

◆ LEXCELLENCE ◆

CASE SOLVING EXERCISE

**GROUP ASSIGNMENT WITH TWO SCENARIOS AND ABSTRACTS FROM
RELEVANT LEGISLATION**

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I. GROUP ASSIGNMENT- SCENARIO 1

I. GROUP ASSIGNMENT

On the basis of the facts of the case and the arguments of the Parties please discuss the case within your group and decide on the legal issues. N.B: the parties may have submitted erroneous legal arguments in order to substantiate their claims/defend their interests.

How to proceed (to judgment)?

We recommend you first to summarise the facts of the case and the main arguments of the parties. After that, it seems for us practical to deal with the following basic questions:

- Does your court have jurisdiction to deal with the case, in particular to assess the criteria of compatibility as laid down in the GBER?
- Is the defendant State authority's submission concerning the lapse of the limitation period well-founded? Which limitation period is applicable to the claim concerning recovery and to the claim seeking compensation of damages?
- How to deal with the defendant's request for suspension of proceedings (until the Commission concludes its investigation of the case)?
- How to deal with the submission concerning the lack of incentive effect of the aid?
- How to deal with the submission concerning violation of the proportionality criteria?

In case you found this exercise too easy or would reach a final conclusion very quickly we have prepared an alternative version of the same story which raises more complicated issues (so do not hesitate to solve it briefly if you like).

Facts of the case

On 10 July 2014, the competent authority of Dreamland (EU Member State) gave an amount of EUR 28 million *ad hoc* regional investment aid (entirely from national State resources) to Lucky Works Plc. (a large enterprise) in order to build its factory producing electric motorcycles in the *REMOTE* region. The authority granted the State aid in question on the basis of the GBER, namely as regional investment aid falling under Article 14 of the Commission Regulation (EC) No 651/2014 (General Block Exemption Regulation, GBER). The aid was actually paid to the company without prior notification to the Commission. The facility was built and started its manufacturing activities in January 2017.

In August 2019, the new lawyer of the competitor undertaking, Hardworking Ltd., learned about the aid from an article in the local newspaper and decided to file a lawsuit (on behalf of Hardworking Ltd., the Plaintiff) before the national court alleging that the aid in question was unlawful State aid and it should have been notified in advance to the Commission. In the Plaintiff's point of view the aid did not fulfil the compatibility requirements of regional investment aid under the GBER because it did not have an incentive effect and infringed the principle of proportionality. The Plaintiff requests the court to order the recovery of the aid and claims compensation of damages sustained as a result of the unlawful aid. The damages sought

started to occur as a consequence of the operation of the subsidised production facility (i.e. from January 2017). Moreover, parallel to the court proceedings Hardworking Ltd. lodged a complaint with the European Commission concerning the alleged unlawful aid. The Commission has not closed its preliminary examination yet.

The Dreamland State authority (defendant in the proceedings before the national court) argues that it had previously checked the appropriateness of the aid and it found that it fulfilled all the requirements of the GBER. The Defendant argues that the whole amount of the aid was required in order for the investment to be carried out in the *REMOTE* region.

According to the regional aid map, the aid intensity in the *REMOTE* region was 50% and the overall costs of the investment carried out by the beneficiary amounted to EUR 70 million. Based on the calculation stipulated in the GBER (Article 2, (20)) the maximum aid amount was EUR 30 million and the amount of the aid actually granted to the beneficiary was EUR 28 million.

The State authority also submits that recovery of the aid would be time-barred anyway as the national limitation period of 5 years is applicable, which started on 10 July 2014 (grant of the aid). We (you, i.e. the national court ruling on the case) are going to decide the case on 27 September 2019. The Plaintiff argues that the 10 year limitation period shall be applied to recovery as laid down in the relevant EU legislation.

II. THE PLAINTIFF'S POSITION

II.1. FORMS OF ORDER SOUGHT

The court should:

- a) recover the unlawful State aid from the beneficiary in the amount of EUR 28 million plus interest
- b) order the State to pay the sum of EUR 10 million as compensation for the damages the Plaintiff had suffered
- c) order the Defendant to pay its own costs and the Plaintiff's costs in connection with the proceedings

II.2. PLEAS IN LAW AND MAIN ARGUMENTS

II.2.1. Infringement of the standstill obligation

Infringement of Article 108(3) TFEU

First, it should be recalled that within the system of State aid, according to Article 108 (3) TFEU Member States are under an obligation to notify the Commission each aid measure they intend to grant and not to implement the aid until the Commission has taken a final decision on the measure in question. Member States thus may not implement aid measures without the prior approval of the Commission. Certain categories of aid, such as regional investment aid, may

however be lawfully implemented under the Block Exemption Regulation¹ but only in cases where the measure in question meets all the relevant requirements enshrined in the GBER. If all the conditions are met, the standstill obligation does not apply and the Member State does not have to notify the aid in advance and ask for the Commission's approval.

