

# State aid

## Notion of aid, administrative procedure, national courts

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**SheppardMullin**  
Unpacking Complexity  
Unfolding Opportunity





# Outline

## **I. Introduction**

1. Rationale of State aid control and historical background
2. Sources and general mechanism

## **II. Notion of aid**

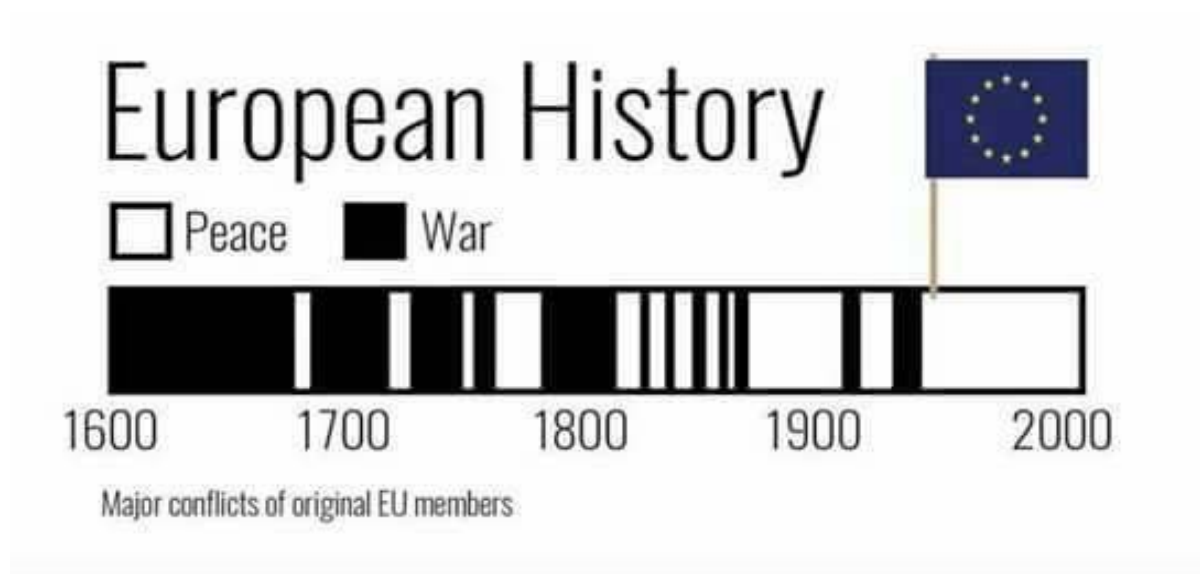
1. Advantage (see other session)
2. Selective (see other session)
3. Transfer of State resources / Imputability
4. Distortion of competition / Effect on trade

## **III. State aid procedure**

1. Commission administrative procedure
2. Judicial review – role of national courts



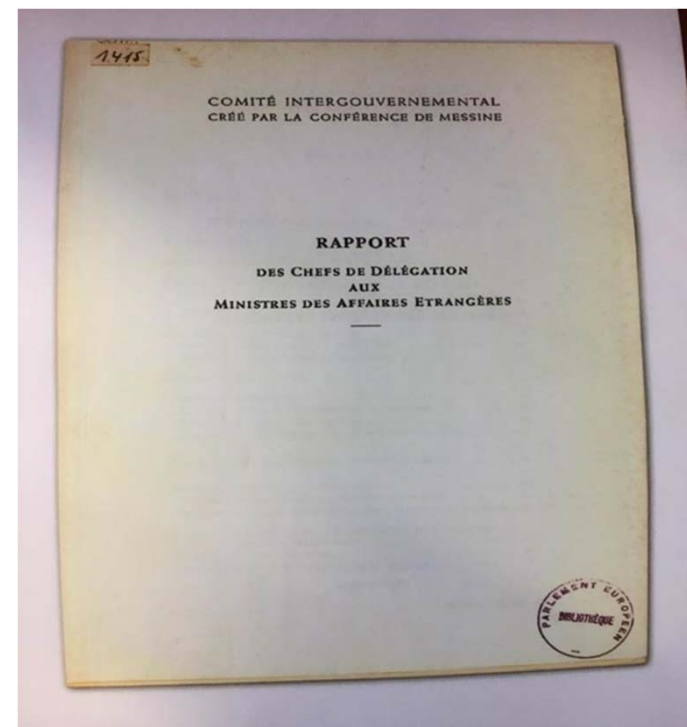
# The origins ...





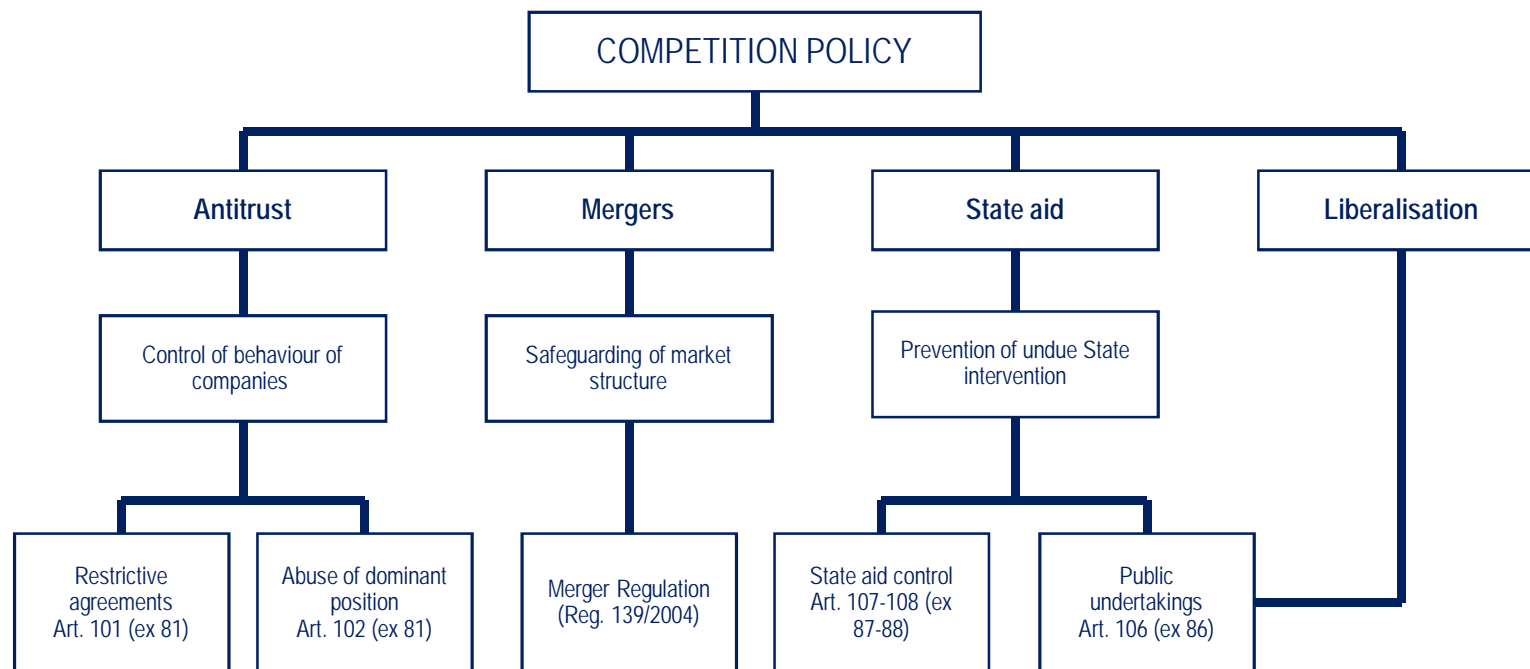
# State "interventionism"

- State economic operator – State regulator
- European integration
  - 1955 *Messina* – 1956 *IG Conference*
  - 1956 *Spaak Report* ([http://aei.pitt.edu/996/1/Spaak\\_report\\_french.pdf](http://aei.pitt.edu/996/1/Spaak_report_french.pdf))
    - Completion of the common market
    - Two types of competition distortions
      - Artificial advantages granted by Member States
      - Discrepancies of national legislation and regulations
    - Prevent the Member States to engage in
      - Subsidies race
      - Export aid
      - Protectionism
- Compare with other regions (U.S., Federal States)
- But increasing “export” of State aid control
  - EFTA, EEA, FTA, European Agreements, Association Agreements, Comprehensive Economic and Trade Agreements, Deep and Comprehensive Free Trade Agreements
  - Brexit issues





# State aid and EU competition policy







## State aid and EU competition policy (2)

- State aid is about competition between Member States and competition between undertakings
- State aid control is part of competition policy
- Some reasons for State aid control:
  - EU market integration
  - internal market, level playing field
  - liberalisation
  - competitive European industry
  - subsidy race
  - cohesion





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# Sources

- Article 107(1) TFEU: notion of aid – principle of prohibition
- Article 107(2) TFEU: automatic compatibility
- Article 107(3) TFEU: compatible aid under Commission's margin of discretion
  - Frameworks and Guidelines
- General Block Exemption Regulation (GBER)
- *De minimis* Regulation
- Article 108 TFEU: procedure
- Article 109 TFEU: legislation
- Article 106(2) TFEU: Services of General Economic Interest (SGEI)
- Article 93 TFEU: transport
- Procedural Regulation (Council Regulation (EU) 2015/1589)
- EU case law





## Article 107 TFEU: a two-step approach

- Article 107(1) TFEU: notion of State aid and general **prohibition**

*“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, insofar as it affects trade between Member States, be incompatible with the common market”.*

- Articles 107(2) and 107(3), 106(2) TFEU: **derogations** (aid "compatible with the internal market")





## Compatible aid under Article 107(2) TFEU

- The following types of aid “**shall be**” compatible: *[no margin of discretion]*
  - 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.





