

ADMINISTRATIVE & PUBLIC LAW

When the £650m loan awarded to British Energy was disputed by Greenpeace and Ecotricity, it highlighted the crossover between judicial review in the High Court and the European Courts. Julian Gregory reports on this division of labour

Courting controversy

The British Energy (BE) rescue aid case is an interesting example of the crossover between judicial review in the High Court and judicial review in the European Courts in Luxembourg. This is because the granting of state aid usually generates two decisions: firstly, the decision of the domestic public sector body to grant aid and secondly, the European Commission's (EC's) decision granting or refusing approval of the state aid.

Both decisions are subject to judicial review — the former before the Administrative Court; the latter before the Court of First Instance (CFI) of the European Communities. Strategic issues arise for a claimant who wishes to challenge the granting of state aid, including whether the emphasis should be placed on litigating the case in the English courts rather than before the EC and, eventually, the CFI. Consideration must be given to the different timescales involved, the different requirements on standing and any differences in procedural rights and eventual remedies.

The Department of Trade & Industry's decision to grant a £650m loan to BE was challenged by way of domestic judicial review proceedings by Greenpeace and Ecotricity, a wind power energy company. The claimants argued that the loan had not been notified

to the EC in sufficient time for them to consider its compatibility with the common market prior to its grant and, therefore, that it constituted unlawful state aid in breach of Article 88(3) of the Treaty. They sought a declaration that the loan was unlawful and an order that it be repaid. Ecotricity also sought an order for damages.

At the permission stage, the Secretary of State and BE argued that the claimants did not have standing to bring the claim. They argued that the aid was not unlawful under Article 88(3) EC, which does not preclude the grant of aid as a matter of urgency in exceptional circumstances; and that the claim ought in any event to be stayed until the EC had determined the compatibility of the loan with the common market.

On 22 November 2002, Mr Justice Maurice Kay gave permission for both claimants to proceed, although without prejudice to the right of the Secretary of State to challenge Greenpeace's standing at the substantive hearing.

A few days later, on 27 November 2002, the EC published its decision that the rescue aid granted to BE was compatible with the common market, although the EC noted with regret that the UK had implemented measures in breach of Article 88(3) EC. They found

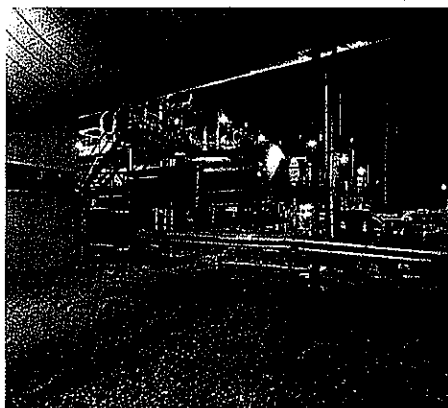
that BE qualified as a 'firm in difficulty' under section 2.1 of the EC's Community Guidelines on state aid for rescuing and restructuring firms in difficulty and that the rescue aid to a maximum amount of £1,175m, was needed to keep the company afloat in the short-term.

At that stage, the claimants faced a choice. Given the presumed validity of the EC decision, the domestic proceedings could not continue unabated. The claimants could have either gone ahead with the national proceedings and challenged the validity of the EC decision indirectly via a preliminary reference to the European Court of Justice (ECJ) under Article 234 EC, or brought a direct annulment action before the CFI under Article 230 EC, pending which, the domestic proceedings would be stayed. In the majority of cases, however, indirect challenges by way of preliminary reference are conditional on the claimant first exhausting his rights of annulment, within the two-month time limit — a claimant is not allowed to circumvent the restraints of Article 230 EC by resorting to domestic proceedings and failing to make use of the annulment procedure, unless there is some doubt about him fulfilling the standing requirements.

On 10 April 2003, after the domestic application for judicial review had been withdrawn by consent of the parties, Ecotricity and Greenpeace lodged an application in the CFI, under Article 230 EC, for the annulment of the EC's decision on the rescue aid. The EC has recently submitted a defence of its decision, to which the claimant will respond prior to the substantive hearing before the CFI.

Potential differences exist between the two different avenues of challenge available to claimants, in terms of standing, intensity of review and remedies.

In domestic judicial review proceedings, any person with 'sufficient interest' in the matter may challenge a decision. This test has been interpreted flexibly to promote the access of individuals and public interest groups whose interest may go beyond mere financial concerns or strict legal rights. By contrast, the test of direct and individual concern laid down in Article 230



British Energy (above) was awarded a loan of £650m as it was seen to be a 'firm in difficulty' according to the EC

EC, recently confirmed by the ECJ in *UPA*, is narrower.

A state aid challenge will be admissible if the applicant can show that he is a 'party concerned' within the meaning of Article 88(2) EC. This includes persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competitors and trade associations.

Traditionally, the Community courts have been reluctant to recognise the standing of associations under Article 230 EC. The settled position is that an association will not be entitled to bring an action for annulment on behalf of its members where the latter cannot do so individually. However, the CFI has made some inroads on this position. It has recently stated that an association will be able to bring an annulment action where the competitive market position of at least some of the association's members is affected by the grant of the aid. Further, special circumstances may entitle an association to proceed on behalf of its members — for instance where it has played an active and influential role in the administrative procedure leading to the adoption of the decision.

Proceedings before the Community courts may take on a different perspective if other member states decide to intervene, which they are entitled to do.

Article 230(2) EC sets out four main heads of review: (i) lack of competence, (ii) infringement of an essential procedural requirement, (iii) infringement of the EC Treaty or of any rule of law relating to its application and (iv) misuse of powers. Those heads are broadly similar to the irrationality, illegality and impropriety grounds under English public law. However, in practice, the CFI may show more deference to the exercise of the EC's discretion by imposing a threshold of "manifest error".

In terms of remedies, Article 231 EC states that if the action is well founded, the CFI shall declare the decision void *ab initio*. A corollary of this is that the EC will be required to take any steps necessary to comply with the judgment. The applicant will have to bring a separate action for damages under Article 288(2) EC. The available relief is, therefore, not as flexible as the unified range of injunctive, declaratory and compensatory remedies which the Administrative Court may impose as it sees fit in the circumstances of the case.

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