

EEUSTAID

BUILDING OF CENTRAL AND EASTERN EUROPEAN JUDICIAL
CAPACITIES FOR THE ENFORCEMENT OF EU STATE AID LAW

THE RECOVERY OF UNLAWFUL AID: LEGISLATION AND JURISPRUDENCE

Disclaimer

"The views expressed are purely those of the speaker and my not in any circumstances be regarded as stating an official position of the Romanian Competition Council"

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THE RECOVERY OF UNLAWFUL AID: LEGISLATION AND JURISPRUDENCE

THE CHALLENGE OF THE PROCESS



The main topics:

What is
State aid?

Recovery:
Why? What? How? When?
By whom? From whom?

How they
did it?



COMPETITION

Competition: a mechanism of the market economy which encourages companies to offer consumer goods and services at the most favourable terms for consumers

European Competition Law Pillars

- ▣ Anticompetitive agreements/actions
- ▣ Abuse of dominance
- ▣ Merger Control
- ▣ **State aid**

KEY ACTORS

- ▣ European Commission (DG COMP/DG TREN/Legal Service/Commissioners' college) – sole competence for the assessment of compatibility of aid
- ▣ Union Courts (General Court and Court of Justice) – direct actions/appeals – preliminary rulings referred by national courts
- ▣ Member States (the addressees of State aid investigations but also third parties)
- ▣ Private entities (beneficiaries/complainants/third parties)
- ▣ National courts (stand-still clause - suspension/recovery injunction but also damages)

MAIN SOURCES

- ▣ Treaty on the Functioning of the European Union (**TFEU**).
- ▣ Union Courts jurisprudence.
- ▣ Commission Notice on the notion of State aid as referred to in Article 107(1) of the TFEU, OJ C 262, 19.7.2016 (**NoA**).
- ▣ Council Regulation (EU) **2015/1589** laying down detailed rules for the application of Article 108 of the TFEU, OJ L 248, 24.9.2015 (the '**Procedural Regulation**') – replacing Regulation 659/1999.
- ▣ Commission Regulation (EC) **794/2004** implementing Council Regulation (EU) 2015/1589, OJ L 140, 30.4.2004, with all subsequent amendments (the '**Implementing Regulation**').

MAIN SOURCES

- ▣ **Recovery Notice**, OJ C 272, 15.11.2007, *updated notice due in 2019*.
- ▣ Commission notice on the enforcement of State aid law by national courts, OJ C 85/9.4.2009 (the **Enforcement Notice**).
- ▣ 2006 Study on the enforcement of State aid law at national level. Part I, Application of EC State aid rules by national courts; Part II, Recovery of unlawful State aid. (updated in 2009, new study in preparation in 2019).
- ▣ Recovery cases status:
http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html

recovery_statistics (1) - Excel		
File	Home	Insert Page Layout Formulas Data Review View Help Acrobat Tell me what you want to do
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Information on recovery of unlawful aid		
Pending recovery cases (sorted by date of recovery decision)		Pending recovery cases (sorted by Member State)
Number of recovery decisions adopted since 1 January 1999		List of recovery decisions adopted since 1 January 1999
Recovery result: Aggregate amounts since 1999 (at EU-level and by Member State)		Recovery result by individual beneficiaries (Start of publication: 1 June 2018)

<http://ec.europa.eu/competition/stateaid/legislation/legislation.html>



COMPETITION

European Commission > Competition > State Aid

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Rules applicable to State aid in transport sector

Rules applicable to State aid in coal sector

1

Notion of STATE AID



ARTICLE 107(1) TFEU

*“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**”*

Existing of state aid - **Cumulative** conditions:

- ▣ Transfer of state resources
- ▣ To an undertaking (economic activity)
- ▣ Conferring an economic advantage
- ▣ Selectively
- ▣ By distorting competition
- ▣ By effecting trade

SUPPORT MEASURE

NO state
resources

**NO
State
aid**

State resources

NO economic
activity

**NO State
aid**

Economic activity

NO
selectivity

**NO
State
aid**

Selectivity

NO
advantage

**NO
State
aid**

Advantage

NO effect
on trade
(local)

**NO State
aid**

Effect on
trade

State aid
rules
applicable



ECONOMIC ACTIVITY

■ *Offering goods or services on a market*

Irrelevant whether the beneficiary entity's legal form or status under national law or is set up to generate profit



ECONOMIC ACTIVITY

Exception: Exercise of public powers is not an economic activity
(*Activity forms part of the essential functions of State or closely connected to those activities*)

Examples:

- ▣ maritime traffic control and safety;
- ▣ anti-pollution surveillance;
- ▣ the organisation, financing and enforcement of prison sentences;
- ▣ the development and revitalization of public land by public authorities etc.



ECONOMIC ADVANTAGE

- *Any **economic benefit** which an undertaking could not have obtained under normal market conditions, that is to say in the absence of State intervention.*
- ▣ granting of positive economic advantages
- ▣ relief from economic burdens



ECONOMIC ADVANTAGE

Exception: state acts as a similar private economic operators under normal market conditions (*market economy operator principle*).

- ▣ private **investor** test

- ▣ private **creditor** test

- ▣ private **vendor/buyer** test (e.g. a competitive, transparent, non-discriminatory, unconditional and sufficiently well-publicised tender procedure)

+

- ▣ cumulative conditions for SGEI (*Altmark Trans*, C-280/00)



SELECTIVITY

- A State measure must **favour** '*certain undertakings or the production of certain goods*'.

Examples of exceptions:

- ⌘ a general measure
- ⌘ a tax amnesties
- ⌘ a measure (derogating from the system of reference) is justified by the nature or the general scheme of the reference system



DISTORTION OF COMPETITION

- A public measure distort or threaten to distort competition when it is liable to **improve the competitive position** of the recipient compared to other undertakings with which it competes.

