

EU State Aid Litigation

Public & private State aid enforcement

ERA, Brussels, 18 May 2018



Jacques Derenne
Partner, Global Co-Practice Group Leader, *Antitrust and Competition*
Sheppard Mullin, Brussels
Professor, University of Liège & Brussels School of Competition
Global Competition Law Centre, College of Europe

SheppardMullin

Unpacking Complexity
Unfolding Opportunity



Outline

- Main sources
- Public enforcement: Commission
 - Context of a negative Commission decision
 - Principles governing recovery by the Commission
 - Recovery in practice
 - Sanctions for non recovery
- Private enforcement: national courts
 - Distinct and complementary roles: see yesterday's presentation
 - Article 108(3) TFEU: principles developed by case law
 - Powers and obligations of national courts



Main sources

- Articles 108(2) — 260(2) TFEU (Article 108(3): national courts)
- Council Regulation (EU) 2015/1589 (replacing Regulation 659/1999) – Articles 12, 13, 16, & 17
- Recovery Notice (OJ C 272/4, 15.11.2007)
- Enforcement Notice (OJ C 85, 9.4.2009)
- 2006 Study on the application of State aid at national level (updated in 2009)
 - Part II: recovery (enforcement of negative decisions)
- State aid scoreboards
- Recovery cases status:
http://ec.europa.eu/competition/state_aid/studies_reports/recovery.html



Public enforcement



When does the Commission order recovery?

- Final decision finding unlawful and incompatible aid
- Commission has to order recovery
 - Article 16(1) Reg 2015/1589
 - Exceptions
 - statutory limitation (Article 17)
 - general principle of law (Article 16(1))
 - Contrast with case law pre-Reg 659 (now 2015/1589)
 - logical consequence of unlawfulness - faculty
- Objective is to re-establish *ex ante* situation
 - Not a sanction
 - With interest rate (compound interest since 2003)



Recovery policy

- Systematic recovery in all cases of unlawful and incompatible aid
- No means of defence
 - except for absolute impossibility
(see cases below, e.g., C-63/14, *Commission v. France*: no absolute impossibility)
- Political context of a negative decision
 - Member State has not notified the aid
 - Grantor / “violator” has to recover the aid
 - Beneficiary the actual “victim”
 - Generally no legitimate expectations of the beneficiary

