

European State Aid Law – Procedures

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Actors

- Commission: informal policy instruments + formal decisions
- Council: procedural framework (Article 109)
- CJEU, GC: important contribution to enhancing effectiveness of state aid rules
- National courts: GBER, standstill clause of Art.108 (3), cooperation Commission?
- Third parties? Private enforcement

Ex ante authorisation system

- Article 108 + Regulation 659/1999
- + implementing Regulation 794/2004
 - E.g. what is an alteration that amounts to new aid
- Regulation 659/1999
- 4 procedures
 - Notified aid, unlawful aid, misuse of aid and existing aid
- Rights of third parties
- amendment Regulation 734/2013:
- more effective complaint procedure, wider investigative powers + formal cooperation national courts Commission added as new chapter to Reg 659/1999

Procedure I: notified aid (1)

- Notification by Member States of all new aid and aid schemes
Article 108 (3) + Article 2 (1)
 - New aid, aid scheme see definitions Article 1
 - Exceptions : GBER + *de minimis* + SGEI Decision
- Central governments competent to notify, not the enterprises
 - Form, content, notification form, other details in implementing Regulation
- Standstill obligation (Article 108 (3, third sentence) Article 3)
 - direct effect: role of national courts see recent cases though
 - What happens with charges financing the unlawful aid? Part of the aid measure or not?

Procedure I: notified aid (2)

■ Preliminary examination: Article 4

- Decision not to raise objections OR Decision to initiate the formal investigation procedure pursuant to Article 108 (2)
 - Obligation for Commission, unclear in case-law “serious doubts” or “serious difficulties”
 - C-284/12 Deutsche Lufthansa: national courts are bound once formal investigation starts i.e. cannot declare non-existence state aid
 - Compare C-39/94 SFEI: National court can investigate concept of state aid

■ Commission within 2 months take a decision

- 2 months begins on the day when notification is complete
- Request for additional information starts the period running again
- Lorenz procedure: No decision within 2 months, aid deemed to be authorised, prior notice to Commission

Procedure I: notified aid (3)

- **Formal investigation Article 108 (2) + Article 6**
- Member States and interested parties may submit comments after initiation of formal procedure (Article 6)
 - Limited rights of interested parties: “sources of information”, no principles of fair hearing e.g. no access to file
 - Primarily dialogue between M.Sts and Commission
- Burden of proof: M.Sts: compatibility
- **Article 9: 4 type of decisions**
 - No state aid
 - Positive decision: authorization
 - Conditional decision
 - Negative decision, recovery of aid
- No time limit Article 9 (6) 18 months

Unlawful aid

- Articles 12-15
- Unlawful aid is new aid put into effect contrary to Article 108 (3) see Article 1 (f)
- Start of procedure *ex officio* or complaint
- Reasonable time-limits depend on circumstances of case
- Collecting of information: M.Sts disincentive to provide it, injunctions
- Clear identification of beneficiary to initiate formal procedure (*Le Levant*)

Recovery decision

- **Article 16 + Notice on recovery policy**
- Member State obligation to take all necessary measures
- Immediate and effective execution without delay in accordance with national procedural law
- National legislation providing for suspensive effect of actions against recovery order should be disapplied
- Except where recovery is contrary to general principle of EU law
 - very restrictive interpretation: legitimate expectations and legal certainty
 - Diligent businessman should be able to determine whether Article 108 (3) procedure has been followed
- Limitation period 10 yrs Article 15

Recovery decision

- **Amount to be recovered Article 14 (2)**
- The objective of recovery: to ensure that the beneficiary forfeits the advantage it had enjoyed over its competitors, to restore the situation before granting aid
- Include interest at an appropriate rate
- **C-69/13 Mediaset:** national court should follow Comm position
- Identification of aid beneficiary
 - Problem: recipient is not the beneficiary, original beneficiary does not exist anymore or not in the same form e.g. insolvency or large number of beneficiaries
- Implementation of recovery order
 - In accordance with relevant national procedural law: M.St is grantor of aid and at the same time addressee of recovery decision (escape, delay)
 - Absolute impossibility