Except: a legal monopoly that excludes competition on the market, but also for the market.



EFFECT ON TRADE

- *‘where State financial aid strengthens the position of an undertaking as compared with other **undertakings competing in intra-[Union] trade**, the latter must be regarded as affected by the aid.’*

Except (EC decisional practice): **local effect** when the beneficiary supplied goods or services to a **limited area** within a MS and was unlikely to **attract customers** from other MS, and that it could not be foreseen that the measure would have more than a **marginal effect** on the conditions of crossborder investments or establishment.



EXAMPLES OF STATE AID INSTRUMENTS

- ⌘ direct grants / subsidies
- ⌘ waiving revenue which would otherwise have been paid to the State (taxes/penalties exemptions or reductions)
- ⌘ soft loans (preferential interest rates)
- ⌘ public guarantees
- ⌘ direct investment in the capital of companies (without return of the investment according to market conditions)



EXAMPLES OF STATE AID INSTRUMENTS

- ⌘ a firm and concrete commitment to make State resources available at a later point in time
- ⌘ providing public goods or services at a price below market rates
- ⌘ granting access to a public domain or natural resources, or granting special or exclusive rights without adequate remuneration in line with market rates



A natural person owns 2,000 buildings and plots of land. He makes regular real estate sale and purchase transactions (400 transactions in the last 24 months). The local authority grants him a tax exemption on real estate.

Could the exemption measure qualify as State aid?





ECONOMIC ACTIVITY

■ *Offering goods or services on a market*

Irrelevant whether the beneficiary entity's legal form or status under national law or is set up to generate profit



Which of the following sources of funding are considered state-owned or managed by the state?

- (a) the funds provided by the Ministry of European Funds;
- (b) the amounts borrowed at a low interest rate by private commercial banks;
- (c) the amounts that private investors grant to enterprises to develop their own businesses.





Which of the following operations could lead to an economic advantage for an enterprise?

- (a) coverage by the State of the losses of an enterprise;
- (b) A State payment (using public procurement rules) to company X for a bridge building works undertaken by X;
- (c) the increase of state capital to an enterprise by 20% (an *ex-ante* study demonstrates that the state will recover its investment over the next 5 years, with a higher ROE than the market provides).



2

Compatibility of STATE AID



ARTICLE 107 TFEU

Exception from the general interdiction of granting the aid:

- State aid is incompatible with the internal market, unless it falls within the categories of exceptions laid down in Article 107 (2) and (3) TFEU.
- Articles 42, 93, 106(2), 108(2) and 108(4) TFEU also provide for conditions under which State aid is or may be considered compatible with the internal market.



ARTICLE 107(2) TFEU

Exception from the general interdiction of granting the aid:

■ 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.



ARTICLE 107(3) TFEU

Exception from the general interdiction of granting the aid:

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

- (a) aid to promote the economic development of most **disadvantaged regions** of Community.
- (b) aid to promote the execution of an **important project of common European interest**.
- (c) aid or to remedy a **serious disturbance** in the economy of a Member State.
- (d) aid to facilitate the development of certain **economic activities** or of certain **economic areas**.
- (e) aid to promote **culture and heritage conservation**.
- (f) such **other categories** of aid as may be specified by decision of the Council.



ARTICLE 106(2) TFEU

Exception from the general interdiction of granting the aid:

■ Services of general economic interest (SGEI):

Undertakings entrusted with the operation of SGEI or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union.



ARTICLE 108(2) TFEU

- The compatibility assessment of proposed aid measures with the common market, based on the criteria laid down in Article 107 (2) and (3) TFEU, is the **exclusive responsibility** of the European Commission, subject to review by the Union Courts.
- According to settled CJEU jurisprudence (C-199/06, C-17/91, C-354/90), national courts do not have the power to declare a State aid measure compatible with Article 107 (2) or (3) TFEU.



ARTICLE 108(3) TFEU

■ The **notifying obligation**:

Any plans to grant or alter an aid have to be notify, by Member States, *ex-ante*, to the Commission for a compatibility check.

■ The '**stand still obligation**'

Member States may not implement new State aid measures before they have been approved by the Commission.



ARTICLE 108(3) TFEU

Exception from the general obligation to notify:

■ Commission's regulations relating to the categories of State aid **exempted from the procedure of notification:**

⌘ *De minimis* Regulations (general, agriculture, SGEI)

⌘ General block exemption Regulation (GBER)

⌘ SGEI decision

+

⌘ individual aid under approved aid scheme

⌘ existing aid

STATE AID MEASURE

exempted from
notification
(if fulfil the conditions)

*de
minimis*

GBER

SGEI
decision

implementation

implementation

implementation

notifiable state
aid

incompatible

**NO
implementation**

compatible

Implementation
(fulfil the conditions
of sectoral or
horizontal
Regulations or
general principals -
*positive effect v
negative effects*)

3

The recovery of STATE AID

PROCEDURE AND LEGISLATION



- Recovery is the **necessary corollary of the general prohibition of State aid** established by Article 107(1) TFEU and protects the effectiveness of the standstill obligation enshrined in Article 108(3) TFEU.

(Lorenz GmbH v Bundesrepublik Deutschland and Others, C-120/73).



GENERAL PRINCIPLES

- ▣ New aid implemented without notification to EC or before its approval is unlawful.
- ▣ Any aid granted pursuant to an exemption Regulation without meeting the conditions for exemption from notification, established therein, is also unlawful (*Eesti Pagar*, C-349/17).
- ▣ The Member State concerned must in principle put an end to aid implementation and, when already implemented, order its recovery in the absence of exceptional circumstances (*SFEI and Others*, C-39/94; *Eesti Pagar*, C-349/17).