In the present case, granting of the aid amounting to EUR 28 million by the Member State to the beneficiary Lucky Works Plc. for setting up a new production facility in the *REMOTE* region did not fulfill all the criteria set out in the GBER as neither the incentive effect nor the proportionality criteria of the aid has been met and therefore the aid should have been notified in advance to the Commission.

II.2.2. Infringement of the incentive effect

Infringement of Article 6(1) and Article 6(3)a) of the GBER

The requirement of an incentive effect means that the aid effectively has to have an impact on the location choice and in the absence of aid the investment would not be carried out in the area concerned or would not be sufficiently profitable for the beneficiary in the area concerned. However, the Plaintiff can provide appropriate evidence to prove that the aid did not have such an incentive effect.

The Plaintiff refers to a similar investment project which it carried out also in the assisted region (i.e. *REMOTE* region) with an overall cost of EUR 50 million. From the documents attached by the Plaintiff regarding its own investment project's costs, it is apparent that initially a number of locations were considered for the investment, but finally the alternatives had been narrowed down to two locations which received serious consideration: namely *CENTRAL* region and *REMOTE* region (the assisted region in the present case). On the basis of its calculation and comparison that has been made between the costs and benefits of the two locations, it turned out that it was feasible to carry out the project in the assisted region (*REMOTE* region) as the project would have been EUR 2 million less costly than in the alternative location.

On the basis of this, the Plaintiff argues that the aid must not have any incentive effect in connection with the beneficiary's investment as required by the GBER.

II.2.3. Infringement of the principle of proportionality

Infringement of recitals 5 and 22 of the GBER

According to the GBER, the State aid in general should not only serve a purpose of common interest and should have a clear incentive effect among others but it should also be appropriate and proportionate, meaning that the aid does not go beyond what is necessary for the investment and does not exceed the amount that is necessary to trigger the decision by the aid beneficiary.

It can be demonstrated on the basis of the Plaintiff's attached documents regarding the costs of its own, similar investment also carried out in the assisted region that the whole amount of aid granted to the beneficiary was unnecessary, as the investment could have been carried out without any State support.

¹ Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance

Consequently, proportionality cannot be established as it is impossible to conclude on the basis of the abovementioned arguments that the regional investment aid in the amount of EUR 28 million was proportionate. It thus can be concluded that the aid constituted resources put at the disposal of the beneficiary which did not serve the achievement of any of the objectives enumerated in Article 107(3) of the Treaty. Moreover, it can also be concluded that the grant of the aid had highly distortive effects on competition, as it might, in particular, have discouraged competitors to invest in similar projects.

II.2.4. Applicable law in relation to the limitation period to recover the aid

Application of Regulation No 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union

In relation to the limitation period to recover an unlawfully granted aid, Article 17(1) of Regulation No 2015/1589² applies, that is to say the aid may be recovered during a period of 10 years from the time the unlawful aid was granted.

Any other provisions concerning limitation periods are irrelevant in the present case and not applicable. Namely neither the relevant national provisions regarding limitation periods, nor the time period enshrined in Article 3(1) of Regulation No 2988/95³ on the protection of the European Communities' financial interest (setting the limitation period in four years from the time when the irregularity was committed in connection with the EU budget) is applicable.

First, the rules on State aid comprise a specific regime, flowing directly from a higher ranking provision than Regulation No 2988/95, that is to say, Article 108(3) TFEU. Limitation periods under national law that are shorter thus less strict than those under Article 17(1) of Regulation No 2015/1589 would jeopardize the full recovery of unlawfully granted aid that Article 107(1) and Article 108(3) TFEU require.

Moreover, in paragraph 41 of the Commission's Notice on the enforcement of State aid law by national courts, in respect of the interest to be claimed, the Commission basically argues that the national courts should apply Regulation No 659/1999 (the previous version of Regulation No 2015/1589) by analogy. In these proceedings, likewise, in line with the principle of effectiveness, that regulation should apply both to the limitation period for the recovery of aid by a national authority and to the interest to be claimed where aid is recovered.

All in all, the need to protect the Commission's competence requires that Regulation No 2015/1589 should apply and the principle of effectiveness therefore precludes a limitation period of less than 10 years.

² Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, HL L 248., 2015.9.24., 9—29. o.

³ Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, HL L 312., 1995.12.23., 1—4. o.

II.2.5. Damages claim

The Plaintiff also submits that by granting State aid to Lucky Works Plc., the Plaintiff has suffered great damages in forgone revenues and profits which were the direct consequence of the aid. Therefore, the State shall be ordered by the court to pay compensation for that damage suffered in the amount of EUR 10 million.