## Compatible aid under Article 107(3) TFEU

- The following types of aid “**may be considered**” to be compatible
  - a) economic development of most disadvantaged regions of Community
  - b) important common European project or serious disturbance in the economy of a Member State
  - c) development of certain economic activities or certain economic areas
  - d) culture and heritage conservation
  - e) other categories as may be specified by a decision of the Council
- Margin of discretion
  - Guidelines and Frameworks; General Block Exemption Regulation (GBER)





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# Criteria for the notion of aid (Article 107(1) TFEU)

- Advantage ("*in any form whatsoever*" - "*favouring*")
- Granted to an "undertaking"
- Selective ("*certain*")
- Transfer of State resources and imputability to the State ("*granted by a Member State or through State resources*")



- (likely to) distort competition
- (likely to) affect trade between Member States

Cf. Commission Notice on the notion of aid (2016)





# Advantage (see other session)

*"favouring certain undertakings or the production of certain goods" (Art. 107 (1))*

- Economic advantage (any type, any form) that the company would not have obtained under **normal market conditions** (measures which, in various forms, mitigate the normal burdens on the budget of an undertaking)
- Aid determination by its effects
- Public actor in different economic situations:
  - *Market Economy Operator Principle* (MEOP): no advantage if State behaves like a "normal" player on market
  - Investor, Creditor, Vendor, Buyer
- Assessment methodologies:
  - Competitive Tender
  - *Pari passu* situation
  - Benchmarking
  - Other assessment methodologies: IRR (Internal Rate of Return), Expert valuation
  - Not relevant:
    - revenues related to State prerogatives (tax revenues, savings on unemployment benefits)
    - positive externalities related to public policy remit (regional development, industrial / employment policy)
    - philanthropic, social considerations





# Undertaking

- *"every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed" (C-41/90, Höfner)*
- **Economic activity**
  - offering goods and services in the market (C-180/98 to C-184/98, Pavlov)
- **Not economic activity**
  - regulatory tasks, supervisory tasks, activities based on solidarity, basic functions of the State (police, customs, air safety, treatment of prisoners ...)
- Focus on nature of activity, not set-up of entity
  - Public undertakings, part of administration, not-for-profit organisation, charitable organisation
  - Whether market exists depends on organisation by authority
    - Differences between Member States
    - Developments over time





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# Selectivity (see other session)

"*favouring certain undertakings or the production of certain goods*" (Article 107(1) TFEU)

- Not selective: **general measures** (apply to all companies in all sectors of a Member State, no discretionary power)
  - rate of corporate tax
- **Material selectivity**
  - **de jure selectivity**: selectivity derives from the "law"; measures reserved to certain undertakings
  - **de facto selectivity**: although formally measure seems general, structure of measure is such that it "*significantly favours a particular group of undertakings*" (C-106/09P Gibraltar)
  - selectivity based on **discretion**
  - **Tax measures – three-step test**:
    - identification of correct **reference system**
    - **derogation**: does measure differentiate between economic operators who, in light of objective of system, are in comparable factual and legal situation
    - **justification** by nature or general scheme of system (includes proportionality assessment)
- **Regional selectivity**
  - *Azores (C-88/03, Portugal v Commission)*: when infra-state body is sufficiently autonomous from Member State, selective character of its decisions must be assessed with respect to factual and legal situation within its territory rather than within the Member State
  - criteria: institutional autonomy, procedural autonomy, financial responsibility





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# State resources

*"granted by a Member State or through State resources, in any form whatsoever" (Article 107 (1))*

- is there a **transfer**
- of **State resources** and [see *Stardust Marine* in 2002]
- is this transfer **imputable to the State**?
  
- Funds under control and at disposal of State
  - includes EU structural funds
- Transferred in any form whatsoever:
  - positive transfer: direct grants, loans, capital participation
  - foregone revenues: tax waivers or deferrals, sale of assets below market price (e.g. land sale, privatisations), omission to collect or enforce debt
  - exposure of State funds: guarantees



# State resources – Source of the funds

- Money must have been in the State pocket or otherwise controlled by the State
- If money controlled by State, source is irrelevant



- If money paid directly from citizen to undertaking without ever being controlled by State, no State resources (even if e.g. amount set by State): *Preussen Elektra* (C-379/98)





# State resources – Source of the funds (2)

- State control not limited to direct control over money
  - Example: parafiscal levies/charges
- Compulsory levy from group of specific producers/service providers to finance activities of same group
  - can be State resources if sufficient degree of State control
  - often complex question in practice







# State resources - Imputability

- What is "the State"?
  - central, regional or local authorities
  - other public or private bodies designated or established by the State
- What if there are 3 players: State – intermediate body – beneficiary?
  - If intermediate body is publicly owned company, question of who is really taking decision
  - Principle of neutrality of public and private ownership: cannot just equate publicly owned company with State
- Depends on whether decision is imputable to the State
  - *C-482/99 Stardust Marine*, 50-58
- Not imputable if mandatory under EU law
  - *T-351/02 Deutsche Bahn*, 99-104
  - *C-272/12 P Ireland a.o. v Commission* (exemption from excise duty on mineral oils)





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# Distortion of competition & effect on trade

- Two distinct elements, but often treated jointly in the assessment of State aid as they are, as a rule, considered inextricably linked.
- Conditions easily met – legal presumption in some cases
  - Even if the recipient is not directly involved in cross-border trade
  - Even if the recipient exports all or most of its production outside the Union
  - Fulfilled if product or service subject to trade between Member States
- No need to define the market or to investigate in detail the impact of the measure

Cf. Derenne and Verouden, *Distortion of Competition and Effect on Trade Between Member States*, in: *EU State Aid Control: Law and Economics*, Chapter 5, Wolters Kluwer, 2017 (Ph. Werner, V. Verouden (eds.))





# Distortion of competition & effect on trade

- Likely to distort competition
  - Conditions of application, not jurisdictional criteria as in Articles 101-102 TFEU; closely linked with the effect on trade between Member States
  - Easily satisfied: if market open to competition
    - *C-730/79 Philip Morris, § 11*
- Effect on trade between Member States
  - Also if recipient undertaking does not itself participate in cross-border activities
  - No threshold or percentage below which trade is not affected (but see *de minimis* Regulation)
  - No effect on trade only for very local activities
  - Aid for activities in third countries
    - *C-494/06 P Commission v Italy and Wam*
    - *T-303/10 Wam v Commission*
    - *C-560/12 P Wam v Commission*





# Distortion of competition & effect on trade

*“(...) it is not impossible that a public subsidy granted to an undertaking which provides only local or regional transport services and does not provide any transport services outside its State of origin may none the less have an effect on trade between Member States (...)”*

*“(...) there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected (...)”*

- C-280/00 Altmark

*“(...) since it is not inconceivable (...) that medical practitioners specialising in dentistry, such as Mr. Heiser, might be in competition with their colleagues established in another Member State, [(...) an effect on trade (...)] must be considered to be fulfilled”*

- C-172/03 Heiser





# Distortion of competition

- Broad concept
  - A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of a firm in competition with other firms.
  - Generally found to exist when the State grants a financial advantage to a company which is active in a liberalised sector where there is, or could be, competition.
  - Wide interpretation of “distortion of competition” reflects the idea that State aid, unlike (most) agreements between firms and concentrations, can be presumed distortive because it is an *external* intervention in the normal operation of the markets.
  - Authors of the Spaak report believed it to be essential that the playing field for firms was not distorted by “artificial advantages” enjoyed by competitors
- Economists may argue that (but there is no “net aid” concept)
  - subsidies that correct a market failure do not bring about a distortion but rather correct a distortion (example: measures to counter pollution). An external intervention in a market may not at all be bad for market efficiency, on the contrary (but assessment better left to compatibility stage?)
  - small subsidies unlikely to make much of a difference for competition (but can one see these subsidies in isolation?)





