

**ERA Summer Course on European Competition Law**

**State aid control: Articles 107 & 108 TFEU**

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# Agenda

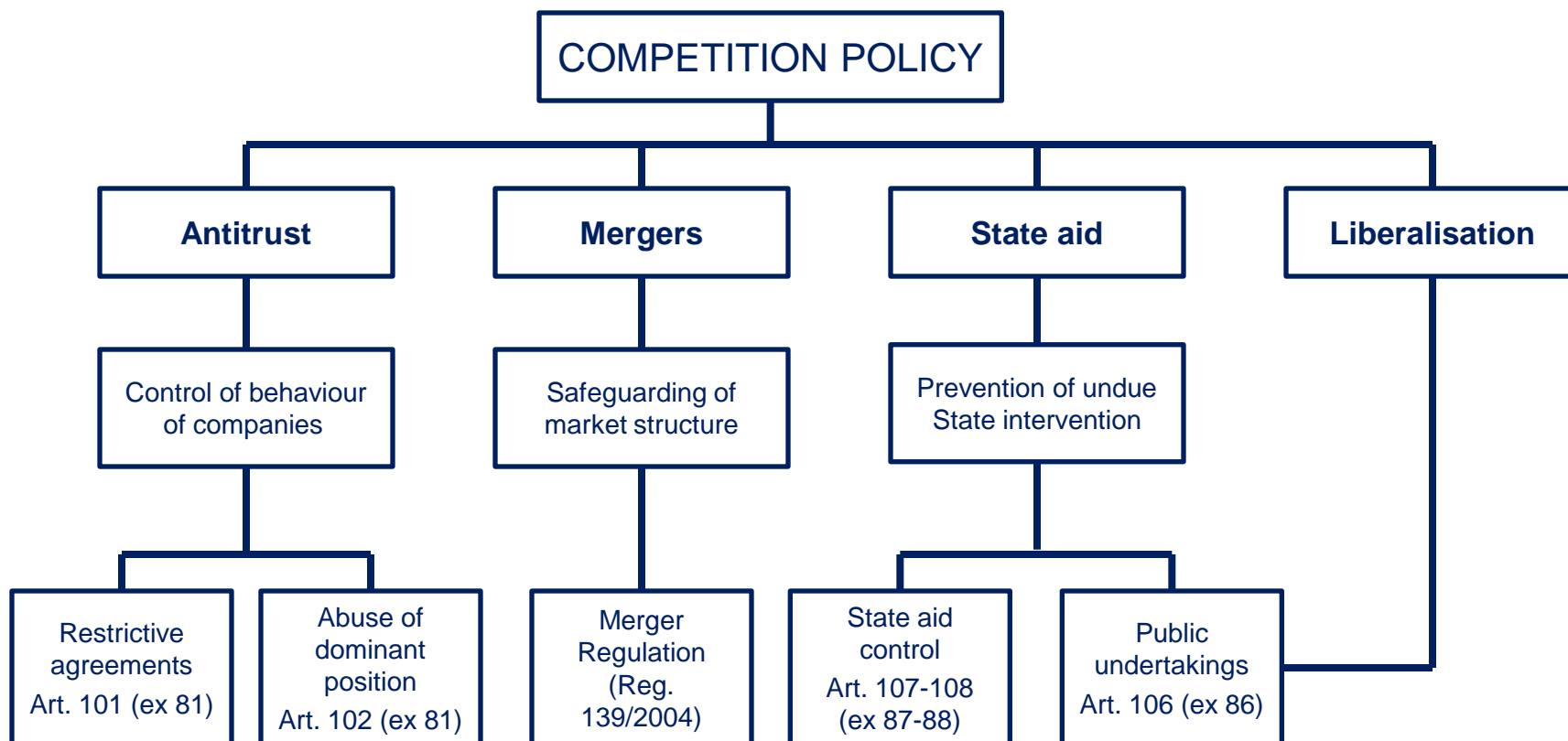
- Introduction to State aid control
- Notion of State aid
- Administrative procedure
- Compatibility assessment
  - Example: aid for rescuing and restructuring non-financial undertakings in difficulty
- State aid modernisation
- Role of national courts

# Introduction to State aid control

## State aid and EU competition policy

# State aid and EU competition policy

Where does State aid lie in relation to EU competition policy?



# State aid and EU competition policy

State aid is competition between Member States (before competition between undertakings)

State aid control is part of competition policy

Some reasons for State aid control:

- lack of EU market integration
- internal market, level playing field
- role in liberalisation
- competitive European industry
- avoid subsidy race
- element of cohesion

# State aid and EU competition policy

## Article 107(1) TFEU

- notion of aid
- 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 internal market”.*

## Articles 107(2-3), 106(2), 93 TFEU

- procedure
- compatibility assessment

# Notion of State aid

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

- Advantage ("*in any form whatsoever*" - "*favouring*")
- 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
  - burden of proof on the Commission
- see Notice on the notion of aid:
- [http://ec.europa.eu/competition/state\\_aid/modernisation/notice\\_aid\\_en.html](http://ec.europa.eu/competition/state_aid/modernisation/notice_aid_en.html) (available in all EU languages)



# Notion of State aid – Article 107(1)

Open definition (wide notion)

## **Six major elements:**

1. Undertaking: *every entity engaged in an economic activity*
2. Advantage: *"favours", in any form whatsoever*
3. Selective: *to an undertaking or a category of undertakings*
4. State origin: *imputability and State resources*
5. Likely distortion of competition
6. Likely effect on trade between Member States

# Undertaking

- *"every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed"* (Höfner, C-41/90)
- test: is the activity economic or not?
- **economic activity**: offering goods and services in the market (Pavlov, C-180/98 to C-184/98)
- **not economic activity**: regulatory tasks, supervisory tasks, activities based on solidarity, basic functions of the State (State education, customs, air safety, treatment of prisoners,...)
  - Case by case analysis

# Undertaking

- focus on the **nature of the activity**, not on the set-up of the entity
  - Public undertakings, part of administration, not-for-profit organisation, charitable organisation
- Whether market exists depends on organisation by authority
  - Differences between MS
  - Developments over time

# Undertaking – What is considered economic activity?

- **Examples**
- **Non-economic: exercise of public powers**
  - Activity forms part of the essential functions of State or closely connected to those activities
  - Examples: army or police, air navigation safety and control, etc.
- **Social security schemes:**
  - Schemes based on solidarity vs. economic schemes
  - Affiliation compulsory?
  - Scheme is non-profit?
  - Benefits independent of contributions?
  - Etc.

# Undertaking – What is considered economic activity?

## ▪ **Education**

- Payments by parents/pupils only cover fraction of costs or all costs?
- Competing private organisations?

## ▪ **Healthcare**

- Public hospitals as integral part of solidarity-based national health system; directly funded from social security contributions / State; free of charge for affiliates
- Hospitals providing services against remuneration (by patients or their insurance); certain degree of competition between hospitals

# Undertaking – What is considered economic activity?

- **Until 2000:** Construction and operation of infrastructure (e.g. airport) is general measure of public policy
- ***Aéroports de Paris (2000)*:** operation of an airport = economic activity
- ***Leipzig/Halle (2011)*:** All public funding of infrastructure (including its construction) that is meant to be commercially exploited subject to State aid rules
- Financing granted before 2000: not subject to State aid rules (legitimate expectations)

# Undertaking – Economic activity and infrastructure

- Public funding of infrastructure that is not meant to be commercially exploited (e.g. non-toll roads) excluded from application of the State aid rules
- **Mixed use of infrastructure**
  - General principle: separation of costs and revenues
  - not subject to State aid rules, if economic use remains purely ancillary
  - Necessary for the operation of the infrastructure or intrinsically linked
  - Limited in scope (~15/20% of capacity)

# State resources

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

translates into:

- is there a **transfer**
- of **State resources** and
- is this transfer **imputable to the State?**



# State resources

- **What are State recourses?**
- **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 fund

- 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 – Transfer – Granting of aid

- aid granted as soon as there is a challengeable act under national law
- not necessary that aid was actually paid out (or the guarantee triggered)
- actual payment important for recovery only

# 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?

# State recourses - Imputability

- 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 (*Stardust Marine, C-482/99*)
- Not imputable if mandatory under EU law

# State origin - State resources

- Wide notion of State
  - Local/federated entities
  - State origin of the aid
    - Aid can transit by a public undertaking
      - *C-303/88, ENI, §12-14, or C-39/94, SFEI, §57*
    - BUT need for a proof of State influence on the public undertaking
      - *C-482/99 France c. Commission ( Stadurst-CL), §52*
    - Aid granted by an organism distinct from the State whose resources come from public authorities
      - *C-305/89, Alfa Roméo §15-16*

# State origin - State resources

- The measure must be financed by State resources
  - *C-379/98 PreussenElektra*, §58; *C-262/12 Association Vent de Colère!*
- Compulsory contributions imposed and apportioned by the legislation of a MS, even if administered by entities separate from the public authorities, are considered state resources.
  - *T-47/15, Germany v. Commission* [2016]
- Including measures financed through parafiscal taxes paid to public or private funds established or designated by the State
  - See *Preussen Elektra* and judgement of 30 May 2013 in Case *C-677/11 Doux Elevage*
- Also public undertakings
  - *C-482/99 France v Commission*
- Temporary control over resources is sufficient
  - *T-358/94 Air France v Commission*, §§63-69
- Inherent budgetary consequences of legislative measures regulating contractual relationships are not covered
  - *C-72 and C-73/91 Sloman Neptun*, §§21-22



# State origin - State resources

- Not only subsidies, also exemptions or reductions of financial charges
  - *C-173/73 Italy v Commission*, §15
- But also
  - loss of revenue for the State, e.g. exemption from penalties or free allowance of trading rights
    - *C-279/08 P Commission v Netherlands*, §106
  - granting of licences to occupy or use public domain, or of other special or exclusive rights having an economic value
    - *C-462/99 Connect Austria*, §§92-93
  - risk of future burden for the State, e.g. guarantees
    - *C-200/97 Ecotrade*, §43
  - if financed by contributions levied on beneficiaries (if it is not a supplementary charge on the State, no State resources)
    - *C-78/76 Steinike & Weinlig*
    - *C-345/02 Pearle a.o.*

# State origin – State resources or/and by the State?

- Alternative approach
- Mandatory character of the aid is enough whatever the management system of the funds financed by parafiscale charges
  - *France v. Commission*, 259/85 – *Steinicke* 78/76
- Hesitation between alternative/cumulative approach:
- Imputability to the State is enough even if private funds
  - *Crédit agricole* 290/85 – *Van der Kooy* 67/85 – *ENI-Lanerossi/Alfa Roméo C-303/88 et C-305/89*
- No utilisation of State resources in sensitive domains (fiscality, social security)
  - *Van Tiggele* 82/77, *Fleischkontor* 213/81
- Toward a cumulative approach
- Importance of State origin of the resources
  - *Sloman Neptun C-72/91* – *Kirsammer C-189/91*
- Cumulative approach confirmed
- Grant by the State or by means of State resources
  - *Sloman Neptun*, *Kirsammer*, *Ecotrade*, *Piaggio*, *Preussen Elektra*
- AND State imputability
  - *Van der Kooy*, *ENI-Lanerossi-Alfa*

# State origin - Imputability

- The measure must be imputable to the State
  - *C-482/99 France v Commission « Stardust »*, §50-58
- National authority power to impose a contribution is insufficient to fund the imputability
  - *C-677/11 Doux Elevage*, §§33 to 41
- All branches of the State, including independent bodies and intra-State entities
  - *T-358/94 Air France v Commission*, §§59-62
  - *C-248/84 Germany v Commission « North-Rhine Westphalia »*, §17
- Not if compulsory application of European law
  - *T-351/02 Deutsche Bahn v Commission*, §§99-104;
  - *C-272/12 P Ireland a.o. v Commission*
- Quid if public announcement of State Support? FT case, see below

## Imputability – Case C-242/13 - Commerz Nederland NV v Havenbedrijf Rotterdam NV (17 September 2014)

- Imputability to State of guarantees given by director of public body acting outside his authority?
- Relevant factors to take into account:
  - the sole director of the company acted improperly, deliberately kept the provision of those guarantees secret and disregarded the undertaking's statutes;
  - the public authority would have opposed the granting of the guarantees, had it been informed of it.
- Those circumstances can exclude imputability only if it can be inferred that the guarantees were provided without the involvement of the public authority.