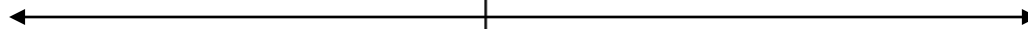
Distinct but complementary roles

Commission

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

National courts

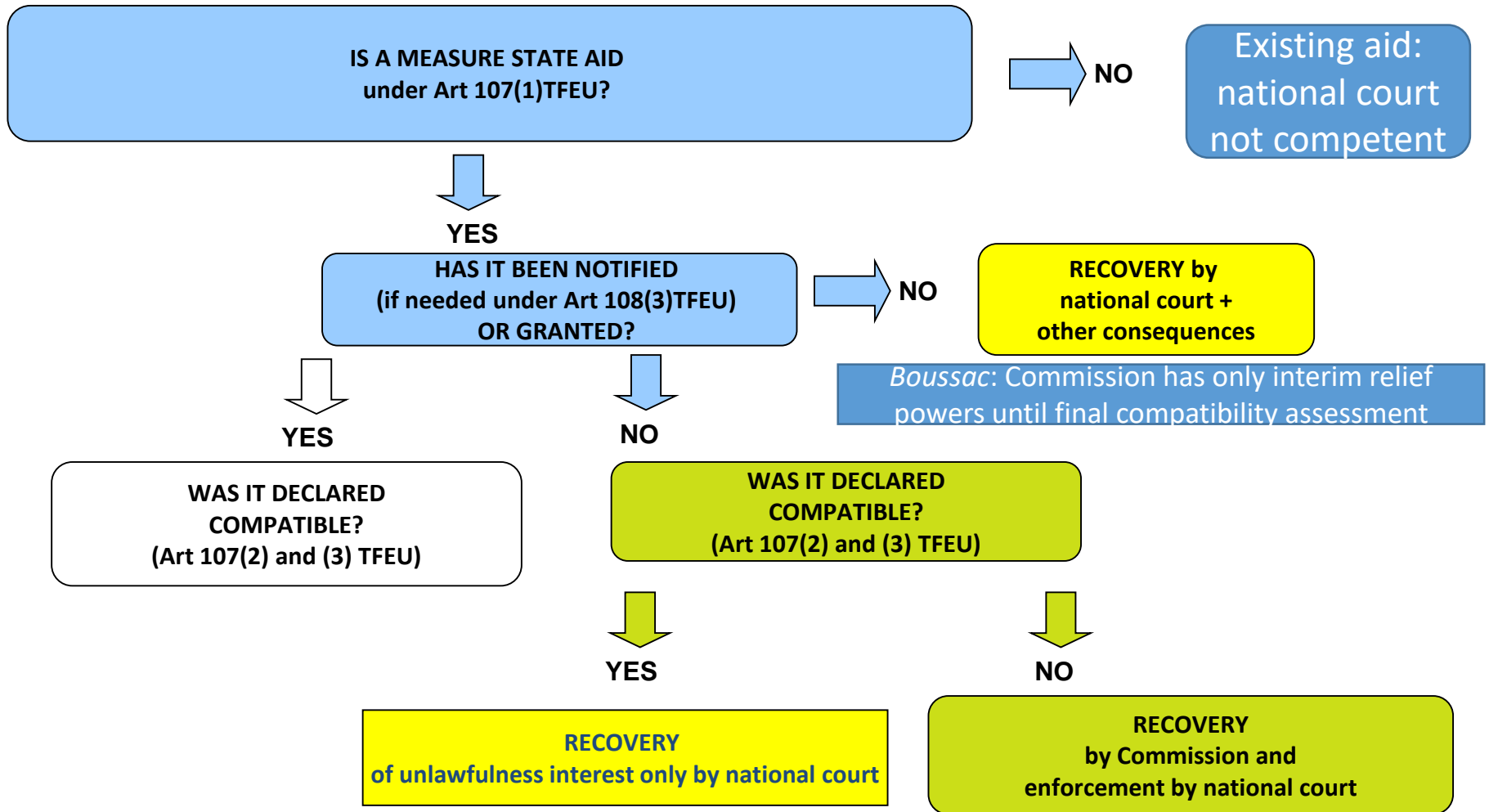
- notion of aid and block exemption regulations
- safeguarding individual rights in case of unlawful aid only
- enforcement of negative Commission decision
- Article 108 (3) TFEU



Interaction: Article 107 (1) TFEU

- national courts competent despite on-going procedure before Commission
- questions from national courts to the CJEU
- the Commission as amicus curiae

Recovery of unlawful aid: Commission / national courts





Main principles

- Commission order recovery
 - With interests for period between disposal and recovery of the aid
 - Guidance on calculation of interest rate
- (national courts order recovery)
 - same principles except *CELF* case
- Recovery governed by national procedural rules
 - Art. 16 (3) Reg 2015/1589: “(...) recovery 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. (...) the Member States (...) shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to European law” (emphasis added).
 - No delay
 - Effectiveness (“provided that”: set aside contrary national law)
 - All necessary measures to ensure recovery
 - Loyal cooperation: "good faith"



Need for clarity of Commission decisions

- Identification of beneficiaries
 - Large number of beneficiaries (schemes, eg tax cases)
 - Notion of "effective beneficiary" (transfer of assets)
- Amount to recover
 - Issue of aid schemes (e.g. tax cases)
 - Commission not required to state amount to be recovered; information needed to determine the amounts is sufficient
 - C-415/03 *Commission v Greece*
 - C-441/06 *Commission v France (France Télécom - transitional tax scheme)*
 - Calculation of interest rate



Other issues related to the recovery order

- Responsible authorities:
 - Federal authorities
 - Regional authorities
 - Local authorities
- Timing
 - Deadline for recovery
 - Problem of the length of national administrative procedures



Possible remedies to these issues

- Recovery notice

- Commitment to precise and complete decisions
- Information to determine amount and identity of beneficiaries
- 2+2 months deadline
- Recovery of net amount only (*Brussels Region/Siemens, 1995*)