GENERAL PRINCIPLES

- ▣ EC, for its part, has also to establish the incompatibility of the unlawful aid with the internal market before ordering its recovery (*France v Commission* ('*Boussac*'), C-301/87).
 - ▣ As the standstill obligation has direct effect, national courts must draw all consequences from the unlawfulness of the aid. (*Fédération nationale du commerce extérieur des produits alimentaires and Others v France* ('*Saumon*'), C-354/90; *Deutsche Lufthansa*, C-284/12).
- (e.g. suspension of the payment of unlawful aid, recovery of unlawful aid, recovery of the appropriate interest, compensation for the affected competitors)



WHY TO RECOVER?

- ▣ to restore the situation which existed in the internal market before the aid was paid (*Commission v Spain* ('*Magefesa II*'), C-610/10).

Recovery is not a penalty but to undo the advantage received through the illegally granted aid.



WHAT TO RECOVER?

▣ the aid amount unlawfully granted

+

▣ the 'recovery interest'



WHY INTEREST?

- ▣ By paying the recovery interest, the aid beneficiary **forfeits the financial advantage** arising from the availability of the aid in question, free of charge, **from the date it was put at the disposal of the beneficiary until it is paid back.**
- ▣ the Implementing Regulation sets out the **method for calculating** the recovery interest.



WHY INTEREST?

- ▣ In the case of recovery decisions subject to court proceedings, the recovery interest shall be calculated also for the periods during which the decision was suspended by a court order or annulled by a first instance judgment then overturned by the Court of Justice.

(CELF and ministre de la Culture et de la Communication ('CELF I'), C-199/06)

Base rates calculated in accordance with the Communication from the Commission on the revision of the method for setting the reference and discount rates (OJ C 14, 19.1.2008, p.6.). Depending on the use of the reference rate, the appropriate margins have still to be added as defined in this communication. **For the discount rate this means that a margin of 100 basispoints has to be added.** The Commission regulation (EC) No 271/2008 of 30 January 2008 amending the implementing regulation (EC) No 794/2004 foresees that, unless otherwise provided for in a specific decision, the recovery rate will also be calculated by adding 100 basispoints to the base rate.

Changes are indicated in bold

Base rates as of 1.6.2019

From	To	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK
1.6.2019	...	-0,11	-0,11	0,00	-0,11	1,98	-0,11	0,02	-0,11	-0,11	-0,11	-0,11	-0,11	0,28	0,56	-0,11	-0,11	-0,11	-0,11	-0,11	-0,11	-0,11	1,87	-0,11	3,56	0,05	-0,11	-0,11	1,09
1.5.2019	31.5.2019	-0,11	-0,11	0,00	-0,11	1,98	-0,11	0,03	-0,11	-0,11	-0,11	-0,11	-0,11	0,28	0,56	-0,11	-0,11	-0,11	-0,11	-0,11	-0,11	-0,11	1,87	-0,11	3,56	0,02	-0,11	-0,11	1,09
1.4.2019	30.4.2019	-0,13	-0,13	0,00	-0,13	1,98	-0,13	0,04	-0,13	-0,13	-0,13	-0,13	-0,13	0,28	0,56	-0,13	-0,13	-0,13	-0,13	-0,13	-0,13	-0,13	1,87	-0,13	3,56	-0,03	-0,13	-0,13	1,09
1.3.2019	31.3.2019	-0,13	-0,13	0,00	-0,13	1,98	-0,13	0,03	-0,13	-0,13	-0,13	-0,13	-0,13	0,28	0,56	-0,13	-0,13	-0,13	-0,13	-0,13	-0,13	-0,13	1,87	-0,13	3,56	-0,13	-0,13	-0,13	1,09
1.2.2019	28.2.2019	-0,16	-0,16	0,00	-0,16	1,98	-0,16	0,03	-0,16	-0,16	-0,16	-0,16	-0,16	0,28	0,56	-0,16	-0,16	-0,16	-0,16	-0,16	-0,16	-0,16	1,87	-0,16	3,56	-0,24	-0,16	-0,16	1,09
1.1.2019	31.1.2019	-0,16	-0,16	0,00	-0,16	1,98	-0,16	0,02	-0,16	-0,16	-0,16	-0,16	-0,16	0,28	0,56	-0,16	-0,16	-0,16	-0,16	-0,16	-0,16	-0,16	1,87	-0,16	3,56	-0,31	-0,16	-0,16	1,09
1.12.2018	31.12.2018	-0,18	-0,18	0,54	-0,18	1,80	-0,18	0,02	-0,18	-0,18	-0,18	-0,18	-0,18	0,30	0,56	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	1,85	-0,18	2,68	-0,33	-0,18	-0,18	1,00
1.11.2018	30.11.2018	-0,18	-0,18	0,54	-0,18	1,41	-0,18	0,02	-0,18	-0,18	-0,18	-0,18	-0,18	0,30	0,56	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	1,85	-0,18	2,68	-0,33	-0,18	-0,18	1,00
1.10.2018	31.10.2018	-0,18	-0,18	0,54	-0,18	1,41	-0,18	0,02	-0,18	-0,18	-0,18	-0,18	-0,18	0,30	0,49	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	1,85	-0,18	2,68	-0,33	-0,18	-0,18	1,00
1.9.2018	30.9.2018	-0,18	-0,18	0,54	-0,18	1,12	-0,18	0,03	-0,18	-0,18	-0,18	-0,18	-0,18	0,30	0,37	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	1,85	-0,18	2,68	-0,33	-0,18	-0,18	0,86
1.8.2018	31.8.2018	-0,18	-0,18	0,54	-0,18	1,12	-0,18	0,04	-0,18	-0,18	-0,18	-0,18	-0,18	0,30	0,21	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	1,85	-0,18	2,68	-0,33	-0,18	-0,18	0,86
1.7.2018	31.07.2018	-0,18	-0,18	0,54	-0,18	1,12	-0,18	0,04	-0,18	-0,18	-0,18	-0,18	-0,18	0,30	0,13	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	1,85	-0,18	2,68	-0,33	-0,18	-0,18	0,86
1.6.2018	30.6.2018	-0,18	-0,18	0,65	-0,18	1,12	-0,18	0,04	-0,18	-0,18	-0,18	-0,18	-0,18	0,30	0,09	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	1,85	-0,18	2,21	-0,33	-0,18	-0,18	0,86
1.5.2018	31.5.2018	-0,18	-0,18	0,65	-0,18	0,95	-0,18	0,03	-0,18	-0,18	-0,18	-0,18	-0,18	0,40	0,09	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	1,85	-0,18	2,21	-0,33	-0,18	-0,18	0,86
1.4.2018	30.4.2018	-0,18	-0,18	0,65	-0,18	0,95	-0,18	0,03	-0,18	-0,18	-0,18	-0,18	-0,18	0,40	0,09	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	1,85	-0,18	2,21	-0,42	-0,18	-0,18	0,73
1.3.2018	31.3.2018	-0,18	-0,18	0,65	-0,18	0,95	-0,18	0,02	-0,18	-0,18	-0,18	-0,18	-0,18	0,54	0,09	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	1,85	-0,18	2,21	-0,42	-0,18	-0,18	0,73
1.2.2018	28.2.2018	-0,18	-0,18	0,65	-0,18	0,75	-0,18	0,02	-0,18	-0,18	-0,18	-0,18	-0,18	0,54	0,09	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	1,85	-0,18	2,21	-0,42	-0,18	-0,18	0,73
1.1.2018	31.1.2018	-0,18	-0,18	0,65	-0,18	0,75	-0,18	0,02	-0,18	-0,18	-0,18	-0,18	-0,18	0,54	0,13	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	-0,18	1,85	-0,18	1,89	-0,42	-0,18	-0,18	0,73
1.12.2017	31.12.2017	-0,15	-0,15	0,76	-0,15	0,57	-0,15	0,03	-0,15	-0,15	-0,15	-0,15	-0,15	0,59	0,19	-0,15	-0,15	-0,15	-0,15	-0,15	-0,15	-0,15	1,83	-0,15	1,55	-0,36	-0,15	-0,15	0,65
1.11.2017	30.11.2017	-0,15	-0,15	0,76	-0,15	0,57	-0,15	0,06	-0,15	-0,15	-0,15	-0,15	-0,15	0,59	0,25	-0,15	-0,15	-0,15	-0,15	-0,15	-0,15	-0,15	1,83	-0,15	1,28	-0,36	-0,15	-0,15	0,65
1.10.2017	31.10.2017	-0,15	-0,15	0,76	-0,15	0,45	-0,15	0,09	-0,15	-0,15	-0,15	-0,15	-0,15	0,59	0,30	-0,15	-0,15	-0,15	-0,15	-0,15	-0,15	-0,15	1,83	-0,15	1,10	-0,36	-0,15	-0,15	0,65
1..9.2017	30.9.2017	-0,13	-0,13	0,76	-0,13	0,45	-0,13	0,12	-0,13	-0,13	-0,13	-0,13	-0,13	0,59	0,30	-0,13	-0,13	-0,13	-0,13	-0,13	-0,13	-0,13	1,83	-0,13	1,10	-0,36	-0,13	-0,13	0,65