## State origin - Bouygues and Bouygues Telecom v. Commission (France Telecom case) (C-399/10 P & C-401/10P, 19 March 2013)

- Unlawful and incompatible State aid via the combination of public statements of support by the Minister for economic affairs and the offer of a shareholder loan
- GC wrongly required a close connection between each advantage and each commitment of State resources
- CJEU, more lenient approach – annulment GC
- 2 July 2015: annulment decision on referral back from the CJEU( T-425/04 RENV et T-444/04 RENV)

# State origin - Commission v. France Fruit and vegetables (T-139/09, 27 September 2012)

- French "contingency plans" for the fruit and vegetable sector
- State aid even though co-financed by voluntary contributions (CVO)
- Relevant criteria
  - not the initial origin of the resources
  - but the degree of intervention by the public authority in
    - the definition of the measure and
    - its method of financing

## State origin - Doux Elevage SNC et Coopérative agricole c. Ministère de l'agriculture (C-677/11, 30 May 2013)

- Contribution on a compulsory basis by trade organisations
- Absence of direct or indirect transfer of State resources
- Contributions remain private in nature, including in the collection process (absence of State prerogatives).

## State origin - C-518/13, Eventech (14 January 2015)

- London bus lane policy adopted by Transport for London: aid?
- CJEU
  - permitting black cabs to use the bus lanes on public roads during the hours when traffic restrictions were operational, but not minicabs, in order to establish a safe and efficient transport system
  - did not appear to involve a commitment of State resources or confer on black cabs a selective economic advantage.



# Advantage

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

various definitions, e.g.:

- A State measure is capable of favouring an undertaking if it produces an economic advantage that the company would not have obtained under **normal market conditions**.
- A transfer of resources to the company or **relief from charges which a company normally has to bear**, whereby the financial advantage is for free or without adequate remuneration.

# Advantage

- - Not only subsidies but measures which, in various forms, mitigate the normal burdens on the budget of an undertaking
  - *C-30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authority*
- - Economic advantage which the beneficiary would not have obtained under normal market conditions
  - *C-39/94 SFEI, DHL, a.o. , §60*
- - Aid is determined by its effects
  - *C-480/98 Espagne c. Commission, §16*

# Advantage – Economically appreciable (I)

- Subsidies
- Exemptions, tax credits, reduced tax rates, reduced taxable amount, accelerated depreciation...
- Sale of land, buildings, shares, assets:
  - open, transparent and unconditional tender procedure
  - expert report or other accurate methods (binding offer in a tender procedure more reliable than expert reports )
    - *T-268/08 and T-281/08 Land Burgenland and Austria, §§69-73*
- Guarantees are an advantage even if the guarantee is not called. It can be an aid to the borrower and aid to the lender
  - *C-275/10 Residex Capital IV*
  - *See Commission Notice (OJ C 155, 20.6.2008, p. 10)*

# Advantage – Economically appreciable (II)

## ■ Investment

- *Ex ante* assessment, based on the information available at the time of the decision
  - *C-124/10 Commission v EDF*
- Consecutive measures may have to be assessed together
  - *Joined Cases C-399/10 P and C-401/10 P Bouygues SA et Bouygues Télécom*
- *Pari passu* investments and other methods of assessment
  - *T-296/97 Alitalia v Commission*

## ■ Reference rate

- proxy for market rate and measure of grant equivalent, particularly for block exemptions and scheme
- based on ratings and collateralisation
  - *See Commission communication (OJ C 14, 19.1.2008, p. 6)*

# Advantage – Market economy operator test (I)

- Market Economy Operator Principle (MEOP): no advantage if State behaves like a "normal" player on market
- Reasoning:
  - State has right to act on market like any other market player (principle of neutrality)
  - if State behaved like a private player, alleged beneficiary did not obtain anything outside "normal market conditions"
- Key question: what would commercial operator do?

# Advantage – Market economy operator test (II)

- *"In order to determine whether such action is in the nature of State aid, it is necessary to assess whether, in similar circumstances, a private investor operating in normal conditions of a market economy (a private investor) (...) could have been prompted to make the capital contribution in question"*
  - *T-228/99 and T-233/99 Westdeutsche Landesbank a.o. v Commission, §245*
- Test
  - Notice on the notion of State aid

# Advantage – Market economy operator test (III)

- Only for commercial activities of the State, not for public function
  - *C-278/92 to C-280/92 Spain v Commission “Hytasa”, §22*
  - *But see C-124/10 P Commission v EDF a.o.*
- Public actor in different economic situations
  - Investor (Market Economy Investor Test, MEIP)
  - Creditor
  - Vendor
  - Buyer
- Not whether the transaction at issue is reasonable for the State, but whether it is at normal market conditions
  - *T-228/99 and T-233/99 Westdeutsche Landesbank a.o. v Commission, §315*

# Advantage - Market economy operator test (IV)

## 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



# Advantage - Private creditor principle (*Frucona Kosice v. Commission*, C-73/11P, 24 January 2013)

- Write-off of tax debt
- CJEU set aside GC's judgment
  - Upholding a Commission decision finding that the Slovakian tax office had granted incompatible State aid to Frucona
- Duration of the procedure
  - a factor that could have a significant influence
- GC failed to establish
  - whether the Commission had taken into account the duration of bankruptcy procedure in its assessment

# Advantage - *Commission v. France* (T-154/10, 20 September 2012)

- Implied unlimited State guarantee to La Poste
- La Poste not subject to the ordinary law rules on administration and winding-up
- Creditors of La Poste in a more favourable situation than private creditors
- More favourable credit terms than the ones it would have obtained on its merits alone and therefore eases the pressure on its budget

# Advantage - *Poste Italiane v. Commission* (T-525/08, 13 September 2013)

- Remuneration of funds from postal accounts placed with the Italian Treasury
- Necessary account of all the relevant elements
  - remuneration in counterpart of the incapacity to use the funds
  - global approach – 1945 decree + 2006 convention
- Existence of specific constraints of the public operator
  - principle of equal treatment

## Advantage - Private investor principle - Bouygues and Bouygues Telecom v. Commission (France Telecom case) (T-425/04 and T-444/04 RENV, 2 July 2015)

- Aid
  - combination of public statements of support and offer of a shareholder loan
- Test of the prudent private investor
  - time when the measures at issue were taken by France
- It is possible to have regard to prior events and objective facts, but they cannot conclusively form the relevant reference framework for the application of the private investor test.

- DFB, a regional authority active in urban development, entered into two contracts with Habidite related to urban housing.
- Aid
  - no private player would have accepted to contract on such terms
  - no prior notification before granted to Habidite.

- A sale of a public land at a price lower than the market value is not necessarily classified as State aid provided that the price of that sale is as close as possible to the market value of the land concerned.
- The CJEU reached that conclusion even though such a sale could confer an advantage on the purchaser. Such a sale may also include other elements of State aid.

# Selective advantage: to an undertaking or a category of undertakings

- Undertakings as entities engaged in an economic activity (offering goods and services on a market),
  - Not State when exercising public powers, nor bodies acting in their capacity as public authorities
  - No aid when advantages to research institute, museum, university, employment policy measures aimed to improve professional education, apprenticeship or workings mobility

# Selectivity - notion

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

- Not selective:
- general measures (apply to all companies in all sectors of a MS, no discretionary power)
- e.g. rate of corporate tax



# Selectivity - notion

- **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 - notion

- General measures
  - Exclusion of general measures
    - Ex: social security regime applicable to all economic sectors (a contrario *Maribel*)
- Selective advantages
  - Presumed to be selective
  - Depend on the context
- Measures that seem to be selective but justified by the nature and general scheme of the system

# Selectivity - notion

- Assessment within the Member State, not comparison with other Member States
- Material and regional selectivity
- De jure and de facto selectivity
- Different features and techniques
  - designation of beneficiaries or economic sectors
  - objective criteria concerning the beneficiary or the conditions for the benefit
    - *C-279/08 P Commission v the Netherlands “NOX”*
    - *C-241/94 France v Commission, §§23 and 24*

# Selectivity - notion

- The measure must constitute an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation
  - *C-487/06 P British Aggregates Association v Commission*, §82
- Neither the large number of eligible undertakings nor the diversity and size of the sectors to which those undertakings belong provide any grounds for concluding that a State initiative constitutes a general measure of economic policy
  - *C-75/97 Belgium v Commission*, §32
- Aid is selective even when it favours all undertakings within a sector
  - *C-66/02 Commission v Italy*, §94

# Selectivity - clearly selective measure

- Aid ad hoc / individual
- Aid provided to one or certain sectors
  - *Belgium v. Commission (Maribel)*, C-75/97, §§28-33
- Aid provided to a specific region of a Member State
  - *Germany v. Commission*, C-156/98, §23
- Aid for which public authorities have a margin of discretion
  - *France v. Commission*, C-241/94, §§22-23
- Aid which apply only to certain categories of undertakings (SMEs, big)
  - *Territorio Historico de Alava e.a. v. Commission*, T-127, 129 and 148/99

# Selectivity – depending on the context

- Aid provided by a local authority in accordance with the Member State's institutional system?
  - *Portugal v. Commission*, C-88/03, §§62-67 (Açores)
    - Decision to reduce tax rate has to be taken by a local authority which has, constitutionally, a political and administrative status distinct from the central government;
    - It has been adopted without the central government being able to intervene on its content; and
    - Financial consequences of a national tax rate reduction applicable to undertakings which are in the region does not have to be compensated by subsidies coming from other regions or from the central government



- Three criteria:
  - **Institutional autonomy**
  - **Procedural autonomy**
  - **Economic and financial autonomy**

# Selectivity – apparently selective but justified by the nature and general scheme of the system (I)

- *Adria-Wien Pipeline*, C-143/99, §42

*"a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil that condition of selectivity"*