III. THE DEFENDANT'S POSITION

III.1. FORMS OF ORDER SOUGHT

The State (the competent public authority) contends that the national court should:

- dismiss the application
- order the Plaintiff to pay the costs
- suspend the proceedings.

III.2. ARGUMENTS OF THE STATE (THE COMPETENT PUBLIC AUTHORITY)

III.2.1. Jurisdiction to assess compatibility with the internal market

First of all, it shall be highlighted that the assessment of compatibility of an aid measure falls within the exclusive competence of the Commission under Article 108 TFEU. Therefore, the national court cannot assess the compatibility of the contested aid, it lacks competence to examine the fulfilment of the conditions laid down in the GBER.

III.2.2. The State did not violate the 'stand still obligation' laid down in Article 108(3) TFEU

The aid duly fulfilled the conditions of the GBER (Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the TFEU), so it was not necessary to notify it to the Commission. Therefore, the State did not violate Article 108(3). The aid in the amount of EUR 28 million was under the notification threshold of Article 4(1) of the GBER (in this case it was EUR 30 million). Therefore, the State did not violate Article 108(3) as the aid fulfilled the requirements of Article 14 of the GBER.

III.2.3. The aid did actually have an incentive effect and also fulfilled requirements of proportionality

The State acted in compliance with the principle of proportionality laid down in Article 5(4) of the Treaty on the European Union, consequently the State could not infringe recitals 5 and 22 of the GBER as the Plaintiff stated.

The State verified – according to point a) of Article 6(3) – that the project would not have been carried out in the *REMOTE* region without the regional investment aid. This amount was necessary to give an incentive – it was proportionate – to opt to locate a planned investment in the relevant region rather than elsewhere because it compensated for the net handicaps and costs linked to a location in the assisted region. The aid amount was proportional because it equalled the difference between the net costs for Lucky Works Plc. to invest in the assisted region and

the net costs to invest in the alternative region(s). The authority took into account the administrative costs, transport costs and wage costs when it calculated the amount of the aid.

The aid amount made it possible not only to compensate for disadvantages of the site location, but also to cover for other disadvantages, including certain unquantifiable ones associated with the risks of an investment in a completely new motor, manufactured elsewhere than the undertaking's principal location.

Finally, under Article 107(3) TFEU, the disadvantages inherent in an investment must 'at least be compensated for', as that is the only way to create incentive to invest in the regions being aided. Other incentives should be created, however, in order to enable disadvantaged regions to bridge their economic gap. Although the primary law prohibits overcompensation, it is nevertheless not premised on a principle of under-compensation.

III.2.4. Article 17(1) of Regulation No 2015/1589 concerning the limitation period to recover an unlawfully granted aid

According to Article 17(1) the limitation period for recovery of unlawful State aid is 10 years:

“Article 17

Limitation period for the recovery of aid

1. The powers of the Commission to recover aid shall be subject to a limitation period of 10 years.”

This sentence is linked to the Commission's tasks, consequently, the limitation period of 10 years cannot be applied in the present case. In contrast, the national rules relating to the limitation period should be applied. In the present case, the national limitation period (5 years) has already expired, because the aid was awarded in January 2014, therefore, the national court cannot order the recovery of the contested regional investment aid.

III.2.5. Suspension of the present proceedings, infringement of the principle of protection of legitimate expectations and the principle of legal certainty

Lastly, it is important to take into account that the Plaintiff has lodged a complaint with the Commission concerning the contested regional investment aid and therefore, **the Defendant requests the court to suspend the proceedings, because the earlier recovery of the contested aid would be contrary to legitimate expectations of the beneficiary and would violate the principle of legal certainty.** Lucky Works Plc. could legitimately expect that the investment aid fulfilled the conditions of the GBER and State aid rules and therefore, it could reasonably believe that the aid would not have to be repaid. Having regard to the foregoing, the court shall suspend the present proceedings until the decision of the Commission.

Additional questions (concerning national jurisdictions):

- What kind of 'lawsuit' could be filed in your national jurisdiction in a similar case? Would it be a separate case for the (administrative) court review of the legality of the State authority's decision (i.e. the one that granted the aid) together with a claim

for ordering recovery and a separate civil law case for the damages claim? Or is the combination of these two possible in a single lawsuit?

- What happened in your national jurisdiction if a claim for recovery (together with the claim for the declaration of unlawfulness of the State authority's original decision granting the aid) was time-barred but the claim for compensation of damages would still be enforceable? Could the illegality of the State authority's decision be taken into account when deciding about the damages claim in a similar situation?