# Effect on trade

- As with the distortion of competition element, the effect on trade element in Article 107(1) has typically been applied in a rather broad manner.
- It is not necessary to establish that the aid has an *actual* effect on trade between Member States but only whether the aid is *liable* to affect such trade.
- Where State aid strengthens the position of a company as compared with other companies active in intra-Union trade, the latter is typically regarded as being affected by the aid





## Commission's change in emphasis (2015-2016)

- Over the years, the Commission has tried to put limits to the scope of the “effect on trade” requirement.
- In a limited number of cases it has considered that, due to their specific circumstances, certain activities had a purely local impact and consequently had no effect on trade between Member States, e.g.:
  - the beneficiary supplied goods or services to a limited area within a Member State and was unlikely to attract customers from other Member States; and
  - it could be foreseen that the measure would have not more than a “marginal effect” on the conditions of cross-border investments or establishment
- See cases in April 2015
- Principles incorporated in Notion of Aid Communication (2016)



## Case illustration: *Lauwersoog port (2015)*

- Investment aid given by the province of Groningen to the port of Lauwersoog
- Aid covered 80% of the investment cost of about EUR 4.2 million.
- Commission focused on services offered by the port of Lauwersoog and came to the conclusion that competition on this market had a purely local character
  - fishing harbour typically used by vessels fishing for shrimps and that these vessels tend to rely mostly on Lauwersoog port
  - share of foreign vessels using the harbour was less than 5%
  - project did not lead to a significant capacity expansion
- Approach defensible, but some potential question marks:
  - What about possible impact on the (downstream) market for shrimps?
  - Equilibrium effect vs. stand-alone case





# Market definition vs. duty to motivate

- Judgment *Philip Morris* of 1980: no need to define the “relevant market” when it comes to establishing the existence of a distortion of competition and an effect on trade.
- Still, there is a minimum standard of reasoning the Commission must apply
- A separate question: how one should define markets in the field of State aid control if one had to?
  - Cf. Commission Notice of 1997 on the definition of the relevant market. Central concept: SSNIP, but focus is on cases where the underlying concern is *market power*. Less relevant for State aid cases (market power not a frequent concern)





## Market definition vs. duty to motivate (2)

- State aid cases often relate in the first instance to the *effect of aid on competitors* and, ultimately, on the *productive and dynamic efficiency of markets* and the *location of economic activity*
  - a more “supply side” oriented concern
- See re motivation
  - *C-494/06 P Commission v Italy and Wam*
  - *T-303/10 Wam v Commission*
  - *C-560/12 P Wam v Commission*





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# Core concepts / Definitions

(see Regulation 2015/1589)

- **new aid vs. existing aid**
  - pre-accession/pre-Treaty
  - approved by Commission
  - "Lorenz procedure"
  - limitation period (10 years)
  - has become aid due to evolution of common market
- **aid scheme / individual aid**
- **notified aid** (or exempted aid) vs. **unlawful aid** (= illegal = aid not notified despite obligation to do so)
- **Completely different distinction (!): compatible vs. incompatible aid**





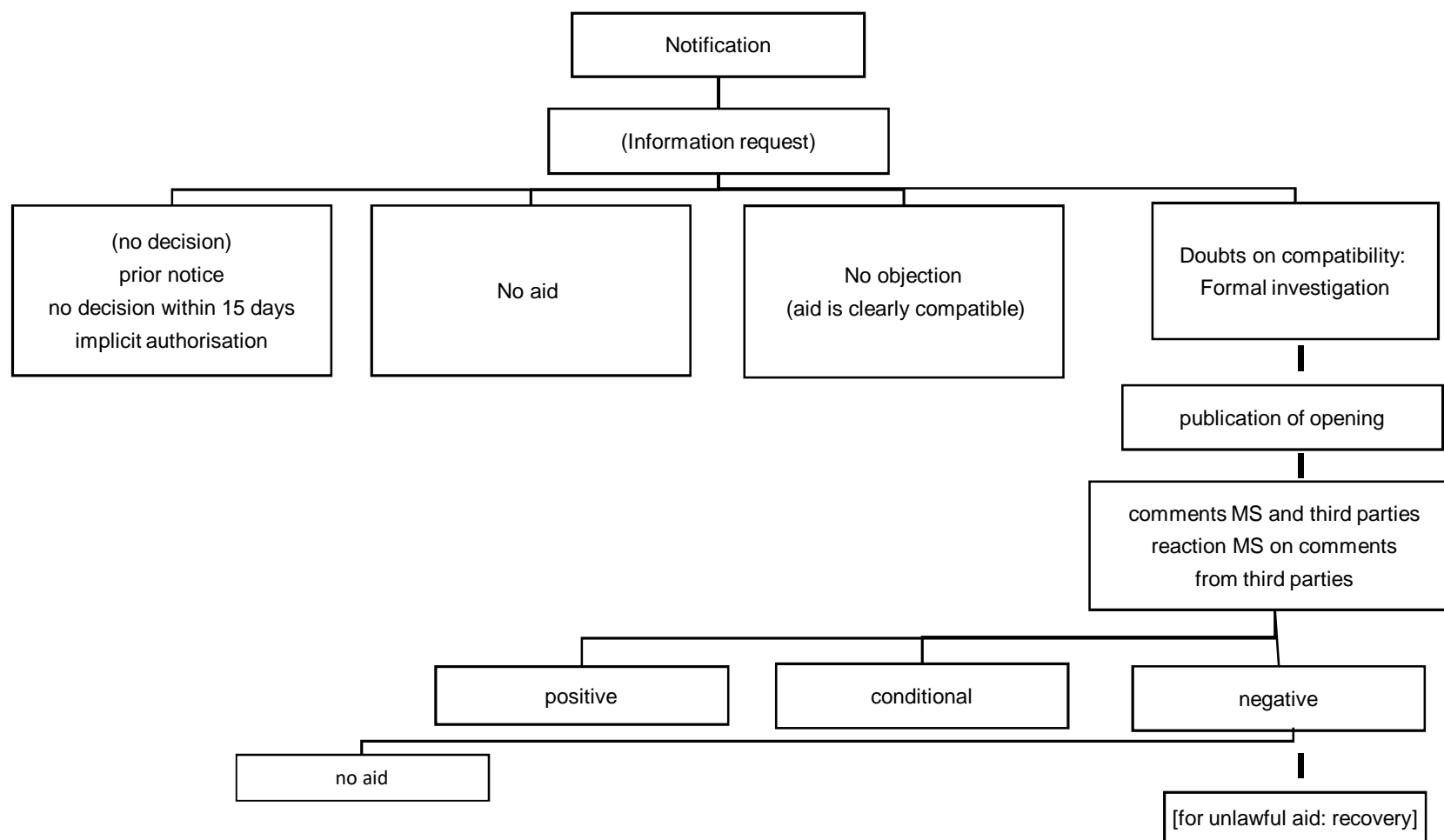
# Procedure: Notified aid

## Notification and standstill obligation (Article 108(3))

- Pre-notification contacts
- Formal notification
- Phase 1: "preliminary examination" by Commission
  - time limit: 2 months after complete notification
  - if not complete, information request
  - if no answer after reminder, deemed withdrawn
  - "Lorenz procedure"
- Possible Phase 2: "formal investigation procedure"



# Procedure: Notified aid







# Procedure: Unlawful aid

- similar procedure as for notified aid, but:
- Art. 12(1): start of the procedure  
complaint or *ex officio*
- Art. 15(2): no time limits
- use of injunctions
  - Art. 12(3): information injunction
  - Art. 13(1): suspension injunction
  - Art. 13(2): recovery injunction
- negative decision can lead to recovery (if aid was granted prior the decision)





# Complaint vs. Market information

- **Complaint:** only by persons with legal standing (most important: competitors) + compulsory form (Art. 24 (2))
- Certain procedural rights
- Can (first) be rejected by "Preliminary assessment letter"
- If complainant insists: formal decision
  
- **Market information:** e.g. from ordinary citizen, political party, ...
- No procedural rights; "Market information letter"
- Commission can decide whether it wants to investigate on *ex officio* basis





## Procedure: Existing aid

- Definition: Article 1(b) Procedural Regulation
- Most common: aid granted before accession
- New Member States: existing aid lists
- Procedure applies to existing aid schemes, not individual aid measures
- Core principle: **only changes for the future**
- Existing individual aid cannot be called into question
- Commission has discretion whether to take action; no complaints as regards existing aid

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## Procedure: Existing aid

- Letter explaining preliminary view: Art. 21(2)
- Proposal for appropriate measures: Art. 22
  - Member State accepts proposal: proposed measure must be implemented
  - Member State refuses proposal:
- Commission must open the formal investigation procedure
- Final decision: appropriate measures become binding





# Additional procedural tools

- **Market Information Tools (MIT)**

- Commission can address questions to third parties
- only during formal investigation
- only if procedure so far "ineffective"
- possibility of fines for providing incorrect information / failing to answer

- **Sector Inquiries (SI)**

- investigation of particular issue (aid instrument, sector) in several Member States
- So far one Sector Inquiry: Capacity Mechanisms (Energy), 2015-2016
- launched by Commission decision
- request for information as for MIT
- interim and final reports





# Amicus curiae

- Request by national court for a (non-binding) opinion and information from the Commission
- Submission by the Commission of written observations on its own initiative
- Oral observations by the Commission once duly authorised by the national courts
- Request by Commission of file / information with a view to examining the legal issue