- *Spain v. Commission*, C-501/00, §124

*"to justify the contested measures with respect to the nature or the structure of the tax system of which those measures form part, it is not sufficient to state that they are intended to promote international trade. It is true that such a purpose is an economic objective, but it has not been shown that that purpose corresponds to the overall logic of the tax system in force in Spain, which is applicable to all undertakings"*

# Selectivity – apparently selective but justified by the nature and general scheme of the system (II)

- Only for tax and compulsory levies: justification by the nature and general scheme of the system. The justification only applies if the measure is in line with the mechanisms inherent in the tax system itself
  - *C-173/73 Italy v Commission*
  - *C-78/08 to C-80/08 Paint Graphos*
- Three-step analysis
  - identify the ‘normal’ regime (reference framework)
  - assess whether the measure derogates from that ‘normal’ regime
  - establish whether the differentiation arises from the nature or general scheme of the system of charges of which it forms part (Commission Notice)
- But technique not decisive
  - selective advantages for certain undertakings in the light of the tax regime as a whole, which formally applies to all undertakings
    - *C-106/09 P and C-107/09 P Commission and Spain v Gibraltar and United Kingdom* §85-108



# Selectivity - MOL Magyar v. Commission (T-499/10, 12 November 2013)

- Extension of mining fee granted in the hydrocarbon sector
- Text of general application applicable to any operator
- Fact that only one operator benefits from the scheme is not sufficient in itself to conclude the measure is selective

## Selectivity - Commission v MOL Magyar on appeal (C-15/14P - 4 June 2015)

- The fact that only one operator (MOL) benefits from the scheme is not sufficient in itself to conclude that the measure is selective
- Absence of any evidence that authorities treated MOL favourably in relation to any other undertaking in a comparable situation
- GC's judgment confirmed – annulment of the decision definitive

# Selectivity – C-270/15, Belgium v. Commission, 30 June 2016

- The notion of selectivity is distinguished from the notion of advantage.
- Identifying an advantage is not enough; its selective nature must be specified.
- A measure conferring an advantage of general application can grant an exclusive benefit to certain undertakings.

# Material Selectivity – Tax rulings

- Fiscal aid forms that apply only to certain groups of undertakings or certain sectors
- Within one MS
- Three step analysis:
  - Reference system
  - Derogation from reference system
  - Justification by the logic of the tax system

# Material selectivity – Tax rulings

- Aggressive transfer pricing can be employed to transform active income in economic activity into mobile royalty and interest payments which can be shifted and attributed to low/no taxation jurisdictions
- First decisions adopted concerning Fiat and Starbucks (Oct 2015) and Belgian Excess Profit (Jan 2016)
- Both negative decisions with recovery
- Selectivity assessment being disputed
- On June 2016 the Commission published a working paper on State aid and tax rulings

see:

[http://ec.europa.eu/competition/state\\_aid/tax\\_rulings/index\\_en.html](http://ec.europa.eu/competition/state_aid/tax_rulings/index_en.html)

# Distortion of competition & effect on trade

- Both criteria:
- Inextricably linked
- 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

# 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 Regulations)
  - 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: Altmark (C-280/00) and Heiser (C-172/03)

“...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...”

*Altmark (C-280/00)*

"...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"

*Heiser (C-172/03)*



# Administrative procedure (Commission)

# Basic concepts

- New aid
- Existing aid
- Unlawful aid
- Aid compatible with the internal market
- Aid incompatible with the internal market

# New Aid

- Notification / standstill obligation (Article 108(3) TFEU)
- Set up of a new aid measure
- Altering an existing aid
- Significant case of application of existing aid schemes approved by the Commission
- Article 1(c) Regulation 2015/1589

# Existing Aid

- Aid existing prior to the entry into force of the Treaty (1958) or at accession date
- Aid set up since that date and approved
- Notified aid put into force within 2 months of notification (when no objections from the Commission)
- Article 1(b) Regulation 2015/1589 (+ limitation period / measure became aid further to evolution of the internal market)
- Specific rules in 2004 accession treaty
  - Aid effective before 10 December 2004 - exhaustive list annexed to the accession treaty
  - Aid approved by national authority (no objections from the Commission within 3 months of notification)
  - Interim formal procedure before May 2004

# On the distinction new aid/existing aid (Case T-527/13 Italy v Commission (24 June 2015))

- GC partially upheld Italian's challenge of decision on State aid deferral of repayments
- The 2011 Italian law instating a payment deferral scheme is a modification of the existing approved aid scheme, rather than a new aid
- Only where an amendment affects the actual substance of the original scheme that the scheme is transformed into a new aid scheme.

# Unlawful Aid

- Direct effect Art. 108 (3) TFEU
- Prior notification and standstill obligation
- Unlawful aid if not notified or if put into effect before Commission decision
- Competing but distinct & complementary powers
  - Commission
  - National judge

# Compatible / incompatible aid

- Compatibility assessment: substance
- No principle of absolute prohibition : exemption under discretionary (subject to judicial review) appraisal by the Commission

# Exemption

- De iure exemptions (107 (2))
  - natural disasters, division of Germany, etc.
- Exemptions under discretionary powers of Commission (107(3))
  - regional and sectoral aid
  - project of common European interest
  - culture, heritage
- Exemptions decided by the Council (108 (2) *in fine*)
- Block exemptions (Art. 109 Regulation)
- Exemptions under Article 106 (2)



# Types of control

## A priori

- New Aid (Art. 108 (3))
  - preliminary examination - Art. 108 (3)
  - formal investigation - Art. 108 (2)

## A posteriori

- Existing Aid (Art. 108 (1))
  - permanent examination - 108 (1)
  - formal investigation - 108 (2)
- Aid covered by block exemption regulation

# Ordinary procedure, simplified procedure, code of best practices

- Council Regulation 2015/1589 (Reg 659/1999 amended in 2013 and recasted in 2015)
- Commission Regulation 794/2004 of 21.4.2004
  - - implementing regulation
- Simplified procedure communication
- Best Practices Code
- Recovery Notice
- Enforcement Notice

# Exclusive competence of the Commission

- Exclusive competence of the Commission to approve an aid as compatible with the internal market
- Prior notification by the State of all aid projects
  - Individual aid
  - Aid schemes
  - Except aid covered by an exemption regulation
- Non-notified aid is unlawful
  - Even if compatible with the common market
  - Except aid covered by an exemption regulation

# New Aid - Procedure

- **Prior notification** of new aid by MS and standstill obligation (Art. 108 (3) TFEU)
- **Preliminary examination** (Article 108(3) TFEU): 2 months unless agreed extension and if notification complete and no objections from the Commission: notice by MS before execution and Commission can oppose (15 days)
  - approval decision
    - no aid (4(2))
    - compatible aid (4(3): Internet publication
  - if serious doubts, obligation to initiate formal investigation (4(3): publication OJ – summary in all languages
- **Formal investigation** (Article 108(2) TFEU): observations by Member States (rights of defence), interested third parties (no right of defence). Formal decision (18 months –best endeavours- unless agreed extension)
  - no aid
  - compatible aid (conditions): positive decision
  - incompatible aid (→recovery): negative decision

# Existing Aid (Article 108 (1) TFEU)

## - Procedure

- Permanent examination by the Commission
- Initiation of the formal investigation (if serious doubts)
- Appropriate measures proposed
- Decision
  - abolition
  - modification
- *Ex nunc* effect only (ex: *coordination centres* in Belgium)

# Unlawful and incompatible aid: Commission's powers: Regulation 2015/1589

## Unlawful aid

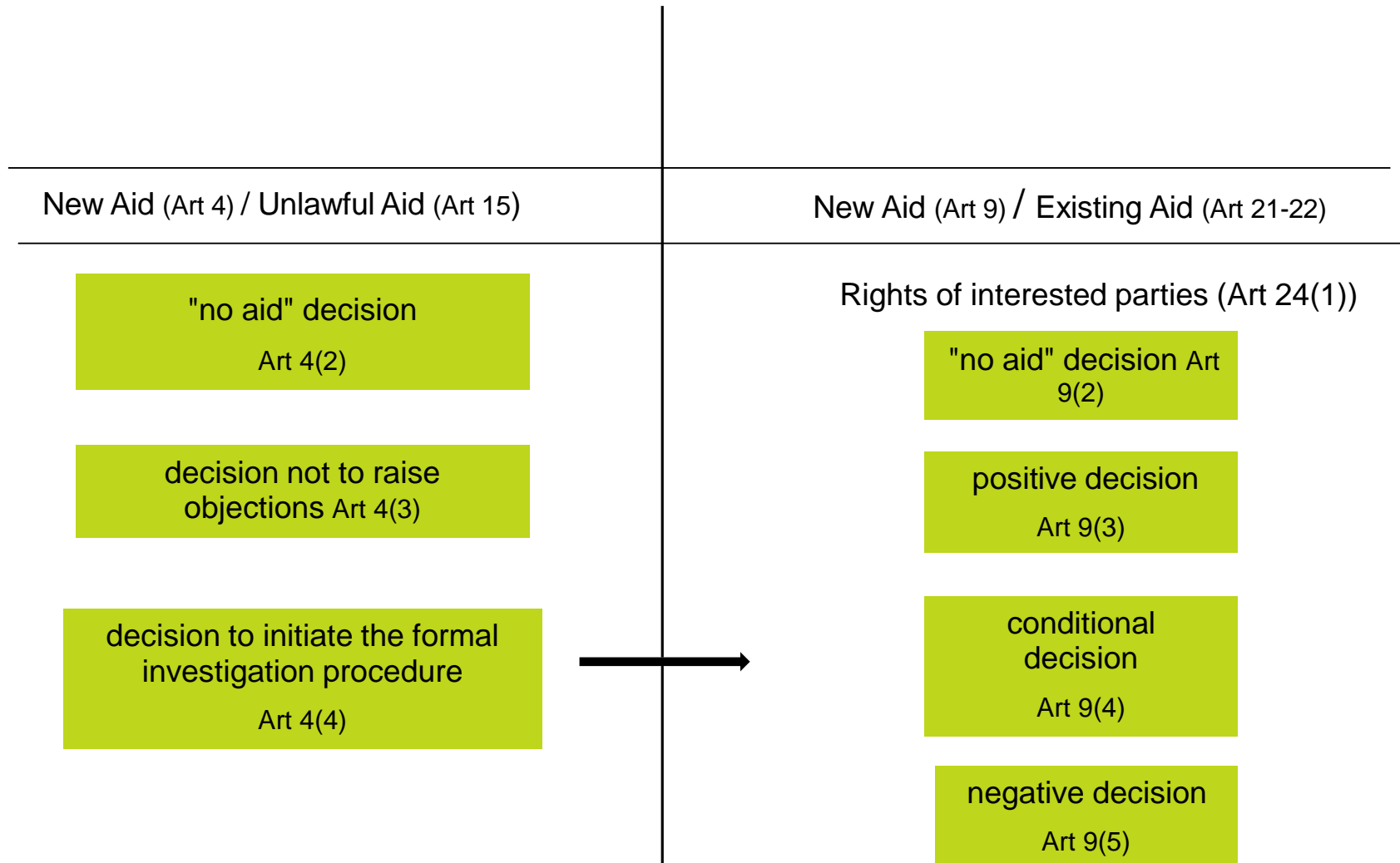
- request for information(12 (2)) – press, complaints, etc.
- information injunction (12 (3))
- suspension injunction (13 (1)) (few examples)
- provisional recovery injunction (13 (2)) (never used)
  - no doubt it is aid
  - urgency
  - serious risk of substantial and irreparable harm to competitor