II. GROUP ASSIGNMENT – SCENARIO 2

The lawyer of the competitor company, Hardworking Ltd. found out from the national Act on the appropriation accounts of Dreamland for the year 2014 that the total amount spent from the aid budget for block-exempted regional investment aid was EUR 153 million. The lawyer also found out from the corresponding Appropriation accounts that the same expenditure reached EUR 160 million in 2013, 156 million in 2012 and 151 million in 2015. For this reason, in the point of view of the Plaintiff, the aid should have been notified to the Commission under Article 108(3) TFEU because under its Article 1(2)a) the GBER did not apply to the individual aid granted to Lucky Works Plc. Without notification the contested aid was unlawful State aid which should have been recovered.

The Dreamland State authority argues that although the aid at issue was granted under Article 14 GBER, it fulfils the substantial conditions of compatibility under Article 107(3)a of regional investment aid. Furthermore, as the Commission has approved its aid scheme for regional investment aid for aid exceeding the threshold of the GBER, and since the substantial conditions of this approved aid scheme are met in the case of the aid granted to Lucky Works Plc., the aid is authorized aid (existing aid), recovery of which is excluded on the basis of the of Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union. Consequently, the aid in question should be considered existing aid, and therefore, it is not possible to order its recovery.

The facts and circumstances of the case are the same as described in Scenario 1.

III. RELEVANT LEGISLATION AND OTHER MATERIAL

III.1. TFEU -TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

TITLE VII

COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS

CHAPTER 1

RULES ON COMPETITION

SECTION 2

AIDS GRANTED BY STATES

Article 107

(ex Article 87 TEC)

“1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:

(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;

(b) aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.

3. The following may be considered to be compatible with the internal market:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.”

Article 108
(ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.”

**III.2. GBER - COMMISSION REGULATION (EU) NO 651/2014 OF 17 JUNE 2014
DECLARING CERTAIN CATEGORIES OF AID COMPATIBLE WITH THE INTERNAL MARKET IN
APPLICATION OF ARTICLES 107 AND 108 OF THE TREATY**

Recitals

“(5) The general conditions for the application of this Regulation should be defined on the basis of a set of common principles that ensure the aid serves a purpose of common interest, has a clear incentive effect, is appropriate and proportionate, is granted in full transparency and subject to a control mechanism and regular evaluation, and does not adversely affect trading conditions to an extent that is contrary to the common interest.”

“(22) With a view to ensuring that aid is proportionate and limited to the amount necessary, maximum aid amounts should, whenever possible, be defined in terms of aid intensities in relation to a set of eligible costs. Where the maximum aid intensity cannot be set, because eligible costs cannot be identified or in order to provide simpler instruments for small amounts, maximum aid amounts defined in nominal terms should be set out in order to ensure proportionality of aid measures. The aid intensity and the maximum aid amounts should be fixed, in the light of the Commission's experience, at a level that minimises distortions of competition in the aided sector while appropriately addressing the market failure or cohesion issue. For regional investment aid, the aid intensity should comply with the allowable aid intensities under the regional aid maps.”

CHAPTER I COMMON PROVISIONS

Article 1

Scope

1. This Regulation shall apply to the following categories of aid:

- (a) regional aid;
- (b) aid to SMEs in the form of investment aid, operating aid and SMEs' access to finance;
- (c) aid for environmental protection;
- (d) aid for research and development and innovation;
- (e) training aid;
- (f) recruitment and employment aid for disadvantaged workers and workers with disabilities;
- (g) aid to make good the damage caused by certain natural disasters;
- (h) social aid for transport for residents of remote regions;
- (i) aid for broadband infrastructures;
- (j) aid for culture and heritage conservation;
- (k) aid for sport and multifunctional recreational infrastructure;
- (l) aid for local infrastructures;
- (m) aid for regional airports; and
- (n) aid for ports.

2. This Regulation shall not apply to:

- (a) schemes under Sections 1 (with the exception of Article 15), 2, 3, 4, 7 (with the exception of Article 44), and 10 of Chapter III of this Regulation, if the average annual State aid budget exceeds EUR 150 million, from six months after their entry into force. The Commission may decide that this Regulation shall continue to apply for a longer period to any of these aid

schemes after having assessed the relevant evaluation plan notified by the Member State to the Commission, within 20 working days from the scheme's entry into force;

(b) any alterations of schemes referred to in Article 1(2)(a), other than modifications which cannot affect the compatibility of the aid scheme under this Regulation or cannot significantly affect the content of the approved evaluation plan;

(c) aid to export-related activities towards third countries or Member States, namely aid directly linked to the quantities exported, to the establishment and operation of a distribution network or to other current costs linked to the export activity;

(d) aid contingent upon the use of domestic over imported goods.