# Recovery (brief summary)

- Purpose: to re-establish situation that existed on market prior to granting of the aid (*not a penalty!*)
- Amount: aid plus compound interest
- Process: subject to national law, but must be immediate and effective
  - Primacy of EU law (*Scott* case law for instance)
- Failure to recover: infringement action to CJEU
- "*Deggendorf*" principle (T-244/93 and T-486/93)
- Beneficiary identification (in case of sale)
  - *Seleco* type issues
  - Economic continuity decisional practice and case law
    - purpose/scope of the transfer
    - transfer price
    - identity of the shareholders or owners of the acquiring undertaking and of the original undertaking
    - moment at which the transfer was carried out
    - economic logic of the transaction





## Outstanding recovery issues (see national courts below)

- Excessive length of the national recovery procedures
- Weakness of the national procedural framework
  - Not adapted for recovery
  - Specific issue of insolvency procedures
    - Conflict of interest Member State v Commission
    - Registration of recovery claims by the State (in time), request priority to be given to the recovery claim, whatever type of claim, participation in definition of the restructuring plan?
    - Challenge decision to restructure if no total recovery within deadline
    - Preference for liquidation unless restructuring plan for total recovery
    - Control market price of sales in case risk of circumvention of recovery when assets are sold
    - legal basis for recovery - for damages
- Lack of enforcement of negative Commission decisions
  - Member States refrain from pursuing beneficiary
  - Competitors do not take action if no direct compensation
  - National courts are not always aware of their competence





## Compatibility assessment - "Common principles"

- Compatibility assessment essentially about striking a (good) balance between
  - Benefits of State aid (objective/effectiveness)
  - Costs of State aid (distortions)
- Necessary to bear in mind: enforcement and compliance costs
  - Architecture of State aid rules: block exemptions vs. more substantive analysis of individual cases (rules based)

Two rationales for State intervention usually distinguished in economics:

- Efficiency rationales (correcting market failures)
  - Equity rationales (redistribution/cohesion)
- 
- In order to be compatible, State aid must satisfy the following criteria:
    1. Contribution to a well-defined objective of common interest
    2. Need for state intervention
    3. Appropriateness of the aid measure
    4. Incentive effect
    5. Proportionality of the aid
    6. Avoidance of undue negative effects
    7. Transparency of aid

(+ if applicable: ex post evaluation for certain larger aid schemes)





# State aid modernisation (SAM)

- Reform programme 2012-2014
- Builds on State Aid Action Plan (2005)
- Main aims:
  - Support growth-enhancing objectives
    - Identification and definition of key assessment criteria ("Common Principles") for market failure, incentive effect, aid to the minimum, appropriateness, distortions, ...
  - Better prioritisation of cases
  - More streamlined procedures





# Prioritisation and streamlining

- GBER: broadening and simplification
  - Less stringent ex ante requirements, but greater reliance on monitoring and, for larger schemes (annual budget > EUR 150 million), ex-post evaluation
- Notified cases/schemes: improved scrutiny
  - Ex ante assessment of the need for aid (rationale of aid, incentive effect, proportionality) and distortions of competition and trade
  - Ex post evaluation (for certain schemes)



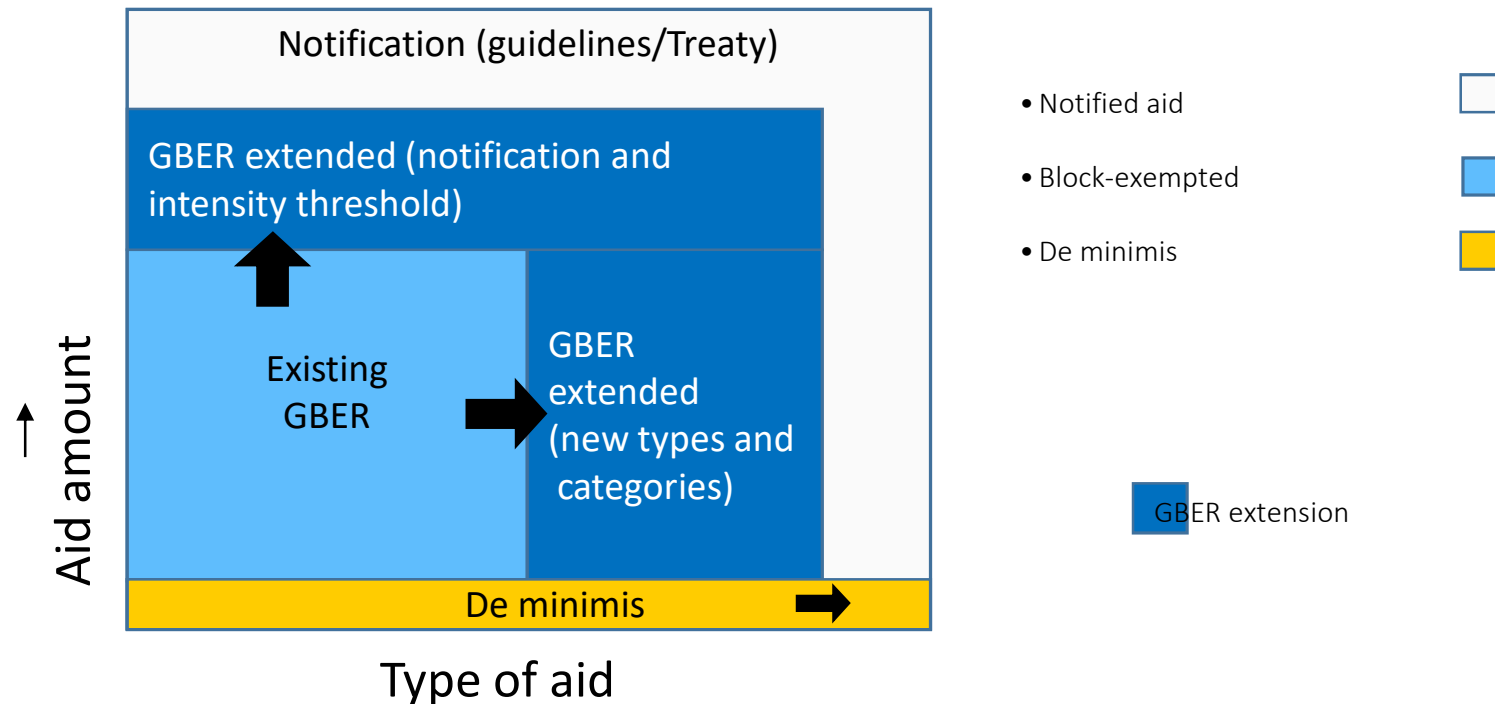


# General Block Exemption Regulation (GBER)

- Standard measures considered not very harmful - deemed to be compatible
- Do not need to be notified to the Commission ("exempted")
- Areas: regional aid; SMEs; access to finance for SMEs; research and development and innovation; training; aid disadvantaged workers and workers with disabilities; environmental protection; natural disasters; transport for residents in remote regions; broadband infrastructure; culture and heritage conservation; sport and multifunctional recreational infrastructures; local infrastructures
- Common conditions (chapter I) + specific conditions
- Towards a certain maturity? [**in 2018, less than 10% still notified**]
  - From ex ante to ex post control
  - from < 50% of measures (32% spending) under GBER pre-2014
  - to 80% of measures (32% of spending) in 2016!
  - notifications : 578 (2013), 332 (2014), 192 (2015)...