Third parties

- Article 24
- Aid beneficiaries, competitors, local governments and other interested parties
- Limited role (but Amendment 2013), compare with Articles 101 and 102
 - “the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case”
 - “In the context of preliminary examination Commission must conduct a diligent and impartial examination of a complaint alleging aid” and it cannot prolong indefinitely its preliminary investigation where a complaint has been lodged
- *Gestelevision Television para 53, Sniace, Lenzing*

Role of national courts

- Cooperation with national courts Article 29
- Safeguard the rights of individuals on the basis of Art.108 (3)
- Identify aid, check criteria of BERs
- NOT: compatibility of aid, validity of Commission decision
- Standstill obligation not respected: protect directly effective individual rights
- recovery, prevent payment of unlawful aid, damages for competitors, interim measures
- Damages actions against Member States, aid recipient on the basis of national law, against Member State on the basis of EU law

Role of national courts

- C-354/90, *FNCE* “National courts must offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures.” para 12
- “In this respect it should be noted, that the principal and exclusive role conferred on the Commission by Articles 92 and 93 of the Treaty, which is to hold aid to be incompatible with the common market where this is appropriate, is fundamentally different from the role of national courts **in safeguarding rights which individuals enjoy** as a result of the direct effect of the prohibition laid down in the last sentence of Article 93(3) of the Treaty.” Para 14

Reform: new architecture for state aid control from 2005 on

- Challenges: Lisbon strategy, enlargement, the increasing complexity and number of documents progressively adopted by the Commission over time
- A more refined economic approach:
 - Qualification or quantification counts?
 - At what stage can a more refined economic analysis step in?
 - Art.107(1) v. Art.107 (3)?
- More streamlined and efficient procedures, better enforcement, higher predictability and enhanced transparency
- Better governance - a shared responsibility with Member States: “true partnership with M.Sts”
- Greater role for national courts?

Simplification of state aid procedures

- “3-stream system”: BER, standard assessment, detailed assessment
 - **Graduation of the assessment:**
 - 1 No aid - De minimis
 - 2 General Block Exemption Regulation (GBER)
 - 3 Standard assessment
 - 4 Detailed assessment
- Enabling Regulation 994/98: adopt BERs
- GBER: Commission Regulation 800/2008 declaring certain categories of aid compatible with the common market in application of Article 87 and 88 of the Treaty
- Notice from the Commission on a simplified procedure for treatment of certain types of State Aid 2009
- Code of Best Practice for the conduct of state aid control procedures
- Guidelines on state aid enforcement by national courts (2009)

GBER

- Target most obvious market failures and distortion on competition is limited
- Assessment criteria can be clearly articulated and implemented by Member States
- Exemption from notification! (a summary description of the aid measure within 20 working days *following* the implementation of the measure)
- Incorporates the content of a series of existing state aid instruments adopted by the Commission since 2001 and introduces further new types of measures
- Authorises aid in favour of SMEs, research, innovation, regional development, training, employment and risk capital

Balancing test: cost-benefit

- More precise economic criteria and a basic methodology
- Assessment of aid compatibility is essentially a balancing of the positive effects of aid (contributing to the achievement of a well-defined objective of common interest) and its negative effects (the resulting distortion of competition and trade)
- Well-designed instrument:
 - Is the aid an appropriate policy instrument?
 - Is there an incentive effect? Does the aid change the behaviour of the beneficiary?
 - Is the aid measure proportionate to the problem tackled?
 - Commission must identify a counterfactual scenario

Guidelines, Notices, framework rules

- *Ex ante* rules: pre-defined criteria for assessment
- Specific approaches depending on the size of the firm, its location, the industry concerned
- Regional aid
 - Articles 107(3)(a) and 107(3)(c)
- Horizontal rules
 - “cross-industry” dimension: tackling problems which may arise in any industry and region
 - Aid for SMEs, R&D, SGEI, employment, training, environment, rescue and restructuring, risk capital
- Sectoral aid
- Specific aid measures (fiscal aid, capital injections, guarantees)