3. This Regulation shall not apply to:

(a) aid granted in the fishery and aquaculture sector, as covered by Regulation (EU) No 1379/2013 of the European Parliament and of the Council (1) with the exception of training aid, aid for SMEs' access to finance, aid in the field of research and development, innovation aid for SMEs, aid for disadvantaged workers and workers with disabilities, regional investment aid in outermost regions and regional operating aid schemes;

(b) aid granted in the primary agricultural production sector, with the exception of regional investment aid in outermost regions, regional operating aid schemes, aid for consultancy in favour of SMEs, risk finance aid, aid for research and development, innovation aid for SMEs, environmental aid, training aid and aid for disadvantaged workers and workers with disabilities;

(c) aid granted in the sector of processing and marketing of agricultural products, in the following cases:

(i) where the amount of the aid is fixed on the basis of the price or quantity of such products purchased from primary producers or put on the market by the undertakings concerned;

(ii) where the aid is conditional on being partly or entirely passed on to primary producers;

(d) aid to facilitate the closure of uncompetitive coal mines, as covered by Council Decision 2010/787/EU (2);

(e) the categories of regional aid referred to in Article 13. ◀

Where an undertaking is active in the excluded sectors as referred to in points (a), (b) or (c) of the first subparagraph and in sectors which fall within the scope of this Regulation, this Regulation applies to aid granted in respect of the latter sectors or activities, provided that Member States ensure by appropriate means, such as separation of activities or distinction of costs, that the activities in the excluded sectors do not benefit from the aid granted in accordance with this Regulation.

4. This Regulation shall not apply to:

(a) aid schemes which do not explicitly exclude the payment of individual aid in favour of an undertaking which is subject to an outstanding recovery order following a previous Commission decision declaring an aid granted by the same Member State illegal and incompatible with the internal market, with the exception of aid schemes to make good the damage caused by certain natural disasters;

(b) ad hoc aid in favour of an undertaking as referred to in point (a);

(c) aid to undertakings in difficulty, with the exception of aid schemes to make good the damage caused by certain natural disasters, start-up aid schemes and regional operating aid schemes, provided those schemes do not treat undertakings in difficulty more favourably than other undertakings.

5. This Regulation shall not apply to State aid measures, which entail, by themselves, by the conditions attached to them or by their financing method a non-severable violation of Union law, in particular:

(a) aid measures where the grant of aid is subject to the obligation for the beneficiary to have its headquarters in the relevant Member State or to be predominantly established in that Member State; However, the requirement to have an establishment or branch in the aid granting Member State at the moment of payment of the aid is allowed.

(b) aid measures where the grant of aid is subject to the obligation for the beneficiary to use nationally produced goods or national services;

(c) aid measures restricting the possibility for the beneficiaries to exploit the research, development and innovation results in other Member States.

Article 2

Definitions

“For the purposes of this Regulation the following definitions shall apply:

[...]

(14) ‘individual aid’ means:

(i) ad hoc aid; and

(ii) awards of aid to individual beneficiaries on the basis of an aid scheme;

(15) ‘aid scheme’ means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be granted to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

[...]

(17) ‘ad hoc aid’ means aid not granted on the basis of an aid scheme;

[...]

(20) ‘adjusted aid amount’ means the maximum permissible aid amount for a large investment project, calculated according to the following formula:

$$\text{maximum aid amount} = R \times (A + 0,50 \times B + 0 \times C)$$

where: R is the maximum aid intensity applicable in the area concerned established in an approved regional map and which is in force on the date of granting the aid, excluding the increased aid intensity for SMEs; A is the initial EUR 50 million of eligible costs, B is the part

of eligible costs between EUR 50 million and EUR 100 million and C is the part of eligible costs above EUR 100 million”

[...]

Definitions applying to regional aid

[...]

“(41) ‘regional investment aid’ means regional aid granted for an initial investment or an initial investment in favour of a new economic activity;”

Article 3

Conditions for exemption

Aid schemes, individual aid granted under aid schemes and ad hoc aid shall be compatible with the internal market within the meaning of Article 107(2) or (3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty provided that such aid fulfils all the conditions laid down in Chapter I of this Regulation, as well as the specific conditions for the relevant category of aid laid down in Chapter III of this Regulation.

Article 4

Notification thresholds

„1. This Regulation shall not apply to aid which exceeds the following thresholds:

- (a) for regional investment aid: the ‘adjusted aid amount’ of aid, as calculated in accordance with the mechanism defined in Article 2, point 20 for an investment with eligible costs of EUR 100 million;”

[...]

Article 6

Incentive effect

“1. This Regulation shall apply only to aid which has an incentive effect.