- Other remedies

- Independent State aid authorities
 - Tasks: detection, advice, recovery of unlawful aid
 - e.g. in Poland, Czech Republic, Hungary, Cyprus, Lithuania, Slovenia
- Recovery law in certain Member States
 - NL: State aid recovery Act of 21 Feb 2018, into force on 1st July 2018



Issues regarding "*immediate*" recovery (1)

- Avoid delay in implementing a Commission decision
- Use powers to order interim measures and injunctions
- Avoid stay of national proceedings:
 - In case of EU challenge (*against the Commission decision*)
 - No stay of proceedings if challenge does not concern aid qualification
 - No stay of proceedings if no Art. 278 TFEU granted (suspensory effect), even if case pending
 - In case of national challenge (*against the national recovery order*)
 - No stay of proceedings if challenge of Commission decision not possible or time barred (no exception of illegality)
 - Possibility to request preliminary ruling on validity of Commission decision (only if not manifestly admissible before GCEU)
 - Request for a Commission opinion in case of doubt
 - No stay of proceedings under national law



Issues regarding “*immediate*” recovery (2) C-232/05 *Commission v France (Scott I)*

- Context
 - Negative Commission decision and recovery order (preferential land price)
 - Action for annulment before GC (no suspension requested)
 - National action against national administrative order to repay
 - Automatic suspensory effect under French law
 - Stay of proceedings pending the judgment of GC
- Application of national procedures subject to “*immediate and effective*” recovery: “*All necessary measures*” includes leaving unapplied national rules impeding recovery
- Stay of proceedings: Commission decision cannot be called into question before national courts, only before GC



Absolute impossibility (1)

C-214/07 *Commission v France* (44 septies)

- Context
 - Unlawful fiscal regime
 - Negative Commission decision
 - Recovery order (two months)
 - Failure to implement decision and recover aid on time
- Issue of identification of beneficiaries (some beneficiaries stopped their activity) and the calculation of the amount to be recovered
- Duty of loyal cooperation: notification of internal difficulties (does not allow excessive delay)
- 2 situations:
 - collective proceedings: registration of the liability relating to the repayment of the aid in question in the schedule of liabilities
 - ceased their activity and transferred their assets: financial conditions of the transfer complied with market conditions (public tendering, expert's report, privately negotiated transfer of assets)



Absolute impossibility (2)

C-369/07, *Commission v Greece*, 7.7.2009

- Article 260 TFEU case
- failure to adopt, by the date on which the period prescribed in the reasoned opinion expired, the measures necessary to comply with the judgment in Case C-415/03 (repayment of the unlawful and incompatible aid granted to Olympic Airways)
- Hellenic Republic ordered to pay to the Commission, into the 'European Community own resources' account
 - a penalty payment of EUR 16 000 for each day of delay in adopting the measures necessary to comply with the judgment in Case C-415/03
 - from one month after the day on which judgment is delivered in the present case until the day on which the judgment in Case C-415/03 is complied with
- Hellenic Republic ordered to pay to the Commission, into the 'European Community own resources' account, a lump sum of EUR 2 million

See also C-507/08, *Commission v. Slovakia*, 22.12.10

See also pending C-93/17, *Commission v. Greece (Greek Shipyards)* – AG Opinion, 16.5.18



Outstanding issues

- 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 provides 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



Persons obliged to reimburse (1)

- *Seleco* (Dec. 2000/536 of 2.6.1999)
 - the beneficiary disappears or is transferred/liquidated into a third party
 - recovery from the third party if economic continuity with the original beneficiary
 - economic rationale (fraud), timing, shareholders, scope of takeover, business model
- *Seleco* (CJEU, C-328/99 et C-399/00)
 - annulment – Commission should have verified the market price
- *Banks* (CJEU, C-390/98)
 - market price reflects the previous aid: the seller keeps the advantage and should reimburse



Persons obliged to reimburse (2)