## Incompatible aid: recovery decision (Art. 16, obligation)

- according to national law
- with interest
- defences
  - exceptional circumstances and legitimate expectations
    - dec. 2000/359- Sicily
    - France Telecom, 2.8.04

10-year limitation period from enjoyment of aid (restarts if Commission or MS action)

# State Aid procedure



# July 2013 Regulation 734/2013 amending Procedural Regulation

- Better management of **complaints**:
  - Justification of legitimate interest
  - Specific form
- **Request for information** following initiation of formal investigation
  - procedure
  - Complex matter
  - Member State (other than the MS concerned), undertakings or associations
- Request for information: "*all market information necessary to enable the Commission to complete its assessment of the measure at stake taking*"
  - - Time limit: one month to answer



# Requests for information (2)

- DG COMP's letter
  - other Member States, undertaking or association of undertakings
  - proportionate time limit
- Commission's decision
  - Undertakings or association of undertakings
  - Shall indicate the right to have the decision reviewed

# Requests for information (3)

- Fines
  - Gross negligence or supply incorrect, incomplete or misleading information
  - Up to 1% of worldwide turnover
  
- Periodic penalty payments
  - fails to supply complete and correct information as requested by the Commission by decision
  - Up to 5% of the average daily turnover

# Amicus Curiae

- **Request of information** in its possession or its opinion on
  - questions concerning the application of State aid rules.
- Commission, acting on its own initiative, may submit
  - **written observations** to the courts of the Member States.
- Possibility to make **oral observations** with the permission
  - of the court in question.
- For the exclusive purpose of preparing its observations,
  - the Commission may **request the transmission of**
  - **documents** at the disposal of the court, necessary for its
  - assessment of the matter.

*[ref to role of national courts below]*

# State aid / Antitrust

- Comparison with **antitrust** procedure
  - Sanction and periodic penalty payments
  - Cooperation with national courts (Article 15 Reg 1/2003)
  - BUT
- Imbalance between Member States and undertakings

# Unlawful aid – powers of national courts

(see below)

- Exclusive control by national courts
  - notification obligation – standstill obligation
  - until decision of the Commission on compatibility
- Role of national courts
  - assess whether measure is aid
    - Art. 107(1) TFEU: competing powers with Commission
  - draw consequences from violation of notification obligation
  - no application of substantive rule of Art. 107(3) TFEU (compatibility assessment)
- Powers
  - suspension injunction, recovery injunction, recovery decision, damages

# Main sources for recovery by the Commission

- Article 108(2) TFEU
- Regulation 2015/1589 – Article 16
- Recovery Notice
  - OJ C272/4 of 15 Nov 2007
- 2006 Study on the application of State aid at national level
  - Part II: recovery (enforcement of negative decisions)
- State aid scoreboards

# Recovery – Commission decisions

- case law codified by Regulation 2015/1589
- C° v. Germany, 12.7.73
  - recovery is logical consequence of unlawfulness and incompatibility
- C°v. Italie, 4.4.95 (2 judgments)
  - forfeits the advantage and its effects
- Germany v. C° (System Microelectronic Innovation), 29.4.04
  - eliminate the distortion of competition caused by the competitive advantage procured by the unlawful aid

# Recovery - Commission decisions

- Systematic recovery in all cases of unlawful and incompatible Aid
- Limited exceptions to recovery – Art. 16(1)-17 Reg 2015/1589
  - general principles of EU law (legal certainty)
  - limitation period of 10 years
  - exceptional circumstances / absolute impossibility

*See no absolute impossibility in C-214/07, Com. v. France*
- Political context of a negative decision
  - Member State has not notified the Aid
  - Grantor has to recover the Aid
  - Generally no legitimate expectations of the beneficiary



# Recovery decisions: Commission/ Member State

- Commission (or national courts) order recovery
- Member States organise recovery of the Aid
  - With interests for period between grant and recovery of unlawful aid
  - Guidance on calculation of interest rate
- Recovery governed by national procedural rules
  - Art. 16 (3) Reg 2015/1589: the Member State shall take “all necessary measures” to ensure “immediate and effective” recovery
    - No delay
    - Effectiveness
    - Loyal cooperation: "good faith"

# Indications in recovery decisions

- Commitment to precise and complete 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)
  - As from the grant of the aid (Siemens)
  - Interest to eliminate all ancillary advantages (Siemens)
  - Commission is not required to state amount to be recovered; it is to be calculated by the MS (Ladbroke)
  - Information needed to determine the amounts is sufficient
  - Calculation of interest rate
  - Application of other block exemption regulations?
  - Recovery of net amount only – net tax – tax to be determined by MS (Siemens)

Example: C-674/13 - Commission v Germany (6 May 2015) – [see also SNCM case on 9 July 2015]

- Germany condemned for recovering only a small amount of the unlawful aid (DPAG)
- Germany considered only commercial post-related services as non-regulated, as opposed to the Commission's view of identifying even business-to-business services as non-regulated
- CJEU
  - Germany should have carried out an assessment to determine whether business-to-business parcel services were a separate market from business-to-consumer parcel services.

# Commission decision of 23 February 2011 on aid granted by Italy in favour of in favour of Portovesme (1)

## *Article 2*

The State aid unlawfully granted by Italy, in breach of Article 108(3) of the TFEU... amounting to €12 845 892,82 in favour of Portovesme Srl...is incompatible with the internal market.

## *Article 3*

1. Italy shall recover the aid referred to in Article 2 from the beneficiaries.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
4. Italy shall cancel all future payments of the aid referred to in Article 2 with effect from the date of adoption of this Decision.

## *Article 4*

1. Recovery of the aid referred to in Article 2 shall be immediate and effective.
2. Italy shall ensure that this Decision is implemented within four months of its notification.

# Commission decision of 23 February 2011 on aid granted by Italy in favour of in favour of Portovesme (2)

## *Article 5*

1. Within two months from notification of this Decision, Italy shall submit the following information to the Commission:
  - (a) the total amount (principal and recovery interest) to be recovered from the beneficiary;
  - (b) a detailed description of the measures already taken and planned to comply with this Decision;
  - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. Italy shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 2 has been completed. It shall immediately submit, on simple request from the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

## *Article 6*

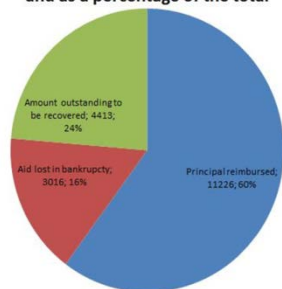
This Decision is addressed to the Italy.  
Done at Brussels.

# Implementation of negative Commission decisions – status (1)

Improved enforcement of the past years:

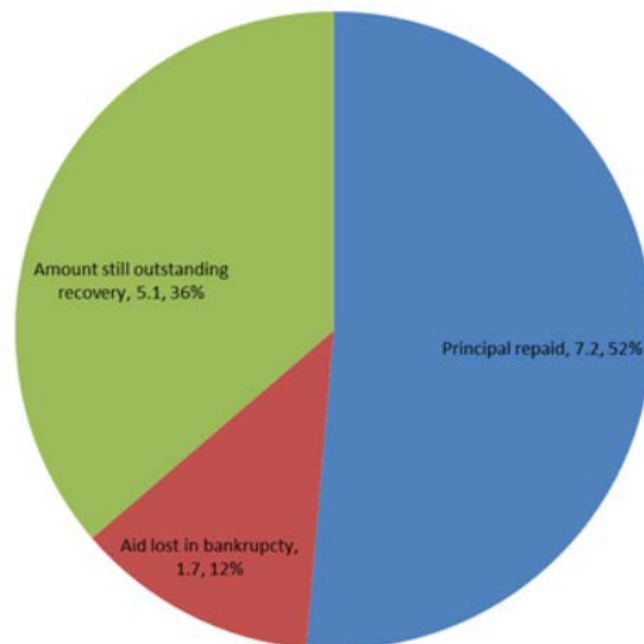
- Principal reimbursed: €7.2bn (€11bn)
- Aid lost in bankruptcy: €1.7bn (€3bn)
- Outstanding amount: €5.1bn (€4bn)

Situation on recovery of illegal and incompatible State aid (by 31/12/2013) in volume (million EUR) and as a percentage of the total



Source: DG Competition. Note: The information includes all recovery decisions adopted since 1/1/2000 until 31/12/2013 in regard of aid measures granted to industry and services and for which the aid amount is known. For the purpose of this presentation, the amount recovered does not include the interest which was also recovered.

Recovery of illegal and incompatible State aid (Period 2004-2014; Situation on 30/06/2014) expressed in volume (billion EUR) and as a percentage of the total



Source: DG Competition.

NB: (1) The above information refers to State aid measures through which aid was granted to industry and services and which recovery decisions were adopted in the period 1 January 2000 until 30 June 2014.

(2) "Principal repaid" does not include the interest which was recovered as well.

# Implementation of negative Commission decisions – status (2)

- Main Member States concerned: ITA, SP, GRE, GER, FRA

Active pending recovery cases by Member State, June 2014

	Situation 30.06.2014
Italy / Italia	12
Spain / España	11
Greece / Ελλάδα	6
Germany / Deutschland	5
France	4
Ireland	2
Netherlands / Nederland	2
Portugal	2
Finland / Suomi	2
Poland / Polska	1
Slovakia	1
Slovenia	1
<b>TOTAL</b>	<b>47</b>

Source: DG Competition, situation on 30 June 2014

# Sanctions for non implementation and ways to enforce negative decisions

- Against the Member States
  - Article 108(2) TFEU proceedings by the Commission
  - Article 260 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)



# Outstanding issues

- Excessive length of the national recovery procedures
- Weakness of the national procedural framework
  - not adapted for recovery
    - eg insolvency procedures
    - eg legal basis for recovery
    - eg principle of res judicata
- Enforcement of negative Commission decisions
  - Number of national cases increasing
  - Limits:
    - Member States refrain from pursuing beneficiary
    - Competitors do not take action if no direct compensation
    - National courts are not always aware of their competence
    - Beneficiary: possible challenge by the before national courts
      - procedure
      - substance

# Who should reimburse?

- **Seleco** (Dec. 2000/536, 2 June 1999)
  - in case of beneficiary transferred: recovery with third party if economic continuity
- **Seleco** annulled (C-328/99 et C-399/00)
  - no recovery with third party if share deal at market price – (Commission should have verified this point)
- **Banks** (C-390/98)
  - sale of beneficiary at market price – selling price includes aid, seller keeps advantage: recovery by seller
- **Germany v. C<sup>o</sup>** (*System Microelectronic Innovation*), C-277/00, 29.4.2004: confirmation of *Banks* - share deal – market price
  - *"where an undertaking that has benefited from unlawful State aid is bought at the market price, that is to say at the highest price which a private investor acting under normal competitive conditions was ready to pay for that company in the situation it was in, in particular after having enjoyed State aid, 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"* (para 80)