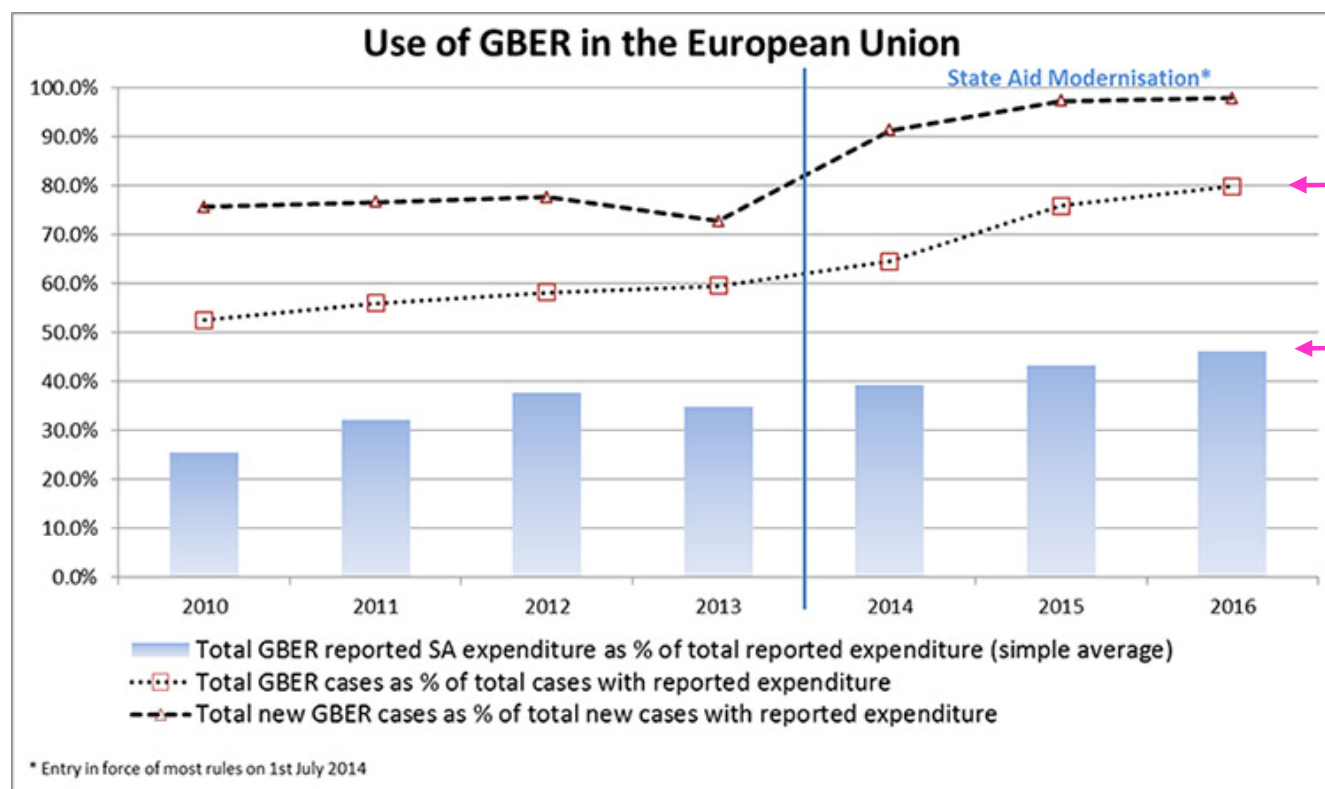


# State aid modernisation and the GBER





# Block exempted aid vs. notified cases/schemes



80 % of cases covered by GBER

Spending covered by GBER. Numerical average per MS: 46%, overall weighted average: 32%

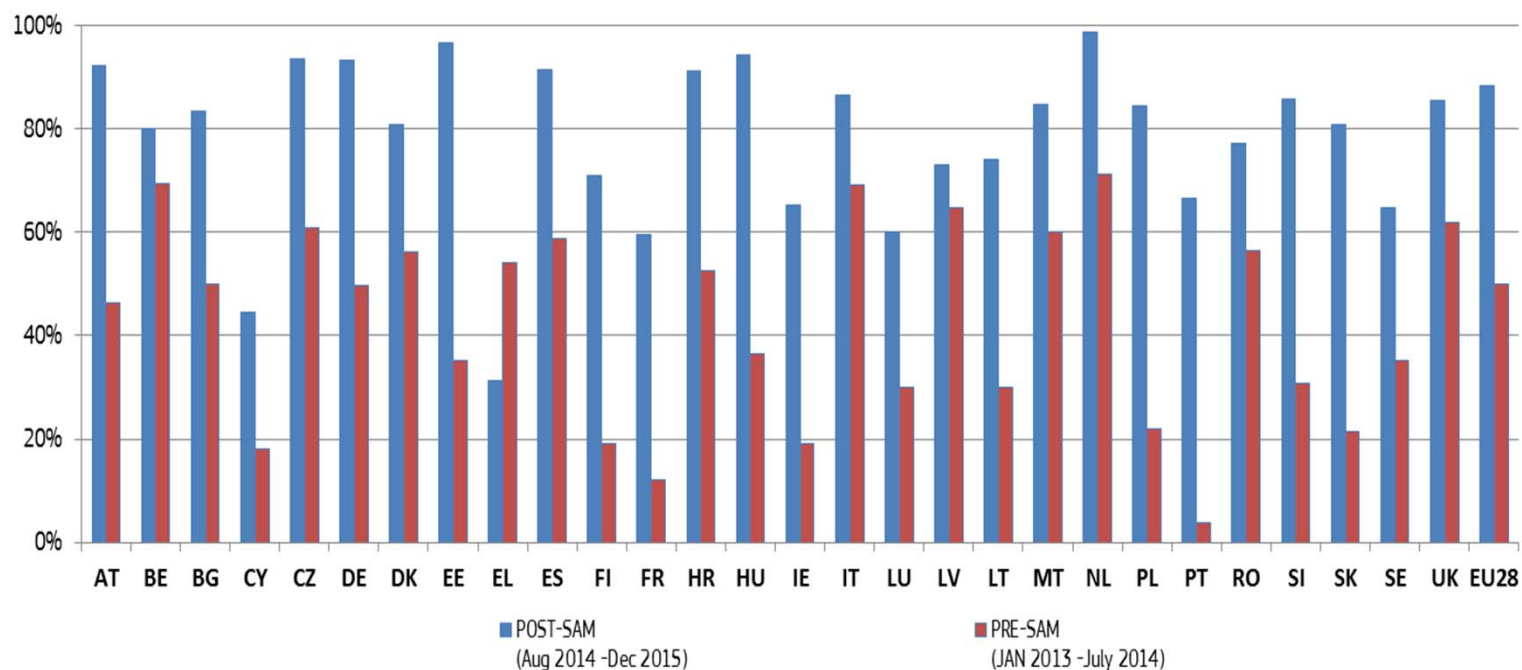
Source: State aid Scoreboard (2017)



# Use of GBER per MS

State Aid Modernisation (SAM)

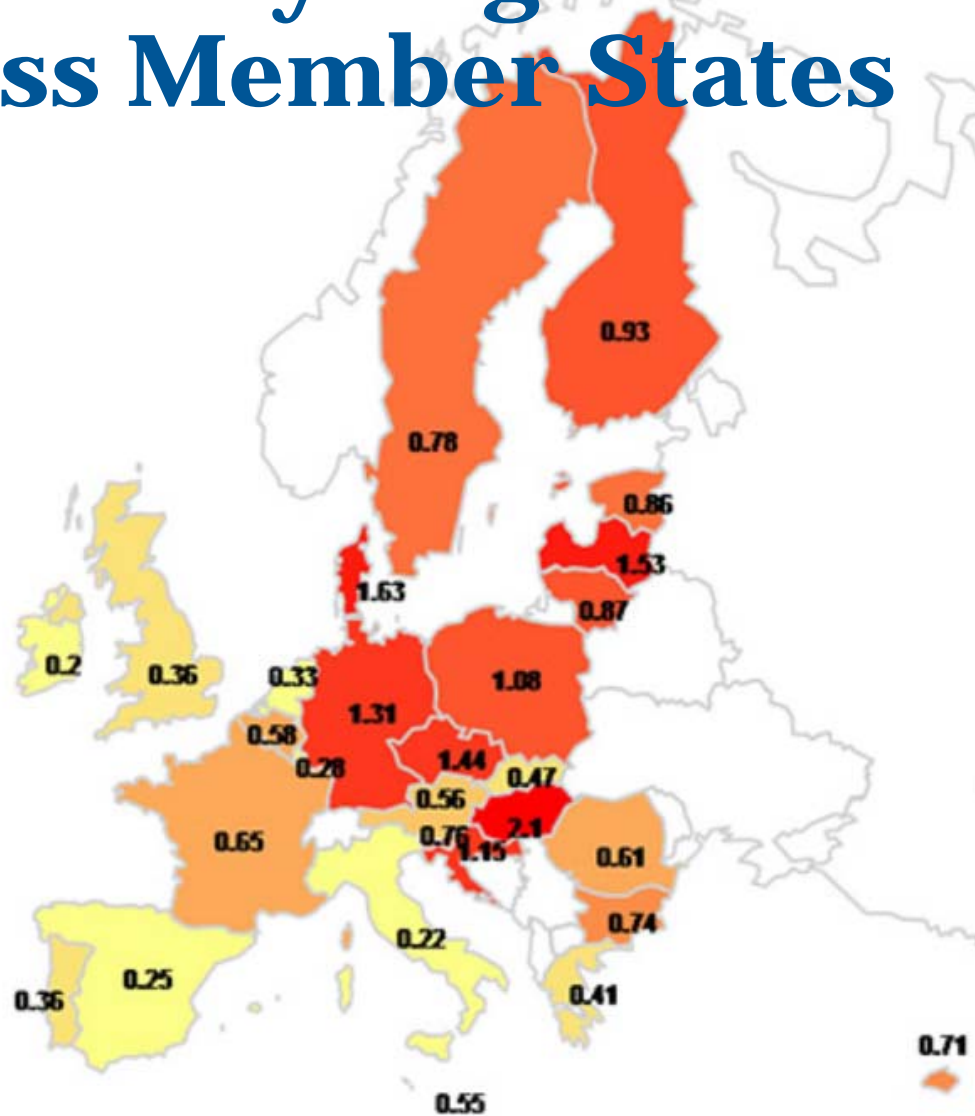
Comparison of GBER uptake ratio before and after SAM



Source: N. Pesaresi "State aid: Selected developments",  
UK State Aid Law Association Berlin Roundtable, 24 June  
2016



# Propensity to give aid - differences across Member States



State aid expenditure as % of GDP (2016)