2. Aid shall be considered to have an incentive effect if the beneficiary has submitted a written application for the aid to the Member State concerned before work on the project or activity starts. The application for the aid shall contain at least the following information:

- (a) undertaking's name and size;
- (b) description of the project, including its start and end dates;
- (c) location of the project;
- (d) list of project costs;
- (4) type of aid (grant, loan, guarantee, repayable advance, equity injection or other) and amount of public funding needed for the project;

3. Ad hoc aid granted to large enterprises shall be considered to have an incentive effect if, in addition to ensuring that the condition laid down in paragraph 2 is fulfilled, the Member State has verified, before granting the aid concerned, that documentation prepared by the beneficiary establishes that the aid will result in one or more of the following:

(a) in the case of regional investment aid: that a project is carried out, which would not have been carried out in the area concerned or would not have been sufficiently profitable for the beneficiary in the area concerned in the absence of the aid.

(b) in all other cases, that there is:

- a material increase in the scope of the project/activity due to the aid, or

- a material increase in the total amount spent by the beneficiary on the project/activity due to the aid, or

- a material increase in the speed of completion of the project/activity concerned;”

CHAPTER III

SPECIFIC PROVISIONS FOR DIFFERENT CATEGORIES OF AID

SECTION 1

Regional aid

Subsection A

Regional investment and operating aid

Article 13

“Scope of regional aid

This Section shall not apply to:

(a) aid which favours activities in the steel sector, the coal sector, the shipbuilding sector, the synthetic fibres sector, the transport sector as well as the related infrastructure, energy generation, distribution and infrastructure;

(b) regional aid in the form of schemes which are targeted at a limited number of specific sectors of economic activity; schemes aimed at tourism activities, broadband infrastructures or processing and marketing of agricultural products are not considered to be targeted at specific sectors of economic activity;

(c) regional aid in the form of schemes which compensate the transport costs of goods produced in the outermost regions or in sparsely populated areas and granted in favour of:

(i).activities in the production, processing and marketing of products listed in Annex I to the Treaty; or

(ii) activities classified in Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 establishing statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 as well as certain EC Regulations on specific statistical domains (53) as agriculture, forestry and fishing under section A of the NACE Rev. 2 statistical classification of economic activities, mining and quarrying

under section B of the NACE Rev. 2 and electricity, gas, steam and air conditioning supply under section D of the NACE Rev. 2; or

(iii) transport of goods by pipeline;

(d) individual regional investment aid to a beneficiary that has closed down the same or a similar activity in the European Economic Area in the two years preceding its application for regional investment aid or which, at the time of the aid application, has concrete plans to close down such an activity within a period of up to two years after the initial investment for which aid is requested is completed in the area concerned;

(e) regional operating aid granted to undertakings whose principal activities fall under Section K ‘Financial and insurance activities’ of the NACE Rev. 2 or to undertakings that perform intra-group activities whose principal activities fall under classes 70.10 ‘Activities of head offices’ or 70.22 ‘Business and other management consultancy activities’ of NACE Rev. 2.”

Article 14

Regional investment aid

“1. Regional investment aid measures shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty, provided that the conditions laid down in this Article and in Chapter I are fulfilled.

2. The aid shall be granted in assisted areas.

3. In assisted areas fulfilling the conditions of Article 107(3)(a) of the Treaty, the aid may be granted for an initial investment regardless of the size of the beneficiary. In assisted areas fulfilling the conditions of Article 107(3)(c) of the Treaty, the aid may be granted to SMEs for any form of initial investment. Aid to large enterprises shall only be granted for an initial investment in favour of new economic activity in the area concerned.

4. The eligible costs shall be as follows:

(a) investment costs in tangible and intangible assets;

(b) the estimated wage costs arising from job creation as a result of an initial investment, calculated over a period of two years; or

(c) a combination of points (a) and (b) not exceeding the amount of (a) or (b), whichever is higher.

5. The investment shall be maintained in the recipient area for at least five years, or at least three years in the case of SMEs, after completion of the investment. This shall not prevent the replacement of plant or equipment that has become outdated or broken within this period, provided that the economic activity is retained in the area concerned for the relevant minimum period.

12. The aid intensity in gross grant equivalent shall not exceed the maximum aid intensity established in the regional aid map which is in force at the time the aid is granted in the area concerned. Where the aid intensity is calculated on the basis of paragraph 4(c), the maximum aid intensity shall not exceed the most favourable amount resulting from the application of that intensity on the basis of investment costs or wage costs. For large investment projects the aid

amount shall not exceed the adjusted aid amount calculated in accordance with the mechanism defined in Article 2, point 20;

14. The aid beneficiary must provide a financial contribution of at least 25 % of the eligible costs, either through its own resources or by external financing, in a form, which is free of any public support. In the outermost regions an investment made by an SME may receive an aid with a maximum aid intensity above 75 %, in such situations the remainder shall be provided by way of a financial contribution from the aid beneficiary.”