# Who should reimburse? (2)

- C<sup>o</sup>v. Grèce (C-415/03): fraud
- Olympic Airways (old) – Olympic Airlines (new)
- Alitalia (Decision 12.11.2008, N 510/2008)
- - no aid in favour of acquirers
  - open, transparent and non discriminatory procedure
  - independent valuation of assets
  - no specific conditions attached
  - no circumvention of recovery obligation of €300 m loan
  - no economic continuity Alitalia / acquirers
  - no economic continuity Alitalia / CAI

# Pressure means by the Commission

- suspension of positive decision until other incompatible aid not recovered
  - same beneficiary
  - same MS
    - no cross-border effect
    - but see *Electrolux/Whirpool - FagorBrandt* (joined cases T-115/09 – T-116/09, 14 Feb 2012)
- practice confirmed by GC and CJEU
  - reasoning via cumulation of aid
  - C-355/95P *TWD*

# Consequences of recovery decisions

- Suspension of positive decision until other incompatible aid not recovered
  - same beneficiary
  - same MS
    - no cross-border effect
    - See also *Electrolux/Whirlpool - FagorBrandt* (joined cases T-115/09 – T-116/09, 14 Feb 2012)
- Practice confirmed by GC and CJEU
  - reasoning via cumulation of aid
  - C-355/95P TWD

# Recovery in case of aid transferred to acquirer

- Recovery of unlawful and incompatible extends to the purchaser in case of economic continuity
  - See Joint cases C-328/99 and C-399/00, *Italy and SIM 2 Multimedia SpA v. Commission*, 8 May 2003, §78
- Commission's body of evidence:
  - Purpose of the transfer
  - Transfer price
  - Identity of the shareholders or owners of the acquiring firm and of the original firm
  - Moment at which the transfer was carried out
  - Economic logic of the transaction

# Simplification package

Simplified procedure

Best practice

# Simplification package

## Origin: State aid action plan

- More efficient procedures and better enforcement of State aid law
- Followed by amendments to the Procedural Regulation in 2013
- Programme:
  - First modernize substantive rules
  - Then introduce/practicize procedural Best Practices
  - → one step after the other



# Simplification Package

- More transparency, predictability and efficiency for State aid procedures
- Shared objective: reinforced cooperation, better quality of notifications, reduced duration
- Future Architecture:
  - Block-exemption (GBER) – no notification
  - Simplified Procedure – simplified notification
  - Best Practices Code for all other State aid cases

# Simplified procedure - Best practices

- **Simplified** *(straightforward cases)*
  - pre-notification
  - summary notice
  - observations by third parties
    - 10 working days
  - decision
    - 20 working days following notification (*best endeavours*)

- **Best practices**
  - pre-notification
  - participation beneficiary promoted
  - MAP, *mutually agreed planning*
  - preliminary examination
    - single information request
    - stop-the-clock
  - formal examination
    - strict deadline
    - 4 m *best endeavours*

# Compatibility assessment

# Exemptions

- Article 107(2) TFEU (exempt by law)
  - a. aids of a social character to individual consumers
  - b. natural disasters or other exceptional occurrences
  - c. *division of Germany*
  
- Article 107(3) TFEU (exclusive competence of the Commission and broad discretion)
  - a. regions with abnormally low standard of living and serious underemployment
  - b. important project of European interest [**new 2014 communication**] or to remedy a serious disturbance in the economy of a Member State [**financial crisis cases**]
  - c. certain activities – certain economic areas
  - d. culture – heritage conservation
  - e. other categories by decision of the Council: shipbuilding

# Compatible / Incompatible Aid

- Compatibility assessment on the substance
- No principle of absolute prohibition: exemption under discretionary (subject to judicial review) appraisal by the Commission
- Exemptions:
  - *De iure* exemptions (107 (2)): natural disasters, etc.)
  - Exemptions under discretionary powers of Commission (107(3))
    - regional and sectoral aid, project of common European interest, culture, heritage
  - Exemptions decided by the Council (108 (2) in fine)
  - Block exemptions (Art. 109 Regulation)
- Revised de minimis regulation
  - Aid of up to €200 000 per undertaking over a three year period
  - Subsidised loans of up to €1 million

# How is compatibility assessed? C-303/13 P

## Commission v. Andersen (I)

- principle of *tempus regit actum*
  - any action should be regulated by the law in force at the time it was adopted
    - the aid granted until the moment in which the new regulation came into force should be assessed according to the old instrument
    - the aid granted from that moment onwards should be assessed according to the new one
      - transitional provisions.

# How is compatibility assessed? C-303/13 P

## Commission v. Andersen (II)

- GC's suggestion that the instrument used for the assessment of compatibility should be the one in force at the time the contract was originally granted **does not fully reflect the nature of State aid**
  - the aid is in fact an advantage which is enjoyed by an undertaking throughout time and until it is removed with recovery
  - the moment in which the contract was granted does not have particular relevance.
- CJEU set aside the GC's judgment and referred the case back to it.

# State Aid Modernisation (SAM)



# State Aid Reform (2005-2009)

- Action Plan (SAAP) 2005-2009
  - "less and better targeted aid"
    - Lisbon strategy objectives: R&D, innovation, risk capital investments for SMEs, SGEI...
    - Reform of regional aid: least developed regions
  - Refined economic approach
  - More effective procedures and better enforcement
    - Draft general block exemption (simplification & consolidation)
    - Extension of the scope of block exemptions
  - Excluded sectors
    - agriculture, fisheries, coal and transport

# State Aid Modernization (2012-2014)

- 8 May 2012: Commission's communication on State Aid Modernisation (SAM)
  - Foster growth in a strengthened, dynamic and competitive internal market
  - Focus enforcement on cases with the biggest impact on the internal market
  - Streamlined rules and faster decisions
- 17 January 2013, EP's Resolution on SAM
- November 2012: opinions of the European Economic and Social Committee and of the Committee of the Regions

# State aid modernization (2012-2014) (2)

## The Commission's program

- To identify common principles for assessing the compatibility of aid with the internal market, across various guidelines and frameworks
- To revise, streamline and possibly consolidate State aid guidelines to make them consistent with those common principles

# SAM: The Commission's objectives

- Identifying common principles for assessing the compatibility of state Aid with the internal market, across various guidelines and frameworks
- Revising streamline and possibly consolidate State Aid guidelines to make them consistent with the common principles identified
- Fostering growth in a strengthened, dynamic and competitive internal market;
- Focussing enforcement on the cases with the biggest impact on the internal market; and
- Streamlining the rules and enabling faster decisions.

# Assessment: Opportunities and challenges

- Contribute to a better decision-making
- Contribute to a better allocation of financial resources
- Ensure a better control by Member States
- Reconcile the principle of equal treatment with a certain (and necessary) degree of flexibility

# Contribution to economic recovery and growth

- The competition policy must support the general objectives of the European Commission
- The objective of the modernization is to align the expenses in terms of State aid with the **objectives of Europe 2020**
- The objectives of President Juncker should be reflected in the DG COMP initiatives: single digital market, energy policy, financial services, industrial policy et fight against tax evasion

# Status of the reform

## Adopted legal texts (not exhaustive):

- Procedural Regulation
- Implementing Regulation
- Broadband Guidelines
- Cinema Communication
- Guidelines on Regional State Aid
- *De Minimis* Regulation
- Guidelines on Risk Finance Aid
- Energy & Environment
- Aviation Guidelines
- GBER
- R&D&I
- Rescue and Restructuring

## Last legal texts adopted:

- Notice on the notion of State aid published in May 2016

# Measures adopted

- Council Regulation (EU) No 734/2013 of 22 July 2013: new procedure – Regulation 2015/1589: consolidated version
- Council Regulation (EU) No 733/2013 of 22 July 2013: enabling regulation (extension of GBER)
- Broadband guidelines
- Regional aid guidelines 2014-2020 (entry into force: 30 June 2014)
- Cinema communication (14/11/2013)
- Commission Regulation No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 TFEU to de minimis aid (18/12/2013)



# Measures adopted in the course of 2014

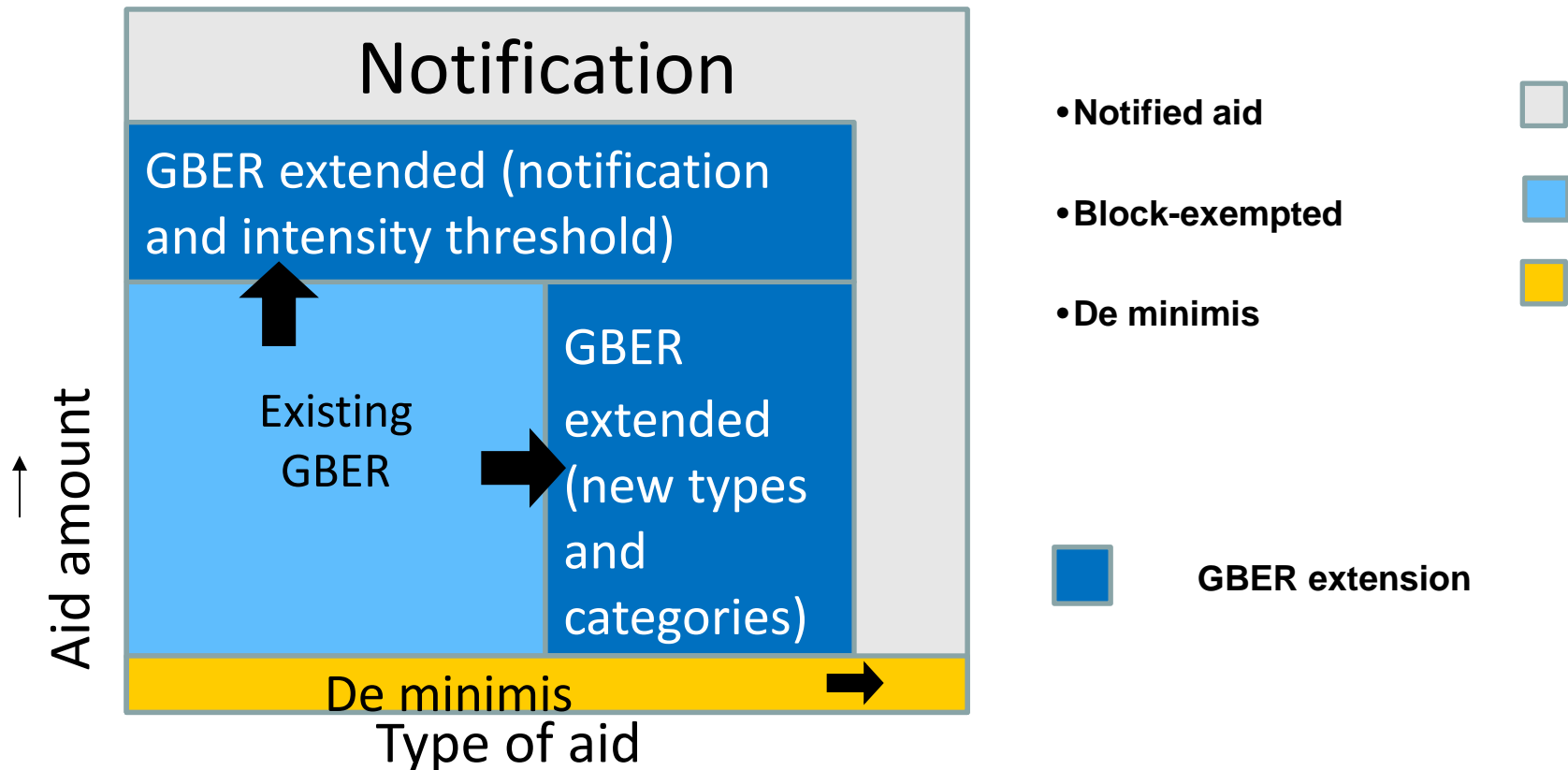
- Risk capital guidelines (15/01/2014)
- Guidelines on State aid to airports and airlines (20/02/2014)
- Rescue and restructuring guidelines (06/07/2014)
- Guidelines on State aid for environmental protection and energy 2014-2020(09/04/2014))
- General Block Exemption Regulation (GBER – 17 June 2014)
- Draft R&D&I framework (27/06/2014)