A company needs, for current expenses, a loan of €5,000,000, for 5 years.

The company made a request to a commercial bank. The bank conditions imply a €700,000 interest for 5 years.

At the same time, the enterprise addressed the same request to the local public authority, that decided to credit the company, asking it to pay an interest of €400,000.

EC issued a recovery decision (the measure has not been notified and the aid is incompatible).

What is the amount to be recovered?





The interest regarding the recovery of an unlawful state aid (ordered by the EC) is calculated:

- (a) from the date of granting the aid until the date of the recovery decision;
- (b) from the date on which the State aid was made available to the beneficiary until the actual recovery date;
- (c) from the date on which the state aid was paid to the beneficiary until the date of the recovery decision.





WHEN TO RECOVER?

▣ After a EC recovery decision:

*‘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 for the immediate and effective execution of the Commission decision’*

(Article 16(3) of the Procedural Regulation).

▣ After a national court / grantor recovery decision:
according to the national legislation



WHEN TO RECOVER?

- ▣ Obligation to implement the EC recovery decision within the set deadlines:
 - ⌘ 1st deadline by which to provide information on established aid amount and recovery interest as well as the method used/to be used by the Member State to implement the recovery decision: generally, 2 months.
 - ⌘ 2nd deadline by which full recovery must have been implemented (principal aid amount + recovery interest): generally, 4 months.



WHEN TO RECOVER?

- ▣ Extension of deadlines: difficulties regarding timely and effective implementation of recovery to be submitted to EC during administrative procedure.
- ▣ The MS should also make a proposal for suitable solutions.
- ▣ If the difficulties are objective and the road map reasonable: **extended deadline in the decision itself**. Faster and easier than an *ex-post* extension.



WHO HAS THE RESPONSABILITY TO RECOVER?

▣ From the EC perspective:

⌘ **the Member State.** A EC decision addressed to a MS is binding on all the organs of that State, including its courts. (*Eesti Pagar*, C-349/17)

▣ From national perspective:

⌘ according to the national legislation:

☞ the grantor

☞ a national coordinating body on recovery

☞ Ministry of Finance etc.



HOW TO RECOVER?

- ▣ The MS is free to choose the national procedure to implement a recovery decision, provided that it allows for the immediate and effective execution of the recovery decision.

(Commission v Germany ('Biria Gruppe'), C-527/12)



HOW TO RECOVER?

- ▣ The MS may consider provisional recovery (e.g. using an escrow account agreement) insofar it is adequate to ensure the full, albeit provisional, removal of the distortion of competition brought about by the incompatible aid.