- *Germany v Commission* (CJEU, C-277/00, inconsistent with *Banks*)
 - share deal at market price: *"the aid element was assessed at the market price and included in the purchase price. In such circumstances, the buyer cannot be regarded as having benefited from an advantage in relation to other market operators"* (ref to *Banks*) [para 80]
 - But, *"the undertaking to which unlawful State aid was granted retains its legal personality and continues to carry out, for its own account, the activities subsidised by the State aid. Therefore, it is normally this undertaking that retains the competitive advantage connected with that aid and it is therefore this undertaking that must be required to repay an amount equal to that aid. The buyer cannot therefore be asked to repay such aid"* [para 81]

Persons obliged to reimburse (3)

C-357/14 P, *Electrabel et Dunamenti v Commission*,

- The Court clarifies in favour of *Germany v Commission*: ref to the previous paras
- Market price protects the buyer but not the undertaking bought (the "activity" bought)
- The Court refers to legal personnality whilst the treaty refers to "undertaking"
- *"the legal forms of the entity that committed the infringement and the entity that succeeded it are irrelevant. Imposing a penalty for the infringement on the successor can therefore not be excluded simply because, as in the main proceedings, the successor has a different legal status and is operated differently from the entity that it succeeded"* (C-280/06, *Autorità Garante della Concorrenza e del Mercato v ETI a.o.*, para 43)
- What matters: economic continuity of the activity subsidised



Persons to reimburse (4)

- *Commission v Greece* (C-415/03): fraud (para 33 et 36)
 - Olympic Airways (old) – Olympic Airlines (new)
- Decision of 12.11.2008, N 510/2008 – Italy (Alitalia)
 - No aid to acquirers of assets
 - Open, transparent and non-discriminatory procedure
 - Independent evaluation of the assets
 - No "public powers" conditions
 - No risk of circumvention of the obligation to recover the unlawful and incompatible aid (loan of €300 m)
 - No economic continuity between Alitalia and acquirers
 - No economic continuity between Alitalia and CAI



Economic continuity - references (1)

- Judgments
 - *Mory o.a. v Commission*, C-33/14 P
 - *Italy and SIM 2 Multimedia Spa v Commission*, C-328/99 & C-399/00
 - *Germany v Commission*, C-277/00
 - *Greece v Commission*, T-415/05, T-416/05 & T-423/05
 - *Commission v France*, C-214/07
- Decisions of the Commission
 - 2 June 1999, *Seleco SpA*, OJ L 227 of 02.06.1999
 - 1 October 2014, SA.31550, *Nürburgring*, OJ L 34 of 10.2.2016
 - 4 April 2012, SA.34547, *Sernam* (*sui generis* decision on continuity)
 - 31 July 2014, SA.34791, *Val Saint-Lambert*, OJ L 269 of 15.10.2015
 - 31 August 2014, SA.38810, *Val Saint-Lambert* (*sui generis* decision on continuity)



Economic continuity – principles (2)

- Purpose of the transfer
 - assets and liabilities, continuity of the workforce, bundled assets
- 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
 - after the start of the investigation, the initiation of the procedure or the final decision
- Economic logic of the transaction



Economic continuity – (3)

Val Saint Lambert (2014) - two Commission decisions:

- SA.34791
 - incompatible aid granted to VSL by the Walloon Region
 - VSL should reimburse
 - VSL declared bankruptcy & certain of its assets were sold
 - T-761/15, *Sogepa v Commission* (dismissed as inadmissible)
- SA.38810
 - recovery obligation not transferred to the buyer of the assets
 - absence of economic continuity with VSL (limited extent of the assets purchased)



Economic continuity – (4)

SERNAM (2012) – SA. 12522

- Since 2004, Sernam received unlawful and incompatible aid - recovery pf of €642m + interest
- French authorities must recover the aid paid to Sernam from *Sernam Financière* and its subsidiaries
- Economic continuity between the former SNCF subsidiary and *Sernam Financière* and its subsidiaries, which have retained the competitive advantage obtained through the aid granted to Sernam
- Action for annulment rejected by the GC (T-242/12)
- Appeal rejected (C-127/16 P, 7 March 2018).