# General Block Exemption Regulation (GBER)

# Context of GBER

- The GBER 2014-2020 is a set of 43 exemptions that can be used to provide effective and compliant State aid
- Aid under GBER can be provided without prior approval from the Commission
- To use the GBER, the granting body must publish a scheme on the internet and complete an online form which goes to the Commission
- Applies from 1 July 2014 until 31 December 2020

# Scope of GBER



# Moving from an ex-ante to an ex-post control

## ■ **Greater impact of the new GBER:**

- A significant percentage of the aid measures fall under the scope of the GBER (until 90 % if Member States use the GBER to design their aid measures)
- It will reduce the administrative load on the parties and will allow a simplification of the procedure (more particularly in terms of duration and constraints on the beneficiary companies).

## ■ **Greater importance of the ex-post control:**

- By the Commission - greater supervision
- By Member States - evaluation ex-post of their most important projects
- Peer-review and public examination of the most important aid measures

# When does GBER apply?

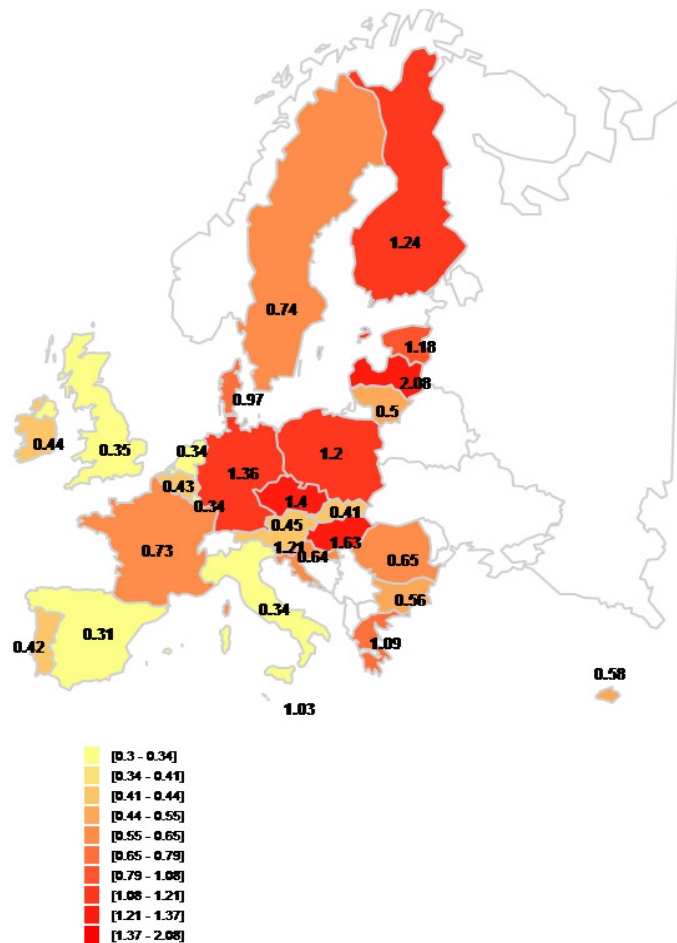
- Scope:
  - Types of aid covered by GBER
  - Types of aid not covered by GBER
  - Sectors not covered by GBER
- Thresholds:
  - Different thresholds set out in Article 4 GBER
  - GBER does not cover aid above those levels – notification to Commission is required

# Main types of aid covered by GBER

- Regional aid
- Aid to Small and Medium Sized Enterprises (SMEs)
- Aid for access to finance for SMEs
- Aid for research and development and innovation (R&D&I)
- Training aid
- Aid for disadvantaged workers and for workers with disabilities
- Aid for environmental protection
- Aid to make good the damage caused by certain natural disasters (new category)
- Social aid for transport for residents of remote regions (new category)
- Aid for broadband infrastructures (new category)
- Aid for culture and heritage conservation (new category)
- Aid for sport and multifunctional recreational infrastructures (new category)
- Aid for local infrastructures (new category)

# State aid expenditure in 2014 (source: State aid

scoreboard 2014)



*State aid expenditure as % of GDP (2014)*

**According to the** *State Aid expenditure as % of GDP (2014)*

**According to the national expenditure reports for 2014, Member States (EU28) spent 101.2 billion EUR i.e. 0.72% of GDP on State aid.**

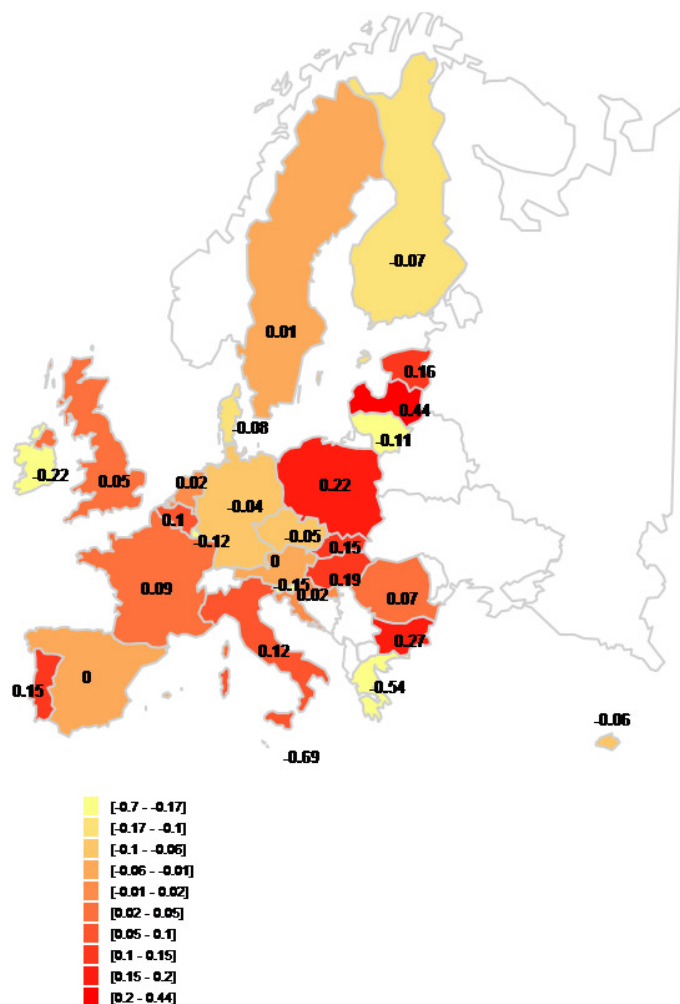
In nominal terms, this represents an increase of about 50% compared to 2013 expenditures (+ 33.4 billion EUR). However, the increase in expenditure is largely (85%) due to inclusion of more renewable energy support schemes (RES) in the reporting. In 2014 shows an increase was reported on State Aid on environmental protection and energy savings of about +28.5 billion EUR at EU level.



# State aid expenditure in 2014

(source: State aid

scoreboard 2014)

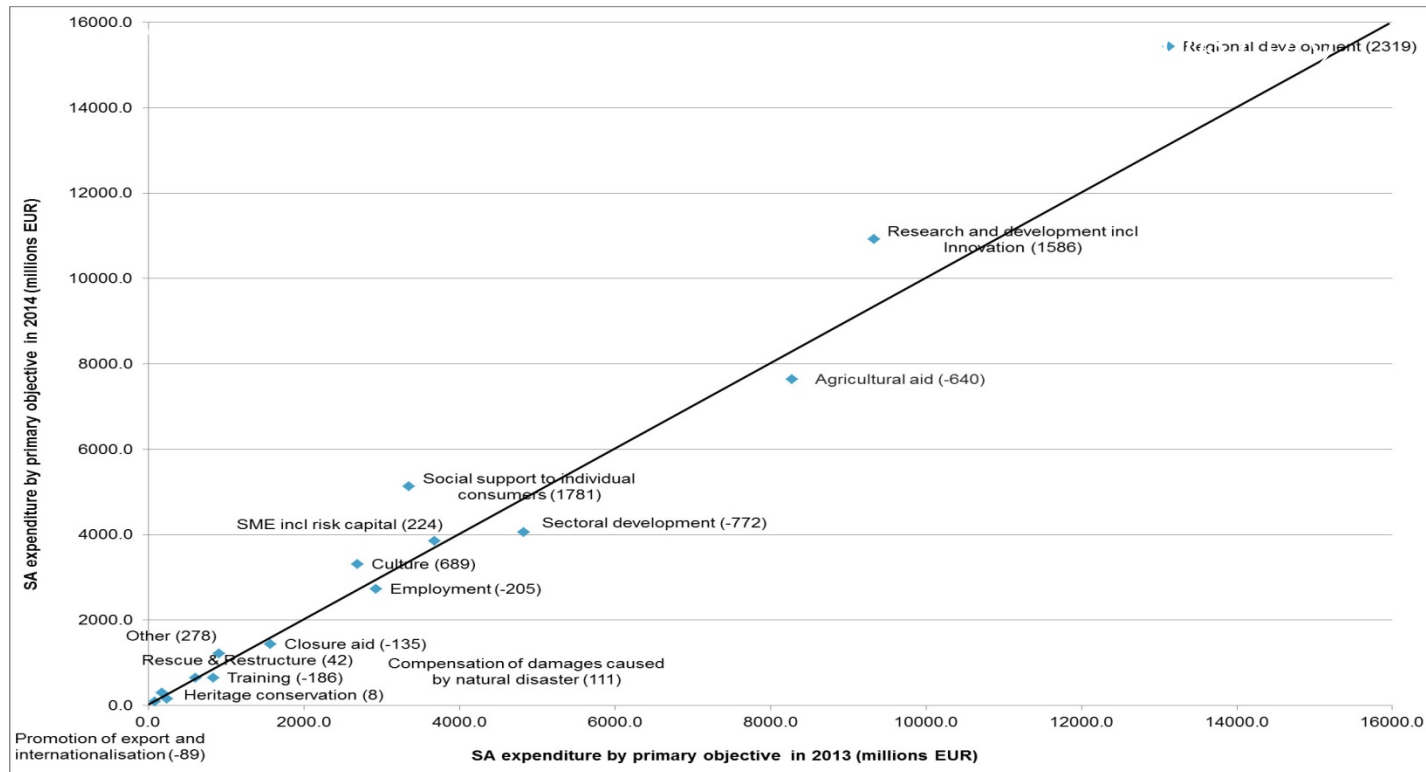


State aid expenditure as % of GDP (p.p. change 2013-2014), **excluding environmental and energy savings**

**Without State aid on environmental and energy savings, Member States declared they spent at European Union level about 58 billion EUR i.e. 0.41% of GDP on state aid.**

In nominal terms, this represents an increase of about 9.3% compared to 2013 expenditures (+4.9 billion EUR).