The advantage linked to the unlawful (and incompatible) aid has to leave the beneficiary.



HOW TO RECOVER?

- ▣ **Deferrals or payments in instalments** beyond the recovery deadline **cannot be allowed** even if they would maximise the return of the MS.
- ▣ In exceptional cases, the MS could recover aid by means other than a cash payment, such as **recovery in kind** or **offsetting of State aid claims** against the existing credits held by the aid beneficiary against the MS concerned.



Insolvency proceedings

Recovery from an insolvent beneficiary

- ▣ MS has to register the claim relating to the aid to be recovered (including interest) in the schedule of liabilities within the recovery deadline, provided that this is followed by (i) recovery of the full recovery amount, or, if that can not be achieved, (ii) the winding-up of the undertaking and the definitive cessation of its activities.
- ▣ Where a plan providing for the restructuring or temporary continuation of some or all of the activities of insolvent undertaking (aid beneficiary) is proposed to the creditors' committee, the authorities of the MS can support that plan only if it ensures recovery of the full recovery amount within the recovery deadline.



Insolvency proceedings

- ▣ A MS cannot waive part of its recovery claim if the aid beneficiary continues its activity after the recovery deadline
- ▣ All the organs of the MS, including its courts, **must leave unapplied all provisions** under the national insolvency proceedings or the national rules governing voluntary liquidation which, by keeping the aid to be recovered at the disposal of the beneficiary, do not ensure immediate and effective execution of a EC recovery decision.
- ▣ The Commission considers that the MS must challenge any decision adopted by its national courts in breach of EU law.



FROM WHOM TO RECOVER?

- ▣ From the undertaking (activity) who received the advantage.

If the aid beneficiary exits the market but a portion or all of the advantage is transferred to a **legal and economic successor**, the recovery obligation should be extended to the latter.



At 5.3.2019, EC issued a recovery decision concerning company A which is owned by Company B, as a 100% shareholder.

At 2.4.2019, A has sold (at a price representing 40% of the market value) the assets forming the core activity to company C, a subsidiary of B.

Prima facie, the MS will must recover the aid from:

- (a) Company A;
- (b) Company B;
- (c) Company C;
- (d) Company A and eventually from Company C.





At 5.3.2019, EC issued a recovery decision concerning company A, which is owned by Company B, as a 100% shareholder.

At 2.4.2019, B has sold 60% of the shares to company C.

***Prima facie*, the MS will must recover the aid from:**

- (a) Company A and eventually from Company C;**
- (b) Company A and eventually from Company B;**
- (c) Company B.**





FROM WHOM TO RECOVER?

Economic continuity (*there is a successor or not?*)

- ▣ Where the assets are sold through an open, transparent, non-discriminatory and non-conditional tender to the highest bidder, the price paid is generally presumed to be the market price.
- ▣ The Commission found economic continuity in cases where there would be no change in the way the business was run, in the scope of the activity or in production.
- ▣ Conversely, in cases where significant changes in the activity or the business strategy were demonstrated, the Commission took the view that there was no economic continuity.



The principle of sincere cooperation

- ▣ The Commission and the Member States (public authorities, national courts) must cooperate in good faith in all phases of State aid proceedings, especially during an investigation pursuant to Article 108(2) TFEU.



The obligation to recover

- Recovery of State aid is not a penalty but rather the logical consequence of the finding that it is unlawful, and it cannot depend on the form in which the aid was granted.

(Belgium v Commission ('Maribel bis/ter scheme'), C-75/97; Commission v Aer Lingus, C-164/15 P and C-165/15 P; Commission v Italy ('Venice and Chioggia II'), C-367/14).



The obligation to recover

- Where adopting a decision finding that aid is incompatible with the internal market ('negative decision'), the Commission has no discretion and **must** order the recovery of the aid unless that would be contrary to a general principle of European Union law (no additional reasons needed).

(Italy v Commission ('Employment Measures I'), C-310/99; Regione autonoma della Sardegna and Others v Commission, T-394/08).



The obligation to recover

- Commission **can** use its discretion and adopt a recovery injunction already during its investigation of the aid measures concerned — i.e. before adopting a final decision on the compatibility of the aid measures with the internal market — provided a series of cumulative criteria are fulfilled.

(Article 13(2) of the Procedural Regulation)



Limits to the obligation to recover

- Commission decisions are presumed to be lawful and **remain binding** in all respects also while proceedings before the Union Courts are pending.
(*Commission v France* ('Lignes maritimes Marseille-Corse'), C-63/14)



The obligation to recover

- Where adopting a decision finding that aid is incompatible with the internal market ('negative decision'), the Commission has no discretion and must order the recovery of the aid **unless that would be contrary to a general principle of European Union law** (no additional reasons needed).

(Italy v Commission ('Employment Measures I'), C-310/99; Regione autonoma della Sardegna and Others v Commission, T-394/08).



Limits to the obligation to recover

- The general principles of European Union law most frequently invoked by MS in the context of the implementation of the recovery obligation are **subject to a restrictive interpretation.**

(*Regione autonoma della Sardegna and Others v Commission*, T-394/08, T-408/08, T-453/08 and T-454/08)



Limits to the obligation to recover

■ The principle of legal certainty

- ▣ Union law prevails and national rules **must be left unapplied or interpreted** in a way that preserves the effectiveness of European Union law. (*Commission v France ('Scott')*, C-232/05)
- ▣ Recovery cannot depend on the consequences under national law of the failure to comply with the standstill obligation. (*DHL Aviation and DHL Hub Leipzig v Commission*, T-452/08)



Limits to the obligation to recover

- The principle of the protection of legitimate expectations

- ▣ In view of the mandatory nature of Article 108(3) TFEU, a Member State whose authorities have granted aid in breach of the standstill obligation may not plead that that infringement creates a legitimate expectation for a beneficiary that the aid would not be recovered.