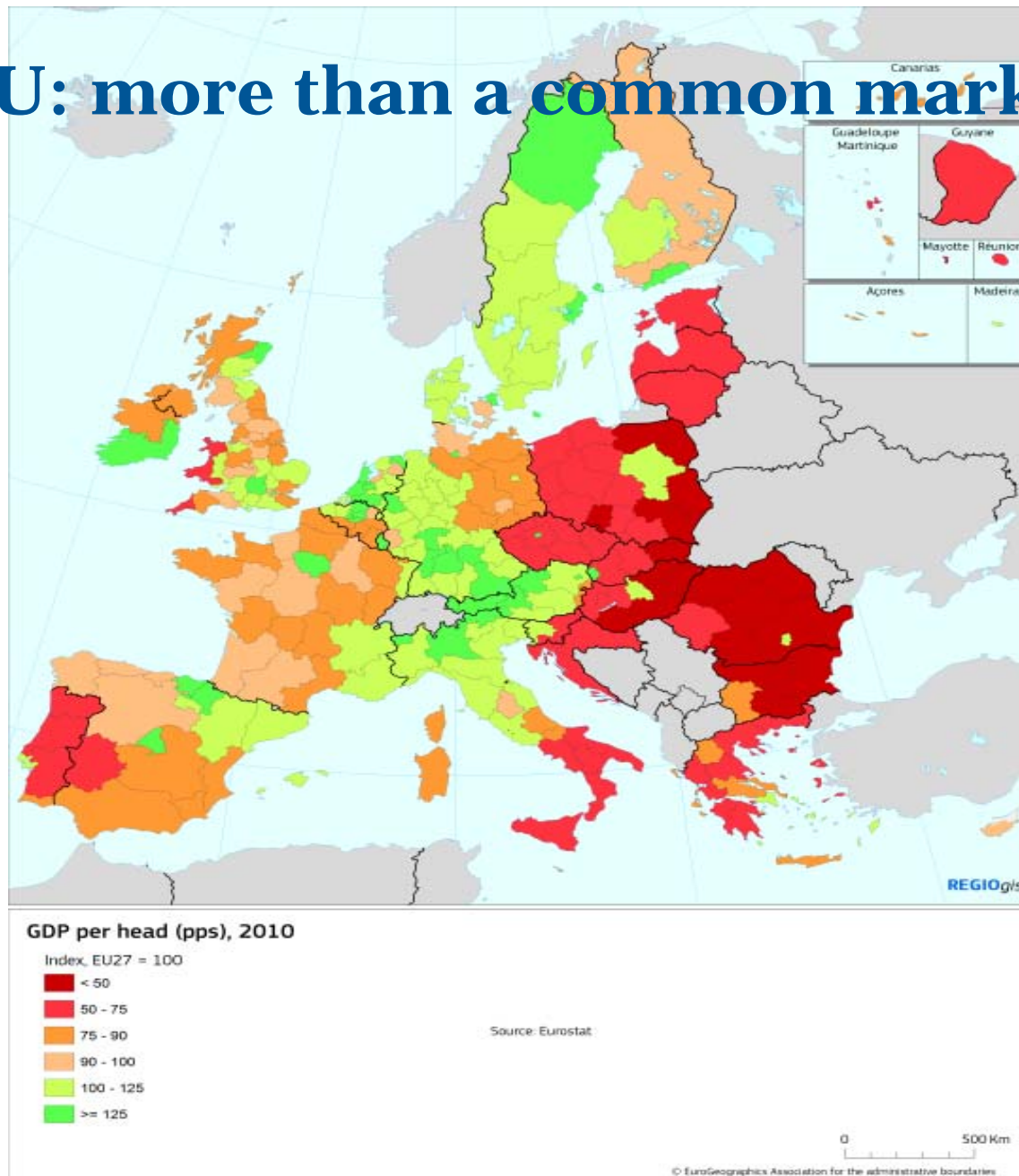
○ Non-crisis related, excluding railways

Source: State aid Scoreboard (2017)

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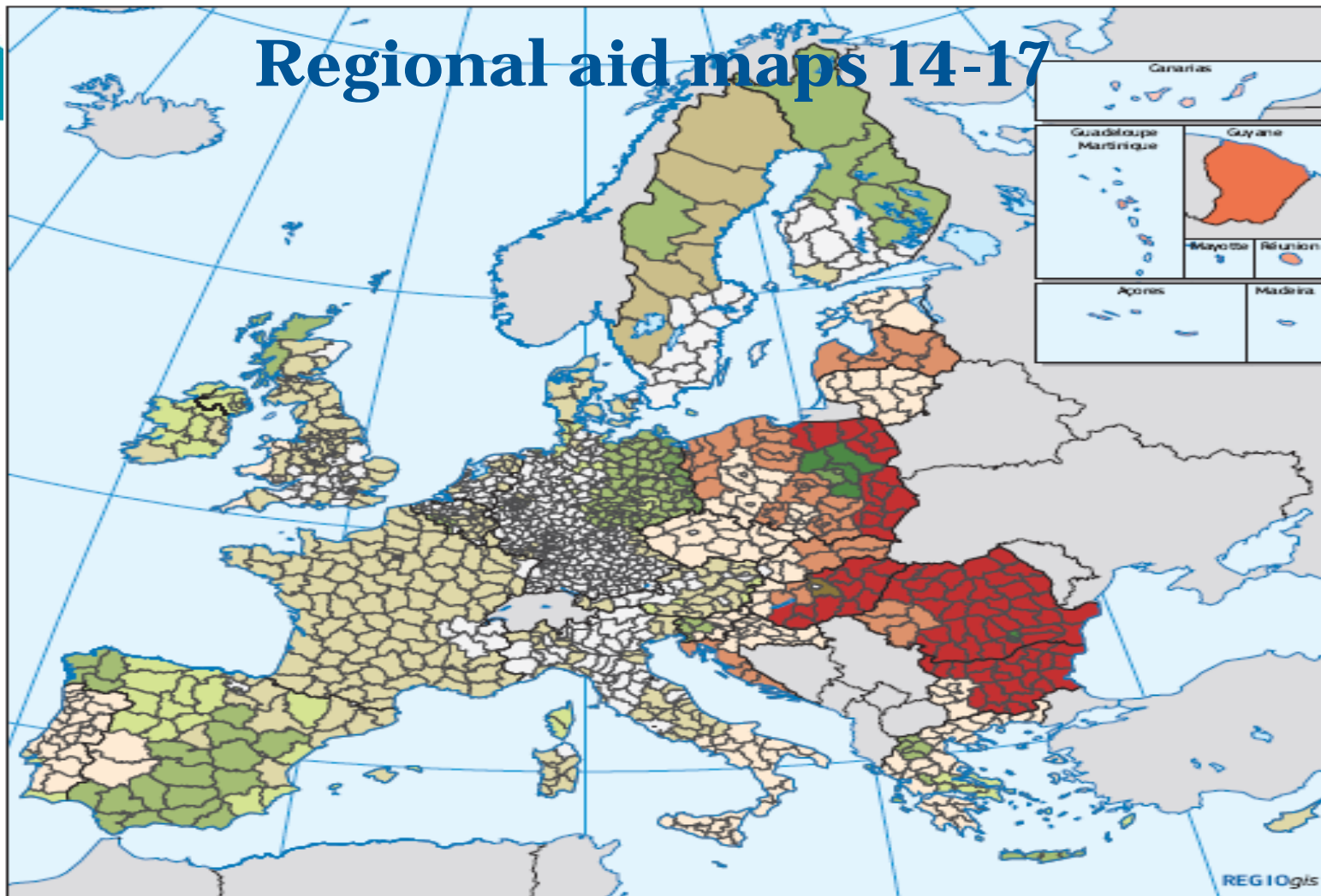
# EU: more than a common market



- Article 3 TFEU:  
*"The Union shall promote economic, social and territorial cohesion, and solidarity among Member States."*
- Article 174 TFEU  
*"In order to promote its overall harmonious development, the Union shall develop and pursue actions leading to a strengthening of economic, social and territorial cohesion."*



# Regional aid maps 14-17



## Regional state aid, 2014-2017

Eligible regions and maximum aid intensity

Art 107.3.a	Art 107.3.a Outermost regions	Art 107.3.c total	Art 107.3.c partial	Other regions
25%	35%	10%	10%	
35%	45%	15%	15%	
50%	55%	20%	35%	
	70%	35%		

Source: DG COMP

0 500 Km

© EuroGeographics Association for the administrative boundaries





# Outline

## **I. Introduction**

1. Rationale of State aid control and historical background
2. Sources and general mechanism

## **II. Notion of aid**

1. Advantage (see other session)
2. Selective (see other session)
3. Transfer of State resources / Imputability
4. Distortion of competition / Effect on trade

## **III. State aid procedure**

1. Commission administrative procedure
2. Judicial review – role of national courts





# Outline

- Unlawful aid and incompatible aid
- Relevant legislation for national judges
- Distinct and complementary roles of national courts and European Commission
- Article 108(3) TFEU: principles developed by case law
- Powers and obligations of national courts