# State aid expenditure in 2014



# State aid expenditure

This is mostly due to:

- (1) an increase of State aid on regional development of about €2.3 billion in 2014;
- (2) the reporting by Member States, as from the year 2014 and in line with DG COMP guidance, of the total amount of aid that is co-financed including both national and EU Structural Funds expenditure (+2.0 billion EUR in 2014 whatever the main objective is);
- (3) an increase in social support to individual consumers expenditure of about +1.8 billion EUR;
- (4) an increase in R&D&I State aid expenditure of about +€1.6 billion (5) a slight increase in reported expenditures on culture (+€0.7 billion) and SMEs (+€0.2 billion) and a decrease in expenditure on agriculture (-€0.6 billion), employment and training objectives (-€0.2 billion).

# Types of aid *not* covered by GBER

- Aid to export related activities
- Aid contingent on the use of domestic over imported goods
- Aid schemes that do not explicitly exclude payments of individual aid to an undertaking subject to an outstanding recovery order or *ad hoc* aid in favour of such an undertaking
- Aid to undertakings in difficulty, with the exception of aid schemes to make good the damage caused by natural disasters
- Aid measures which have conditions attached that result in a breach of EU law

# GBER today

- Covers 90% of the measures
- Proposed review to extend it to ports and airports
- Limited modifications for culture and outermost regions
- More transparency: publication of aid beneficiaries (> EUR 500)
- All MS should take responsibility for better compliance

# De Minimis Regulation

# Notion of de minimis aid – Regulation 1407/2013

- Main structure:
  - the maximum limit remains €200,000 over three years to a single undertaking;
  - that maximum limit is a cumulative limit (so that if two grants of aid together exceed the threshold, the regulation does not apply);
  - it remains limited to “transparent” aid (i.e. where it is possible precisely to calculate the gross grant equivalent);
  - the grantor, before it grants the aid, must inform the recipient undertaking of the gross grant equivalent, refer to the regulation, and obtain a declaration from the undertaking as to any other aid it has received under the regulation in the current and previous two fiscal years; and
  - export-related aid, and aid conditional on the use of domestic goods, are excluded

# Notion of de minimis aid – Elements of Reform

- **undertakings in difficulty** are no longer excluded from the scope of the regulation;
- the lower limit for **road transport** undertakings (€100,000 over three years) now applies only to **road freight** transport;
- “**single undertaking**” is now defined by reference to majority shareholdings, and dominant influence based on contract or provisions in memoranda and articles of association, rather than by reference to the somewhat imprecise definition of the term in general competition law – this will make the €200,000 limit per undertaking easier to apply; and
- **loans** will fall under the regulation (even if their gross grant equivalent calculated on the basis of pertaining interest rates exceeds the general limit) if they are at least 50% secured and the loan is no more than €1m over 5 years or €500,000 over 10 years.



# Framework for Research Development and Innovation

# Research Development and Innovation

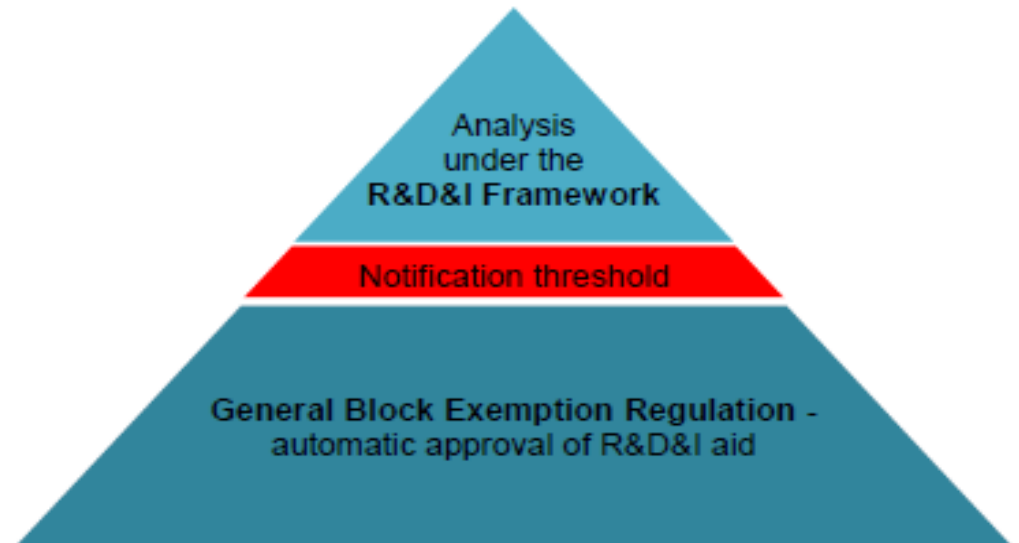
- **Basic Principles:**
  - Effective competition constitutes the best way of increasing the innovation and the competitiveness
  - State aid granted by the Member States reduces the competitors' incentives to invest in Research and Development and to innovate
- **Nevertheless,** there are market failures which discourage companies and to which the State aid can bring a solution:
  - Imperfect and asymmetric information
  - Distribution of knowledge to third parties
  - Network and coordination problems

# Research Development and Innovation

- **Lisbon Strategy (target 3% for 2010)**
  - Contribution of RDI projects to the strategy aiming at employment growth
  - Foster the economy, the employment growth and strengthen the competitiveness of the European industry by:
    - allowing Member States to dedicate a more important part of their budgets to State aid for RDI
    - directing the State aid towards to better projects (thanks to the refined economic approach)
- **Action plan in the field of state aid**
  - Less and more targeted aid
  - Refined economic approach: first application

# Legal Framework for RDI

- The rules on RDI are located in two legal texts:
  - **GBER**: the aid can be granted without prior notification to the Commission
  - **Framework for RDI**: Covers the aid on RDI falling outside the scope of GBER (greater potential of distortion)
- Entry into force: 1 June 2014



# New RDI Rules

- The extension of the scope of application for the aid in RDI
  - The scope of application of the GBER and the framework on RDI was extended and became more flexible.
  - The thresholds of notification were doubled for the aid intended to RDI projects.
- The criteria for the **State aid likely to distort competition**
  - Contribution to an objective of well defined common interest
  - Required intervention of the State
  - Appropriateness of the aid measure
    - Incentive effect
    - Proportionality of the aid
    - Prevention of the negative effects unwanted on the competition and the exchanges between Member States
    - Transparency of the aid

# Notification procedure – concrete example for France

- Cooperation with the Member State (France in this case)
  - (e.g.) National Research Agency (ANR), DGE (*Direction Générale des Entreprises*), General Secretariat for European Affairs (SGAE), PR (Permanent Representation in Brussels)
- Pre-notification
  - Preliminary meeting at the European Commission
  - Drafting a pre-notification memorandum
  - Q&As with the European Commission – subsequent modifications
- Planning
- Notification
- Decision
- Implementation of the aid

# Essential issues raised in front of the European Commission – 1 (according to the notification plan)

- Presentation of the project
  - Objectives, programs, technological locks, partnerships, organization
- Cost of the project
  - Eligible costs
  - By partner, by research category (fundamental research, experimental development, industrial research), by expenditure category, by sub-program, by year
- Description of the State support
  - Amount and intensity
- Existence of the aid (notion of aid)
  - Direct aid (absence of aid?), indirect aid, no aid to public research laboratories, no indirect aid via collaborative research, IP, intervention of public undertakings (no aid?)
- Compatibility of the aid (see below)
  - Positive effects
  - Distortion of competition and effect on trade between Member States
  - Balancing test
- Conclusion

# Essential issues raised in front of the European Commission – 2 (according to the notification plan)

- Positive effects
  - Market failure
    - Imperfect and asymmetrical information, coordination problem
    - Positive externalities and dissemination of knowledge
  - Appropriate instrument to act on the market
  - Incentive effect of the aid
    - No implementation of the project before the date when the aid demand was made
    - For beneficiaries of <7,5 m €
    - For beneficiaries of >7,5 m €
      - Counterfactual scenario (material increase in size or scope of the R&D project; material increase of the total amount spent in the R&D project; material increase in the speed of completion of the project (rhythm))
      - Decision-making process and profitability level (counterfactual, with aid, without aid)
      - Financial analysis and cash flow
      - Risk analysis (techno-economic analysis, partnerships, regulation, market, big R&D projects)
  - Proportionality of the aid



# Essential issues raised in front of the European Commission - 3

## Compatibility of the aid (according to the notification plan)

- Distortion of competition and effect on trade between Member States
  - Relevant market
  - Analysis of the risks of distortion of competition
    - Dynamic incentives
      - Amount of the aid
      - Proximity of the market / category of the aid
      - Open selection procedure
      - Exit barriers
      - Future incentives to compete for a market
      - Product differentiation and intensity of competition
    - Creation or transfer of market power
      - Market power of partners and structure of the market
      - Level of entry barriers
      - Countervailing buyer power
      - Selection process
    - Perpetuation of inefficient market structures
- Balancing test

# Pre-notification phase

- Preliminary questions to the Member State
  - Internal procedure to be followed
  - Notification confirmation
    - Identification of the beneficiaries
    - Dividing in severable projects? (in theory no; if yes, some of the programs may not be notifiable)
- Meeting with the Commission
  - Member State + undertaking's representatives and counsel/economist
  - General introduction
  - Identification of preliminary questions
- Drafting and sending the pre-notification memorandum
  - In cooperation with the Member State
- Period
  - Several months
  - Important to deal with all the problems at this stage of the procedure

# Pre-notification phase

- Notification memorandum after a dialogue / exchange of views with the European Commission
- Period
  - 2 months (in theory) starting from the notification
  - In practice, several months
- No third-party comments
  - The notification is not publicly available
  - Third parties can only lodge a complaint if they have any knowledge of the project
  - Bilateral procedure between the Commission and the Member State
- If issues: opening of phase 2, open to third-parties
  - In this case, the timeframe is very important

# Decision - implementation

- Decision of the College of Commissioners on the basis of the case team analysis
- Notification to the Member State
- Granting of the aid
- Monitoring by the Commission
  - Implementation report by the Member State

# Guidelines on Regional Aid

# Introduction

- **Purpose of regional aid:**
  - To promote the development of disadvantaged areas by addressing their economic handicaps
  - To promote economic cohesion of the EU
- **How?**
  - Support for investment and job creation by undertakings
  - Support for operating expenses of undertakings (exceptionally)
- **Criteria set out in Regional Aid Guidelines (RAG 2014) + GBER:**
  - Where can regional aid be granted?
  - What can aid be granted for?
  - How much aid can be granted?