(Diputación Foral de Vizcaya and Others v Commission, C-465/09)



Limits to the obligation to recover

■ The principle of the protection of legitimate expectations

▣ In case of breach of the standstill obligation, the aid beneficiary cannot claim to entertain legitimate expectations that the grant of the aid was lawful, unless exceptional circumstances apply. (*Deutsche Telekom v Commission*, T-207/10)

The Court of Justice has recognised the existence of legitimate expectations of an aid beneficiary only once, in the case *RSV v Commission*, C-223/85, due to the exceptional situation identified.










Limits to the obligation to recover

The principle of the protection of legitimate expectations



According to the Union Courts, the following situations do not create legitimate expectations:

-  the silence of the Commission on an aid measure notified to it;
-  any apparent failure of the Commission to react to an aid measure which was not notified;
-  the adoption of a decision opening a formal investigation pursuant to Article 6 of the Procedural Regulation, in which the Commission merely carries out a provisional assessment of the aid measures at issue, since an aid beneficiary cannot base legitimate expectations on a provisional decision;
-  absence of action by the Commission for a relatively long period;
-  an earlier decision from the Commission;
-  the adoption of several successive Commission decisions authorising the grant of aid, subsequently annulled by the Union Courts;
-  a proposal for a decision from the Commission submitted to the Council.



Limits to the obligation to recover

■ The principle of *res judicata*

- ▣ The principle of *res judicata* cannot be used to justify an infringement of European Union law and to preclude the recovery of State aid. (*Lucchini*, C-119/05)
- ▣ EU State aid rules prevail over conflicting national laws, which **must be left unapplied**.

This holds true also for national rules and judicial rulings whose effect is that the application of the principle of *res judicata* breaches EU State aid rules.



Limits to the obligation to recover

■ Absolute impossibility to recover

- ▣ The MS's failure to implement the recovery decision can be justified only on the existence of exceptional circumstances which make it absolutely impossible for MS to implement that decision. (*Commission v Greece ('Larco')*, C-481/16)
- ▣ The burden of proof is on the MS to demonstrate the existence of reasons justifying the absence of recovery or only partial recovery of the incompatible aid. (*Commission v France ('Lignes maritimes Marseille-Corse')*, C-63/14)



Limits to the obligation to recover

■ Absolute impossibility to recover

- ▣ the existence of absolute impossibility can not be based on requirements of national law, such as national limitation periods, the absence of a right under national law to impose recovery, a legal vacuum or provisions, practices or situations prevailing in its domestic legal order, including concerns of social unrest. (*Land Rheinland-Pfalz v Alcan Deutschland*, C-24/95; *Italy v Commission ('Lanerossi')*, C-303/88; *Commission v Greece ('Ellinikos Xrysos')*, C-263/12; *Commission v France ('Lignes maritimes Marseille-Corse')*, C-63/14)



Limits to the obligation to recover

■ Absolute impossibility to recover

- ▣ Possible losses for a MS in its capacity as a shareholder or creditor do not justify its failure to fulfil the recovery obligation because the aim of recovery is not to maximise the MS's return but to restore the situation that existed in the internal market before the aid was granted.



Limits to the obligation to recover

■ Absolute impossibility to recover

- ▣ The fact that an undertaking is in financial difficulties or even insolvent does not constitute proof that recovery is impossible, unless it has been liquidated and no assets are recoverable. (*Commission v Belgium*, C-52/84; *Commission v Spain*, C-499/99)
- ▣ **The aid is impossible to recover where the beneficiary has already ceased to exist, without any legal and economic successor.**



Limits to the obligation to recover

■ Absolute impossibility to recover

- ▣ While the absolute impossibility to recover is typically an issue which arises during the execution of a recovery decision, the absolute impossibility to recover may already be established during the Commission's formal investigation pursuant to Article 6 of the Procedural Regulation.

(*Scuola Elementare Maria Montessori v Commission*, C 622/16 P to C-624/16 P)



Limits to the obligation to recover

■ Absolute impossibility to recover

- ▣ To attain that result (recovery), MS may have to **adopt new legal acts**, including legislation, or to **set aside provisions of national law** which do not allow for a swift removal of the difficulties encountered.



Limits to the obligation to recover

■ interim measures granted by national courts

Interim relief, against the national measures adopted to implement the recovery decision because of an alleged illegality of that decision, can be granted by a national court only if the following cumulative conditions are met:

(Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn, C-143/88 and C-92/89; Atlanta Fruchthandelsgesellschaft and Others (I) v Bundesamt für Ernährung und Forstwirtschaft, C-465/93)



Limits to the obligation to recover

■ interim measures granted by national courts

- (i) that court entertains serious doubts as to the validity of the EU act and, if the validity of the contested act is not already in issue before the Court of Justice, the national court itself refers the question to the Court of Justice;
- (ii) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief;
- (iii) the national court takes due account of the interest of the EU; and
- (iv) in its assessment of all those conditions, it respects any decisions of the Court of Justice or the General Court ruling on the lawfulness of the EU act or on an application for interim measures seeking similar interim relief at European level.



The recovery decision is deemed to be fulfilled when:

- (a) aid has been reimbursed at a minimum of 80%;**
- (b) the unlawful aid has been fully repaid;**
- (c) the unlawful aid has been reimbursed in full, including interest, or if that can not be achieved, the company is liquidated under market conditions.**





Limits to the obligation to recover

■ Limitation period

- ▣ The powers of the EC to order the recovery of aid are subject to a limitation period of 10 years (the ‘limitation period’). (Article 17(1) of the Procedural Regulation)
- ▣ The limitation period begins on the day on which the unlawful aid is awarded to the beneficiary. (*BSCA v Commission*, T-818/14)



Limits to the obligation to recover

■ Limitation period

- ▣ The limitation period can be interrupted by any action undertaken by the EC or by the MS at the EC's request. (*ANGED*, C-233/16)
- ▣ If a decision of the Commission is subject to proceedings before the Union Courts, the limitation period remains suspended until the end of the proceedings.



