrative jurisdiction.

9 M Martinelli, 'Il private enforcement dell'art. 108 § 3 TFUE e le controversie sul recupero degli aiuti illegali e incompatibili dinanzi al giudice amministrativo' in LF Pace (ed), *Dizionario Sistematico del Diritto della Concorrenza* (Jovene Editore 2013), 734.

10 In the Italian legal framework, the requirements for granting the suspension of the execution of the recovery follow the CJEU jurisprudence on precautionary measures. See: Joined cases C-143/88 and 92/89 *Zuckerfabrik* [1991] ECR I-00415; Case C-465/93 *Atlanta* [1995] ECR I-03761.

11 M Martinelli (n 8) 747-748.

12 A De Stefano (n 2) 776; L Del Federico 'Riforma contenzioso tributario: giudice amministrativo con "filtro"?' (*GiustiziaFISCALE.com*, 17 May 2016) <<http://www.giustiziafiscale.com/giustizia-fiscale-possibile/813-contenzioso-tributariogiudice-amministrativo-con-filtro>> accessed 20 November 2017.

13 In his work, Enrico Altieri stated that the clear wording of art 49 should exclude the administrative jurisdiction over litigations about fiscal State aid, since it concerns to 'acts and measures that grant aids'; therefore, that should exclude things as tax exemptions or tax reliefs, given that they are implemented in the legal framework through legislation and not administrative activity. The author also implies that the new legal framework might be unconstitutional, as it would be in breach of art 103.1 of the Constitution of Italy. He bases this hypothesis on what was stated by the *Corte Costituzionale* (Constitutional Court of Italy) in its sentence n. 204/2004, as it might be relevant toward L. 234/2012 as well. In this decision the Court assumed unconstitutional art 7 of L. 205/2000, which implemented the exclusive administrative jurisdiction over any litigation about administrative acts regarding zoning or public service. The Constitutional Court asserted that, whenever the administrative act does not expect for its adoption any exercise of authoritative power by the Administration itself, there cannot be any administrative jurisdiction, and therefore the Court declared unconstitutional art 7 mentioned above. Through this decision, Altieri made a parallel between those acts and the self-protection acts adopted by the Agency of Revenue, which have no authoritative power since they are totally bound in their implementation rules by the law. See: E Altieri, 'Prime impressioni sulla giurisdizione del giudice amministrativo in materia di aiuti di Stato' (2013) 2 *Rivista di Diritto Tributario* 297.

For the Supreme Administrative Court, through Article 49 the Italian legislator increased the 'neutral role of the administrative judge as guarantor of the public power in a matter where the interests of the community seem to be priority and are protectable only by exercising special evaluating powers'. The Council of State also affirmed that the new legal framework for the jurisdiction on State aid recovery acts standardised the previous fragmented state of facts, providing a systematic and homogeneous handling of the matter.¹⁴

IV. Observations on the Adequacy of the Italian Legislation in Guaranteeing Recovery Effectiveness

As stated above, the regulatory intervention made by the Italian legislator in the last ten years had been generally ineffective. The main cause of this failure is attributable to the case-by-case approach adopted, which failed to solve the root of the problems linked to the lack of recovery effectiveness.

Through the described L. 62/2005, the Italian legislator focused its action on the development of a better coordinated recovery activity of fiscal aid at executive level. Regrettably, the procedure implemented eventually increased the complexity of the recovery, slowing its execution instead of improving its effectiveness.

Once ascertained, the cumbersome nature of the procedure of fiscal State aid recovery, the Italian legislator tried to streamline it by entrusting its execution to the sole Agency of Revenue with L. 46/2007. Nevertheless, without any structural reformation of the

processual issues, this intervention simplified the recovery, but had no impact on the issues intrinsic to the relation between individual judicial protection and effectiveness.

This aspect has been faced by the Italian legislator subsequently, with the aforementioned introduction of Article 47*bis* of the Administrative Procedural Code, which modified the requirements to obtain the suspension of the execution of the recovery order. The resulting legal framework was however in contrast with the principle of equivalence, since it made way more difficult for the beneficiary firm to obtain the suspension if compared to similar cases in the Italian legal system.

The 2012 reform seems to have at least partially inverted the approach of the Italian legislator by establishing the administrative exclusive jurisdiction over any State aid litigation. The main merit of this legal intervention is, as stated by the Italian Council of State, to have unified, on the procedural side, all the litigation concerning State aid, including those of private enforcement. The new procedural framework overcomes the jurisdictional fragmentation brought by the use of the State aid's nature as a mean of identification of the jurisdiction.

Although L. 234/2012 did not introduce a peculiar procedure for the litigations about State aid, the reform has nonetheless improved the effectiveness of the recovery activity, especially through the limitation of the circumstances in which it is possible to obtain, provisionally, the suspension of the recovery order's execution. It must

be remarked that, unlike the emendation of Article 47*bis* mentioned above, the 2012 reform only reduces the possibility for the beneficiary firms to use the suspension for dilatory purposes. Indeed, it has provided a fair balance of interests between the need of effectiveness of the recovery and the procedural safeguards accorded to the individual, as this legal framework guarantees the access to a quicker decision in substance when there is no extreme threat of damage resulting from the execution of the recovery, while preventing any abuse of suspensive measures.

V. Final Remarks

Presently, the overall Italian legal framework is undoubtedly characterised by greater uniformity, due to the reform of the previous jurisdictions fragmentation on State aid. Particularly with regards to the fiscal aid field, L. 234/2012 had the merit of completing a process of simplification which started with the provision of the recovery activity to the Agency of Revenue. Nevertheless, the 2012 reform faced the possible issues of coordination between the administrative recovery activities and the reduction of State aid litigation timeframe.

The slimming down of procedural provisions, pursued through the summary judgment for recovery litigation, as well as the reform of the suspension of the executions, has been obtained through a fair balance between the need for effectiveness and the principle of equivalence. This approach is not affected by the fact that a specific

¹⁴ Consiglio di Stato sez. III. n. 2401 [2015], paras 12-13.

procedure for State aid recovery litigation has not been implemented.

The Italian experience in fiscal State aid recovery reveals that it is by no means predictable for Member State to guarantee a significant effectiveness of Commission decisions on this topic. The non-application of the internal rules,

preventing the effective execution, despite being an adequate tool, relies upon the actual activity of the Courts and exposes Member States to the risk of further infringement proceedings by the Commission before the Court of Justice. This is especially the case when the inadequacy of a national legal system is such that it regularly slows down

the execution of the recovery order. If a Member State opts for case-by-case emendations, the potential risk of reducing the preexisting procedural guarantees accorded to the individuals is solid.

A unified approach limiting the abuse of the mentioned guarantees without frustrating its operativity could be more effective, by bestowing a residual function to the non-application of the internal rules, rather than a substitution.

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