III.3. REGULATION No 2015/1589 - COUNCIL REGULATION (EU) 2015/1589 OF 13 JULY 2015 LAYING DOWN DETAILED RULES FOR THE APPLICATION OF ARTICLE 108 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

„CHAPTER I

GENERAL

Article 1

Definitions

For the purposes of this Regulation, the following definitions shall apply:

- (a) ‘aid’ means any measure fulfilling all the criteria laid down in Article 107(1) TFEU;
- (b) ‘existing aid’ means:
 - (i) without prejudice to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden, to point 3 and the Appendix of Annex IV to the Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, to points 2 and 3(b) and the Appendix of Annex V to the Act of Accession of Bulgaria and Romania, and to points 2 and 3(b) and the Appendix of Annex IV to the Act of Accession of Croatia, all aid which existed prior to the entry into force of the TFEU in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the TFEU in the respective Member States;
 - (ii) authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;
 - (iii) aid which is deemed to have been authorised pursuant to Article 4(6) of Regulation (EC) No 659/1999 or to Article 4(6) of this Regulation, or prior to Regulation (EC) No 659/1999 but in accordance with this procedure;
 - (iv) aid which is deemed to be existing aid pursuant to Article 17 of this Regulation;
 - (v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the internal market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Union law, such measures shall not be considered as existing aid after the date fixed for liberalisation;
- (c) ‘new aid’ means all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;

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(d) ‘aid scheme’ means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount;

(e) ‘individual aid’ means aid that is not awarded on the basis of an aid scheme and notifiable awards of aid on the basis of an aid scheme;

(f) ‘unlawful aid’ means new aid put into effect in contravention of Article 108(3) TFEU;

(g) ‘misuse of aid’ means aid used by the beneficiary in contravention of a decision taken pursuant to Article 4(3) or Article 7(3) or (4) of Regulation (EC) No 659/1999 or Article 4(3) or Article 9(3) or (4) of this Regulation;

(h) ‘interested party’ means any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.”

“Article 16

Recovery of aid

1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (‘recovery decision’). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

3. Without prejudice to any order of the Court of Justice of the European Union pursuant to Article 278 TFEU, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Union law.”

CHAPTER IV

LIMITATION PERIODS

Article 17

Limitation period for the recovery of aid

“1. The powers of the Commission to recover aid shall be subject to a limitation period of 10 years.

2. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the

unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union.

3. Any aid with regard to which the limitation period has expired shall be deemed to be existing aid.”

III.4. REGULATION NO 2988/95 - COUNCIL REGULATION (EC, EURATOM) NO 2988/95 OF 18 DECEMBER 1995 ON THE PROTECTION OF THE EUROPEAN COMMUNITIES FINANCIAL INTERESTS

TITLE I

General principles

Article 3

“1. The limitation period for proceedings shall be four years as from the time when the irregularity referred to in Article 1 (1) was committed. However, the sectoral rules may make provision for a shorter period which may not be less than three years.

In the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases. In the case of multiannual programmes, the limitation period shall in any case run until the programme is definitively terminated.

The limitation period shall be interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. The limitation period shall start again following each interrupting act.

However, limitation shall become effective at the latest on the day on which a period equal to twice the limitation period expires without the competent authority having imposed a penalty, except where the administrative procedure has been suspended in accordance with Article 6

III.5. SUSPENSION OF THE PROCEEDINGS - EXTRACTS FROM RELEVANT CASE-LAW AND FROM THE COMMISSION’S NOTICE

III.5.1. Judgment of 11 March 2010, *CELF and ministre de la Culture et de la Communication*, C-1/09, EU:C:2010:136

The main proceedings

From 1980 to 2002, *CELF* received operating subsidies from the French State to offset the extra costs of handling small orders placed by booksellers established abroad. *SIDE*, the competitor of *CELF*, lodged a complaint with the Commission concerning the alleged unlawful aid. First in 1993, the Commission declared the aid compatible with the internal market. In 1995, The Court of First Instance annulled this decision, after it annulled, in 2002 and 2008, two further decisions of the Commission declaring the aid compatible with the internal market. In 2009, the Commission adopted a decision extending the formal examination procedure which begun in 1996.

CELF and the French State brought appeals before the national court against the judgment which ordered the French State, at the request of *SIDE*, to recover the aid paid to *CELF*.

The national court referred question for preliminary ruling, asking whether a national court, before which proceedings have been brought, on the basis of Article 88(3) EC, for repayment of unlawful State aid, may stay the adoption of its decision on that application until the Commission has ruled on the compatibility of the aid with the common market after the annulment of a prior positive decision.