Limits to the obligation to recover

■ Limitation period

- ▣ National prescription rules cannot justify a failure to fulfil the recovery obligation and **must be left unapplied**, if need be. (*Land Rheinland-Pfalz v Alcan Deutschland*, C-24/95)



FAILURE TO IMPLEMENT A EC RECOVERY DECISION



■ CONSEQUENCES:

- ▣ infringement proceedings (referring the matter to the Court of Justice)
- ▣ *DEGGENDORF* condition: no new aid granted (for that undertaking) if the previous unlawful aid was not paid back.
(*Textilwerke Deggendorf GmbH TWD v Commission*, C-355 95/ P)



HOW TO RECOVER FASTER?

Ad hoc legislation:

-  helps speeding-up the aid recovery procedure.
-  contributes to provide better legal certainty for all relevant stakeholders, including but not limited to the enforcers.



HOW TO RECOVER FASTER?

- ▣ Establishment of **specialised courts** or a chamber of a court.
- ▣ Establishment of fast-track specialised administrative procedures.
- ▣ Innovative use of national procedural rules in order to accelerate recovery.



HOW TO RECOVER FASTER?

- Effective solution where beneficiary refuses to pay and has no physical assets in the Member State: to seize moveable assets when present in the Member State

In Octobre 2018, France seized a \$98 million Ryanair plane in Bordeaux airport for ~ €0.5 million unlawful aid + interest (2014 EC recovery decision). Just under 24 hours later, the airline relented and paid up.



HOW TO RECOVER FASTER?

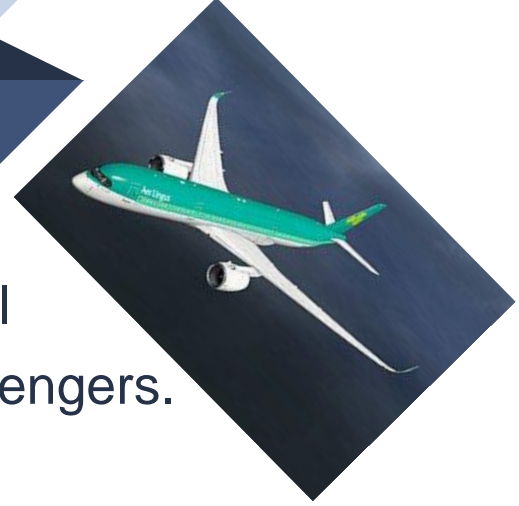
- ▣ Establish, in the Member State, a **directly enforceable** status for the recovery decision issued by the EC, i.e. it will serve as an ‘execution title’ to initiate standard enforcement proceedings, like in the enforcement proceedings initiated on the basis of any other ‘execution title’, e.g. a judgment of a civil court.

4

The recovery of STATE AID

JURISPRUDENCE

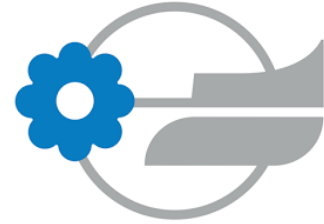
T-473/12 and C-164/15 – *Aer Lingus/Commission*



- ✧ Ryanair and Aer Lingus were subject to a lower air travel tax which had been (in most cases) passed on to the passengers.
- ✧ Commission: reduction of tax constituted SA for airlines
- ✧ General Court: it had to be examined whether advantage has been passed on to passengers, i.e. not necessarily recovery from airline.
- ✧ Court of Justice: General Court was wrong.
- ✧ Recovery of aid entails restitution of the advantage, not of the economic benefit that may have been achieved by its exploitation. (the aid to be recovered from the beneficiaries is in an amount which is set at €8 per passenger)

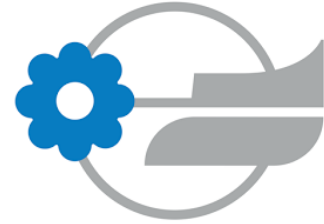


C 403/10 P Mediaset



MEDIASET

- Italy grants subsidies to each purchaser of a digital terrestrial decoders.
- ⌘ The measure at issue was not technologically neutral, since it did not apply to digital satellite decoders.
- ⌘ Advantage for digital terrestrial broadcasters = indirect beneficiaries (audience built up/higher market penetration).
- ⌘ Disadvantage for the competitors (new commers and satellite broadcasters).



- ⌘ Each terrestrial broadcaster gains economic advantage (which they have to share with competitors).
- ⌘ The removal of unlawful State aid by means of recovery is the logical consequence of a finding that that aid is unlawful. The aim of obliging the Member State concerned to abolish aid found by the Commission to be incompatible with the common market is to restore the previous situation, causing the recipient to forfeit the advantage which it had enjoyed over its competitors.



Coopérative d'exportation du livre français (CELF)



- ⌘ CELF - beneficiary of €4.63 million subsidies (1980 – 2001).
- ⌘ Main objective of the aid: *aid for culture*.
- ⌘ Secondary objective: *subsidies to offset the cost of processing French book orders by bookstores established abroad*.
- ⌘ 1992 complaint to EC of the SIDE (competitor).
- ⌘ 3 positive EC decisions (1993, 1998, 2004) – compatible aid.
- ⌘ decisions annulled by the EU Court (1995, 2002, 2008).
- ⌘ 2010 - final EC decision – incompatible state aid.