# Unlawful aid – Incompatible aid

- Unlawful ("illegal")
  - aid not notified
  - aid notified but implemented before Commission decision
  - misuse of existing aid
- national courts
  - obligation to protect subjective rights of third parties
  - ensure that Commission can carry out its compatibility assessment
  - no stay of proceedings
  - enforce Commission negative decisions
- Incompatible
  - lawful or unlawful aid
  - aid not exempted
    - Article 107(2) or (3) TFEU
    - Article 106(2) TFEU
- exclusive powers of Commission
  - prohibition to implement incompatible aid
  - obligation to order recovery if unlawful





# Particularly relevant legislation for national courts

- Article 108(3) TFEU: notification/standstill obligation
- Art. 16(3) of Regulation 2015/1589:

The Member State shall take “all necessary measures” to ensure “immediate and effective” recovery

- National procedures
- Effectiveness/Equivalence
- No delay
- Recovery Notice – 15.11.07
- Enforcement Notice – 25.02.09
  - Objective: encourage private enforcement + effective remedies
  - Role of national courts regarding unlawful aid and implementation of negative Commission decisions
  - Commission support for national courts



# Distinct but complementary roles

## Commission

- application of notion of aid
- assessing compatibility of aid
- obligation to recover unlawful and incompatible aid
- Article 107(3) TFEU
- Article 108(1-2) TFEU

## National courts

- application of notion of aid and block exemption regulations
- safeguarding individual rights in case of unlawful aid only
- enforcement of negative Commission decision
- Article 108(3) TFEU

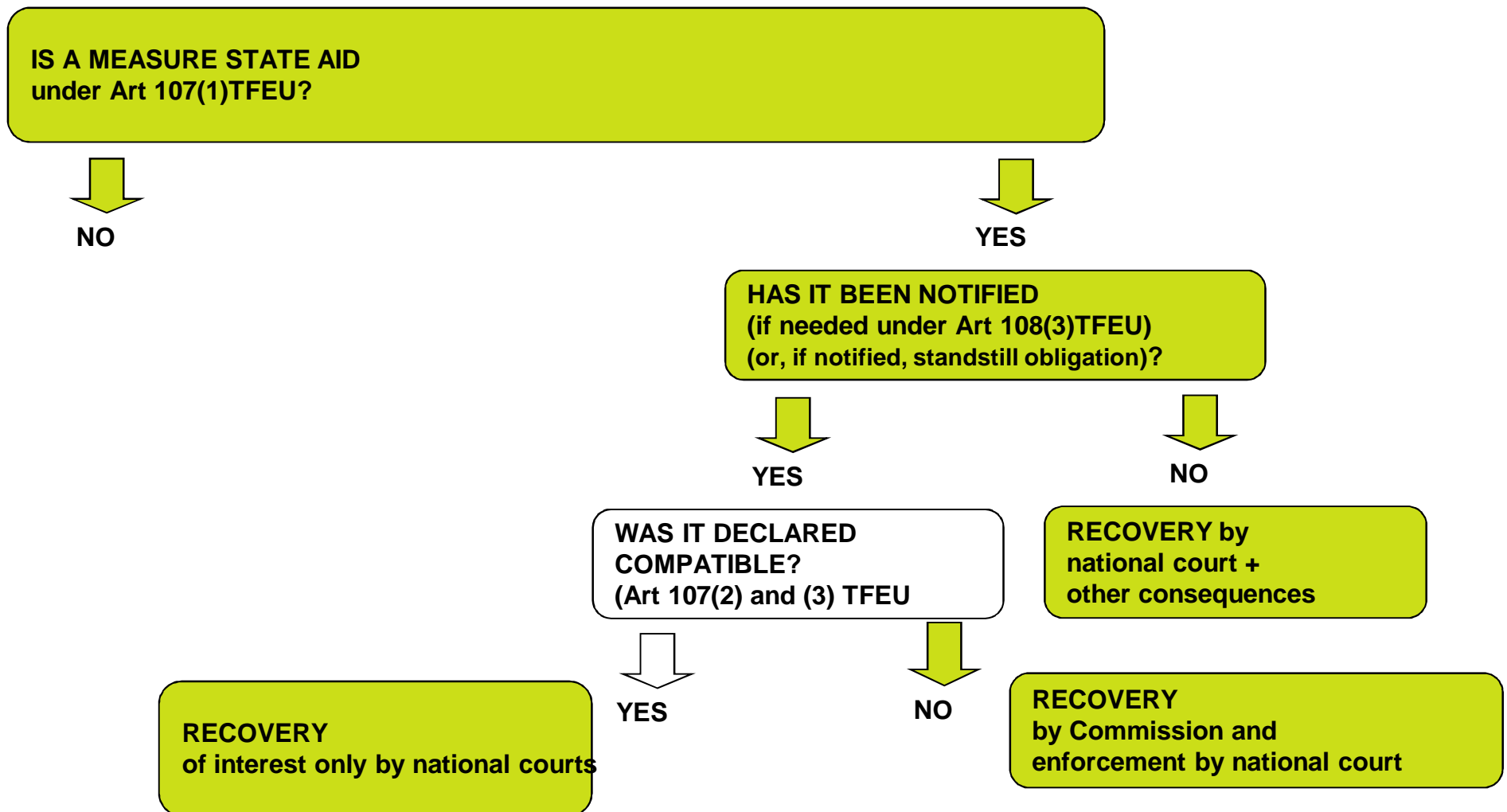


## Interaction: Article 107(1) TFEU

- national courts competent despite ongoing procedure before Commission
- questions from national courts to the Commission or to the CJEU



## What issues will national courts be dealing with?







# C-39/94, SFEI, DHL, Fedex v La Poste

## 11 July 1996

- The Commission and the national courts have distinct but complementary role with respect to control of State aid
  - **Commission:** control of the substance, compatibility of the aid with the internal market
  - **national courts:** regularity of the procedure, ensure that draft aid are notified to the Commission, in protecting subjective rights of third parties
  - other principles in *SFEI*:
    - direct effect
    - no stay of proceedings if Commission reviewing
    - immediate action (interim relief if appropriate)
    - qualification of aid (preliminary reference to CJEU or question to Commission)
    - obligation to recover if no exceptional circumstances
    - damages if necessary
    - beneficiary liable of unfair competition act under national liability law





# Article 108(3) TFEU (1) (see also Art. 3 Reg 2015/1589)

- Notification obligation + Standstill obligation
  - *"The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. (...) The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision".*
- Direct effect (*Costa / Enel*, 1964)
  - right to invoke the provision before the national judge
- Primacy of EU law over national law
  - obligation to apply EU law, if necessary, by setting aside any contrary national law provisions
  - e.g. C-235/05, *Scott I*: national judge must leave unapplied a French legislation providing for automatic suspension in case of challenge of a recovery order by certain local public authorities





## Article 108(3) TFEU (2)

- Immediate response by the judge
  - *SFEI*, C-39/94, 11.7.1996
  - *CELF II*, C-1/09 11.3.2010
  - *Deutsche Lufthansa*, C-284/12, 21.11.2013
- No stay of proceedings : the judge has to rule on the notion of aid (*SFEI*)
- However, if formal investigation procedure initiated: the judge is bound by the qualification of aid by the Commission (*Deutsche Lufthansa*)
- If formal investigation procedure concerns the qualification of aid: the judge should not stay and act with prudence (*amicus curiae* / Article 267 TFEU)





## Article 108(3) TFEU (3)

- No obligation on the beneficiary: the State must notify
  - however, obligation of diligence of the beneficiary: may be liable under national civil liability law (*SFEI*, C-39/94)
- No *ex post* regularisation of unlawful aid by positive decision of the Commission
  - however, *CELFI*, C-199/06: national courts must only order interest recovery (not the principal of the unlawful and compatible aid)





# What powers do national courts have?

- Aid qualification (Art. 107(1) TFEU – but *Deutsche Lufthansa* case)
- Obligation to recover unlawful aid under national law (Art. 108(3) TFEU)
  - Recovery order (including interest)
  - Interim measures
  - Enforce negative decisions of the Commission
    - Final decision
    - 108(2) decision
    - *Case 314/85 Foto Frost* otherwise
  - Compatibility decision does not *a posteriori* regularise the unlawfulness of aid
- Re-establish *ex ante* situation on the market
  - Annul litigious measures (eg contracts)
  - Interim measures, including injunctions not to pay illegal aid
  - Award damages





# Locus standi C-174/02, *Streekgewest*

- Context of case
  - Implementation of a notified aid measure before approbation (exemption from a tax on waste)
  - The Commission declares the aid compatible retroactively.
- Who can rely on the violation of Article 108(3)TFEU?
  - “it may be relied on by a person liable to a tax forming an integral part of an aid measure levied in breach of the prohibition on implementation referred to in that provision, **whether or not the person is affected by the distortion of competition** resulting from that aid measure”.
- Comp with "Ryanair" case (see "German cases")