Findings of the Court

“27 In that regard, the Court has already in essence ruled, in Case C-39/94 SFEI and Others [1996] ECR I-3547, paragraphs 44 and 50 to 53, that:

- the initiation by the Commission of an examination procedure cannot release national courts from their duty to safeguard the rights of individuals in the event of a breach of the requirement to give prior notification;
- where it is likely that some time will elapse before it gives its final judgment, for example, where it seeks clarification from the Commission for the purposes of interpreting the concept of State aid which it may have cause to grant or where it refers a question to the Court for a preliminary ruling, the national court must decide whether it is necessary to order interim measures in order to safeguard the interests of the parties.

28 The Court has thus stressed the national court’s obligation not to defer its examination of the applications for safeguard measures.

29 The last sentence of Article 88(3) EC is based on the preservative purpose of ensuring that incompatible aid will never be implemented. The intention of the prohibition thus effected is therefore that compatible aid alone may be implemented. In order to achieve that purpose, the implementation of planned aid is to be deferred until the doubt as to its compatibility is resolved by the Commission’s final decision (CELF I judgment, paragraphs 47 and 48).

30 The objective of the national courts’ tasks is therefore to pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid, in order that the aid does not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision.

31 A decision to stay proceedings would, *de facto*, have the same effect as a decision to refuse the application for safeguard measures. It would have the effect that no decision on the merits of that application would be taken before the Commission’s decision. It would amount to maintaining the benefit of aid during the period in which implementation is prohibited, which would be inconsistent with the very purpose of Article 88(3) EC and would render that provision ineffective.

32 Therefore, the national court cannot stay the proceedings without rendering Article 88(3) EC ineffective, contrary to the principle of effectiveness of the applicable national procedures.

33 The annulment by the Community judicature of a first positive Commission decision cannot justify any different conclusion prompted by the consideration that, in that case, the aid might subsequently be once again declared compatible by the Commission.

34 The purpose of Article 88(3) EC is clearly prompted by the consideration that, until a new decision has been adopted by the Commission, it cannot be presumed that that decision will be positive in its content.

35 The obligation to give a ruling without delay on the application for safeguard measures does not require the court before which that application is brought actually to adopt such measures.

36 There is an obligation to adopt safeguard measures only if the conditions justifying such measures are satisfied, namely, that there is no doubt regarding the classification as State aid, that the aid is about to be, or has been, implemented, and that no exceptional circumstances have been found which would make recovery inappropriate. If those conditions are not satisfied, the national court must dismiss the application.

37 When ruling on the application, the national court may order either the repayment of the aid with interest or, for example, as the Commission suggested in paragraph 62 of its Notice 2009/C 85/01 on the enforcement of State-aid law by national courts (OJ 2009 C 85, p. 1), the placement of the funds on a blocked account so that they do not remain at the disposal of the recipient, without prejudice to the payment of interest for the period between the expected implementation of the aid and its placement on that blocked account.

38 By contrast, the ‘standstill’ obligation set out in Article 88(3) EC would not be fulfilled, at that stage, by simply ordering interest to be paid on amounts which remain in the accounts of the undertaking. It is in no way established that an undertaking which has unlawfully received State aid could, were it not for that aid, have obtained an equivalent amount by way of loan from a financial institution under normal market conditions and thus have that amount at its disposal prior to the Commission decision.

39 Ultimately, the first obligation of the national court is to make a ruling, whether positive or negative.

40 The answer to the first question is therefore that a national court before which an application has been brought, on the basis of Article 88(3) EC, for repayment of unlawful State aid may not stay the adoption of its decision on that application until the Commission has ruled on the compatibility of the aid with the common market following the annulment of a previous positive decision.”

III.5.2. Commission notice on the enforcement of State aid law by national courts (2009/C 85/01)

“62. Interim recovery can also be a very effective instrument in cases where national court proceedings run parallel to a Commission investigation. An ongoing Commission investigation does not release the national court from its obligation to protect individual rights under Article 88(3) of the Treaty. The national court may therefore not simply suspend its own proceedings until the Commission has decided and leave the rights of the claimant under Article 88(3) of the Treaty unprotected in the meantime. Where the national court wishes to await the outcome of the Commission's compatibility assessment before adopting a final and irreversible recovery order, it should therefore adopt appropriate interim measures. Here again, ordering the placement of the funds on a blocked account would seem an appropriate remedy. In cases where:

(a) the Commission declares the aid incompatible, the national court would order the funds on the blocked account to be returned to the State aid granting authority (aid plus illegality interest);

(b) the Commission declares the aid compatible, this would release the national court from its Community law obligation to order full recovery. The court may therefore, subject to national law, order the actual aid amount to be released to the beneficiary. However, as described in section 2.2.3, the national court remains under a Community law obligation to order the recovery of illegality interest. This illegality interest will therefore have to be paid to the State aid granting authority.”