Coopérative d'exportation du livre français (CELF)



1st phase

- ⌘ EC authorized the aid (NN 127/92) in view of its cultural objective and the special competition existing in the book order processing sector.
- ⌘ EU Court annulled the 1993 EC decision (T-49/93): *The EC had to undertake an in-depth investigation into the competitive conditions in the sector concerned and to assess any discrimination against exporters of French-language books.*



Coopérative d'exportation du livre français (CELF)



2nd phase

- ⌘ EC reauthorized the aid (1999/133/CE). The aid was considered proportionate and no discriminatory, the objective being to offset the extra costs generated by processing the order below FRF 500.
- ⌘ EU Court annulled the 1998 EC decision (T 155/98): *Apparent error in defining the relevant market: export agency vs. book distribution; The EC had to reassess CELF's market share.*



Coopérative d'exportation du livre français (CELF)



3rd phase

- ⌘ EC reauthorized the aid (2005/262/CE) under art. 87(3) of the EC Treaty (now 107(3) TFEU) - aid to promote culture. The aid was considered proportionate to offset the cost of processing small orders.
- ⌘ EU Court annulled the 2004 EC decision (T-348/04): *the EC had, first, erred in law by applying Article 87(3)(d) EC to the period before 1 November 1993 instead of applying the substantive rules in force during the period in question and, secondly, committed a manifest error of assessment in its examination of the compatibility of the disputed aid.*



Coopérative d'exportation du livre français (CELF)



4rd phase

- On 8 April 2009, the Commission adopted a decision extending the formal examination procedure begun in 1996.
- On 14 December 2010, EC issued a recovery decision (C 39/1996 (ex NN 127/92)): *This aid is incompatible with the internal market and must be recovered by the French authorities, except for the sums paid in 1980 and 1981 for which there is a prescription.*

The French authorities must recover the unlawful aid from CELF. The sums to be recovered produce interest from the date on which they were made available to the beneficiary until 25 February 2009, the date of the judgment of the Commercial Court of Paris to initiate the safeguard procedure.



Coopérative d'exportation du livre français (CELF)



Procedures initiated in front of the national authorities (I)

- ⌘ SIDE requested the Ministry of Culture and Communication to stop granting the aid granted to CELF and to recover the aid already granted. The Ministry issued a rejection decision.
- ⌘ SIDE challenged the rejection decision at the Administrative Court in Paris.
- ⌘ In 2001, the Administrative Court annulled the Ministry's decision.



Coopérative d'exportation du livre français (CELF)



Procedures initiated in front of the national authorities (II)

- ⌘ The Court of Appeal maintained the decision of the Administrative Court.
- ⌘ Court of Appeal ordered the French State to recover the sums paid to CELF for the processing of small book orders of the bookstores established abroad, within 3 months of the date of notification of the judgment, subject to a penalty payment of €1,000 a day if delay.
- ⌘ The Council of State has been seized with an appeal by the beneficiary and grantor for the annulment of the 2 judgments.



Coopérative d'exportation du livre français (CELF)



Procedures initiated in front of the national authorities (III)

Case C-199/06 (CELF 1)

Due to the long duration of the aid granted, its declaration as compatible by the EC and the successive annulment of the EC's decisions, the implementation of recovery measures has led to the national court asking the ECJ for preliminary questions.



Coopérative d'exportation du livre français (CELF)



Procedures initiated in front of the national authorities (IV)

Case C-199/06 (CELF 1)

- ⌘ The ECJ ruled on essential issues in relation to the obligation to recover / reimbursement of unlawful and incompatible aid:
 - ⌘ *the national court is not required to order the recovery of unlawful State aid declared compatible by the competent authority;*
 - ⌘ *the national court is, however, obliged to order recovery of the interest relating to unlawful aid during the period of unlawfulness;*



Coopérative d'exportation du livre français (CELF)



Procedures initiated in front of the national authorities (V)

Case C-199/06 (CELF 1)

- if the court orders the recovery of the unlawful aid, it does not prevent the grantor from subsequently enforcing it;
- the national court may admit claims for compensation for the damage caused by the unlawfulness of the aid;
- the amount of the aid to be recovered relates not only to the period before the compatibility of the aid was declared by the authority's decision but also to the period between the adoption of that decision and its annulment by the competent court.



Coopérative d'exportation du livre français (CELF)



Procedures initiated in front of the national authorities (VI)

Case C-1/09 (CELF 2)

🔗 *when ruling on the application, the national court may order either the repayment of the aid with interest or 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.*




Coopérative d'exportation du livre français (CELF)



Procedures initiated in front of the national authorities (VII)

Case C-1/09 (CELF 2)

 *a national court before which an application has been brought, on the basis of Article 88(3) EC (108(3) TFUE), 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.*



Coopérative d'exportation du livre français (CELF)



Procedures initiated in front of the national authorities (VIII)

Case C-1/09 (CELF 2)

🔗 *The adoption by the Commission of three successive decisions declaring aid to be compatible with the common market, which were subsequently annulled by the Community judicature, is not, in itself, capable of constituting an exceptional circumstance such as to justify a limitation of the recipient's obligation to repay that aid, in the case where that aid was implemented contrary to Article 88(3) EC (108(3) TFUE).*



Coopérative d'exportation du livre français (CELF)



Procedures initiated in front of the national authorities (IX)

- ⌘ The State Council adopted a final decision to recover all State aid paid in the period from 1982 to 2001 and the related interest.

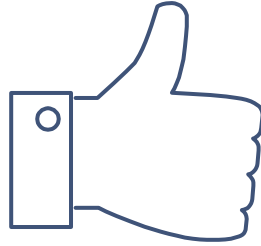


Coopérative d'exportation du livre français (CELF)



Epilogue

- ⌘ Recovery of unlawful State aid has restored the market conditions prior to the moment of granting them.
- ⌘ Since the amount of the aid and the related interest exceeded the assets of the debtor company, the company went bankrupt and thus exits the market.



**THANK YOU
FOR YOUR ATTENTION!**