# Locus standi, effectiveness of EC Law

## C-526/04, *Laboratoires Boiron*

- Context of case
  - Preliminary ruling
  - Non notified measure (tax exemption for wholesalers to compensate their OPS)
  - Laboratories are liable for this tax, they brought an action to be reimbursed
  - According to the national rules, it is to the claimant to prove that the measure is an aid, and consequently that at least one of the Altmark conditions is not fulfilled
- The claimants have standing as they are submitted to the tax and as they are in direct competition with the beneficiary.
- The principle of effectiveness of Community law does not preclude the application of the national rules on burden of proof
- However if it is likely to be impossible or excessively difficult for evidence to be produced, the national court is required to use all procedures available to it under national law in order to ensure compliance with the principle of effectiveness





# National recovery order – Scott III (C-210/09)

- Obligation to recover unlawful aid
  - aid recovered, appeal on ground that the surname and first name of the signing officer for the assessments in question were not indicated on them
- Effectiveness of Article 14(3) Reg 659: *is a possible annulment of the assessments issued for the recovery (complying to Commission decision) such as to hinder the immediate and effective implementation of that decision?*
  - free choice of the means of recovery if not against effectiveness of EU law
  - review by national court of formal legality of recovery order: normal judicial protection
  - nevertheless, annulment might, in principle, confer an advantage on the aid recipient
  - authority and national court must ensure effective recovery and
    - *"ensure that funds corresponding to the aid that has already been reimbursed are not once again made available to the aid recipient, even provisionally"*
- Article 14(3) of Regulation No 659/1999 is to be interpreted as:
  - not precluding, where recovery was already carried out, annulment by the national court of a recovery order on grounds of there being a procedural defect, where it is possible to rectify that procedural defect under national law.
  - precluding that the amounts being paid once again, even provisionally, to the beneficiary of that aid





## Miscellaneous

- Formalistic unlawful aid
  - C-493/14, *Dilly's Wellnesshotel*
    - Lack of express reference to the GBER in an aid scheme
- Action by the judge can create an aid
  - C-590/14 P, *DEI & Commission v. Alouminion tis Ellados*
    - A national court adopting an interim relief cannot provide for measures having the effect of transforming an existing aid into a new aid





# Primacy of State aid law v *res judicata* (1)

## C-119/05, *Lucchini*

- Context of the case
  - National court decided Lucchini could be granted aid
  - Negative Commission decision
  - National law- principle of *res judicata*- preventing recovery
- Should the application of this principle be set aside in order to allow recovery?
- Community law precludes the application of a national law preventing recovery





# Primacy of State aid law v *res judicata* (2)

C-505/14, *Klausner Holz / Land Nordrhein-Westfalen* (1)

- Non compliance of a supply contract
- Declaratory judgment on appeal: the contract is still “in force” – *Res judicata*
- Damages action and Land’s defence:
  - unlawful State aid (contract null and void)
  - information to the Commission
  - questions by national court to the Commission
- Reference to CJEU: can the definitive first judgment prevent the Land from claiming the application of State aid rules?





## C-505/14, *Klausner Holz / Land Nordrhein-Westfalen* (2)

- Obligation of compliance interpretation – Effectiveness
- National exception to *res judicata* should apply:
  - State aid rules were not raised until the definitive declaratory judgment
- In any event, principle of effectiveness applies:
  - to set aside the definitive declaratory judgment rendering impossible application of State aid law
  - to reject national *res judicata* rule likely to render devoid of purposes the exclusive competence of the Commission

[See J. Derenne, *L'autorité de chose jugée à l'épreuve du droit de l'Union européenne – Du principe d'effectivité en général et des règles spécifiques en matière d'aides d'État en particulier*, in *Contentieux du droit de la concurrence de l'Union européenne : questions d'actualité et perspectives* (V. Giacobbo & Chr. Verdure, éditeurs), Larcier, Bruxelles, 2017, pp. 349 -383]



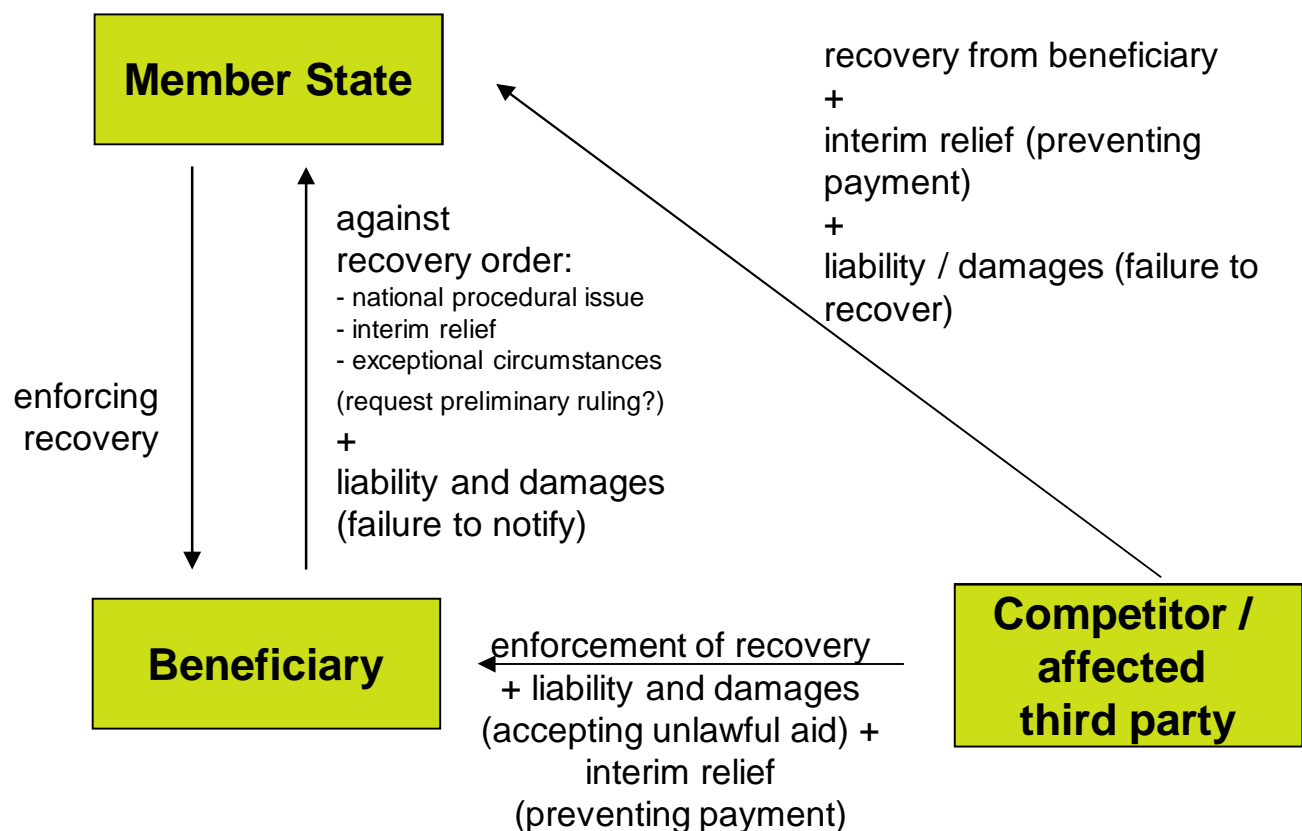


# Who can initiate a State aid action before national courts?

- Competitor of recipient of aid / any third parties affected by unlawful aid
  - against beneficiary
  - against the State
- Aid beneficiary (against recovery)
  - against the State
- State authorities (recovery)
  - against the beneficiary



# Actions before national courts (by type of actors)







# Actions before national courts (by type of actions)

- Annulment
- Recovery – cease and desist orders cases
  - *Breda* case (President Brussels Commercial Court, 1995)
  - *Scott III*
  - *Ryanair* cases
- Unlawful but compatible aid
  - *CELF I+II* cases (French Council of State, 2008, 2010)
- Tax cases
  - *Boiron* cases (Court of Appeal of Versailles, 2 septembre 2010, 3 cases)
- Interim relief
- Damages
  - SFEI, 1996: competitor v beneficiary (principle)
  - competitor v State
  - Fontanille, Salmon, 2004, 2006, France: beneficiary v State





# Annulment for violation of Article 108(3) TFEU

- Member State violates prior notification obligation
- Unlawful State aid granted
- Action for annulment before competent national court
- Recent example
  - Conseil d'Etat, France, 22.2.2017, *société Valmonde*, n° 395948 (annulment of decree n° 2015-1440 of 6 November 2015 relating to public support to pluralism of newspapers – extension of 1986 decree to weekly publications)
    - Commission vs national court (complementary powers)
    - National court empowered to decide on existence of aid
    - Aid not notified, annulment






# Recovery – Cease and Desist Order

Breda case - President Brussels Commercial Court, 1995

- the President of the Brussels commercial court issued a cease and desist order **setting aside** the offer made to a public bid by an undertaking which was granted unlawful aid
  - tender by SNCB (beams for railways)
  - offers by Breda and Manoir Industries
  - Breda was granted unlawful and incompatible aid in Italy
  - Manoir v Breda before commercial court: unfair competition
  - offer by Breda must be withdrawn





**Thank you for your attention!**

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