Sanctions for non implementation and ways to enforce negative decisions

- Against the Member States
 - Article 108(2) TFEU proceedings by the Commission
 - Article 260(2) TFEU proceedings by the Commission
 - Actions by competitors requesting recovery (action for liability and damages)

- Against the beneficiary
 - Application of the *Deggendorf* principle
 - Actions by competitors requesting reimbursement (action for liability and damages)



Private enforcement



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, *CELF I*, 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

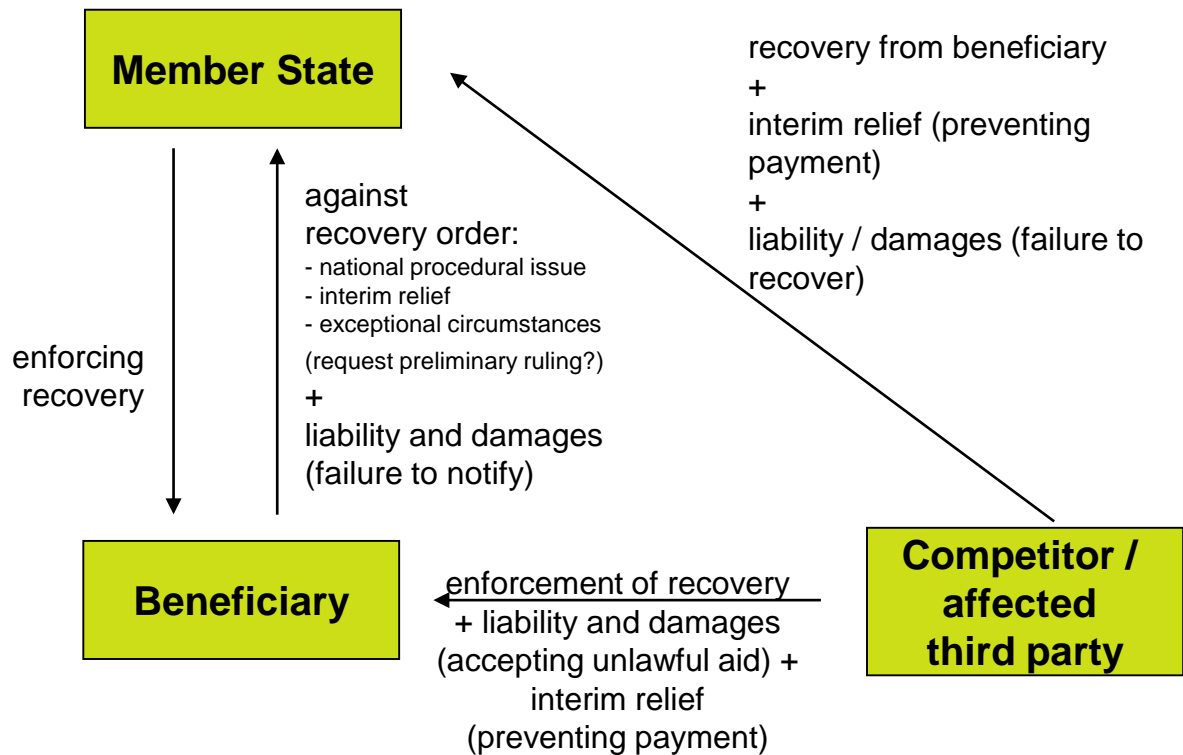
[See J. Derenne, *L'autorité de chose jugée à l'épreuve du droit de l'Union européenne – Du principe d'effectivité en général et des règles spécifiques en matière d'aides d'État en particulier*, in *Contentieux du droit de la concurrence de l'Union européenne : questions d'actualité et perspectives* (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!

Jacques Derenne

Avocat aux barreaux de Bruxelles et de Paris

Partner - *Co-Practice Group Leader, Antitrust & Competition*

+32 2 290 79 05 - jderenne@sheppardmullin.com

SheppardMullin

Sheppard, Mullin, Richter & Hampton LLP

Brussels

IT Tower

Avenue Louise 480

1050 Brussels

Belgium

T: +32 (0)2 290 7900

Beijing | Brussels | Century City | Chicago | Dallas | London | Los Angeles | New York | Orange County | Palo Alto
San Diego (Downtown) | San Diego (Del Mar) | San Francisco | Seoul | Shanghai | Washington, D.C.

www.sheppardmullin.com