# Regional Aid maps

To be effective: regional aid should target problem areas

- Areas with abnormally low standard of living → Art.107(3)(a)
  - Reference point is EU average
  - Criterion → GDP/cap lower than 75% EU average  
→ Outer Most Regions (Art. 349 TFEU)
- Other disadvantaged areas → Art. 107(3)(c)
  - Ex-Article 107(3)(a) regions (2011-2013)
  - Sparsely populated areas
  - Other problem regions with population of at least 50,000

# Regional Aid maps (II)

Comparison population coverage 2006-2013 and 2014-2020:

Types of region	2014-2020	2006-2013
<b>'a' areas</b>	<b>25.8%</b>	<b>33.0%</b>
- GDP/cap < 75%	24.9%	32.1%
- Outermost regions	0.9%	0.9%
<b>'c' areas</b>	<b>21.8%</b>	<b>13.6%</b>
- Former 'a' regions	6.9%	
- Sparsely populated	0.6%	
- Other 'c' areas	14.3%	
<b>Total 'a' + 'c'</b>	<b>47.6%</b>	<b>46.6%</b>

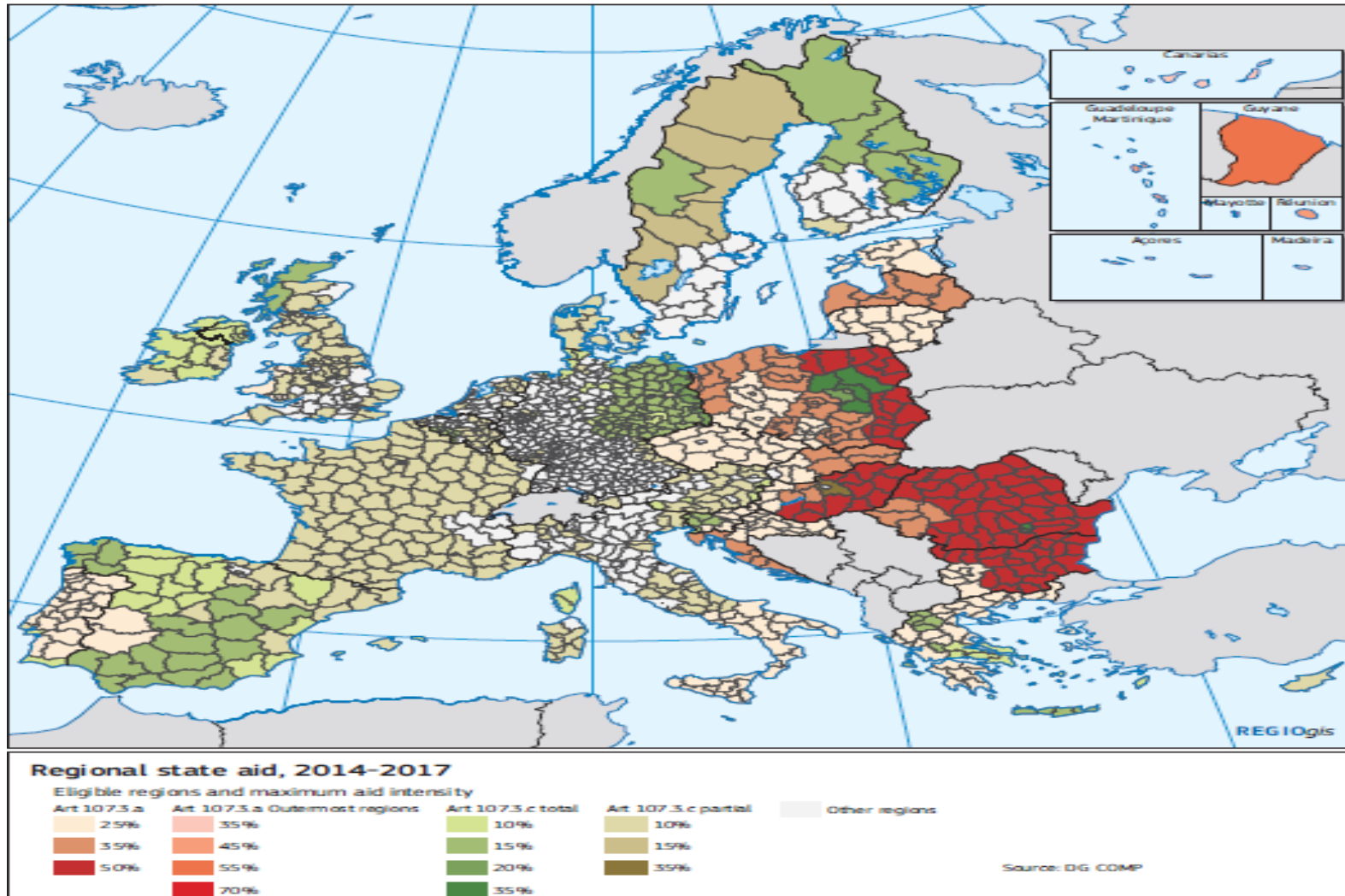


# Regional Aid maps (III)

- Regional aid map also places limits on the amount of investment aid that can be granted in each region:

<b>Assisted area</b> (% EU GDP/head)	<b>Large firms</b> <b>2006-13</b>	<b>firms</b> <b>2014-20</b>	<b>Medium firms</b>	<b>Small firms</b>
'a' areas (<45%)	50%	50%	+10%	+20%
'a' areas (45%-60%)	40%	35%	"	"
'a' areas (60%-75%)	30%	25%	"	"
Ex 'a' areas (until end '17)		15%	"	"
Sparsely populated areas, external border areas	15%	15%	"	"
Other 'c' areas	10%-15%	10%	"	"

# Regional Aid maps (IV)



# Regional Aid maps (V)

Population coverage (%)	Total 2014	'a' areas	'c' areas
<b>Bulgaria, Estonia, Latvia, Lithuania</b>	<b>100.0</b>	100.0	
<b>Greece</b>	<b>100.0</b>	45.9	54.1
<b>Malta</b>	<b>100.0</b>		100.0
<b>Poland</b>	<b>100.0</b>	86.3	13.7
<b>Romania</b>	<b>100.0</b>	89.4	10.6
<b>Slovenia</b>	<b>100.0</b>	52.9	47.1
<b>Slovakia</b>	<b>88.5</b>	88.5	
<b>Czech Republic</b>	<b>88.1</b>	88.1	
<b>Portugal</b>	<b>85.0</b>	69.2	15.8
<b>Hungary</b>	<b>76.7</b>	70.4	6.3
<b>Spain</b>	<b>68.6</b>	6.8	61.8
<b>Ireland</b>	<b>51.3</b>		51.3
<b>Cyprus</b>	<b>50.0</b>		50.0
<b>Italy</b>	<b>34.1</b>	29.0	5.0
<b>Belgium</b>	<b>29.9</b>		30.0
<b>UK</b>	<b>27.0</b>	3.9	23.2
<b>Finland</b>	<b>26.0</b>		26.0
<b>Germany</b>	<b>25.8</b>		25.8
<b>Austria</b>	<b>25.8</b>		25.8
<b>France</b>	<b>24.1</b>	2.9	21.2
<b>Sweden</b>	<b>12.3</b>		12.3
<b>Denmark</b>	<b>8.0</b>		8.0
<b>Luxembourg</b>	<b>8.0</b>		8.0
<b>Netherlands</b>	<b>7.5</b>		7.5

# Investment aid: “Eligible projects”

- Investment in tangible and intangible assets relating to

## **In 'a' regions & SME in 'c' areas:**

- Setting up of a new establishment;
- Diversification of output of establishment into products not previously produced in the establishment;
- Extension of the capacity of an existing establishment;
- Fundamental change in the production process.

## **Large Enterprises in 'c' areas:**

- Setting up of a new establishment;
- Diversification of activity of establishment, if new activity is not same as or similar to activity previously per-formed in the establishment;
- Diversification of existing establishments into new products or new process innovations.

- Acquisition of assets linked to establishment that has closed
- No replacement investment!

# Investment aid: “*Eligible costs*”

Two ways to calculate “eligible costs”:

- Costs calculated on the basis of investment costs:
  - Material assets (land, building, equipment)
  - Immaterial assets (Transfer of technology, Patents, Know-how licenses, ...)
  
- Costs calculated on the basis of wage costs:

Wage costs arising from job creation as a result of the initial investment (two-year wage cost)

# Investment aid: Maximum aid

- Maximum allowable aid is defined as a percentage of eligible costs of the initial investment
- Maximum aid intensity is set in the regional aid maps and depends on:
  - The level of development of the region
  - The size of the enterprise
  - The size of the investment project
    - Regional aid ceilings set in regional aid maps apply to investments with a total eligible cost of less than 50 Mio€
    - For larger investment projects (LIPs): scaling down of maximum aid intensity ceiling

# Investment aid: Other conditions

- Maintenance of investment (or jobs) in the region:
  - 5 years for large enterprises
  - 3 years for SMEs
- 25% of investment should be from own contribution or external finance, but totally free of public support
- Formal application for aid before works on the project started (**formal incentive effect**)

# Operating aid

- Aid not linked to investment project, but aimed at reducing a firm's current expenses
- Permitted exceptionally in cases where investment aid alone is not enough to trigger regional development:
  - The least developed 'a' regions (SME only)
  - The sparsely populated 'c' regions (SME + LE)
  - Outer Most Regions (SME + LE)
- MS to demonstrate that the aid is "proportionate":
  - No over-compensation of extra costs facing companies as a result of specific regional handicaps



# SAM – Impact on Regional aid

Facilitate granting of less distortive aid that contributes to cohesion:

- Widening the scope of the GBER:
  - Investment aid schemes
  - Individual investment aid (< € 7.5 mio in normal 'c' region)
  - Operating aid (<10% of turnover or <25% of labour cost)
  
- No need to notify, but:
  - Transparency
  - Evaluation of large schemes

# SAM – Impact on Regional aid

- Notification requirement for more distortive aid:
  - Large investment aid projects
  - Investment projects of companies closing down activities
  - Operating aid schemes exceeding GBER ceilings
- Stricter assessment
  - Incentive effect on the basis of counter-factual analysis
  - Proportionality → Double ceiling:
    - Regional aid intensity ceiling
    - Minimum aid needed for project to go ahead
  - Black list: Aid linked to delocalisation

# Aviation Guidelines

# The new guidelines on State aid to airports and airlines - Introduction

- Part of State Aid Modernisation Strategy
- Adopted on February 2014
- Replacing the 2005 guidelines and the 1994 aviation sector guidelines
- Aim ensure fair competition
  - for flag carriers down to low-cost airlines
  - from regional airports to major hub airports
  - avoid overcapacity and the duplication of unprofitable airports.
- Assessment based on existing decision-making practice and on the analysis of current market conditions in the airport and air transport sectors

# The new guidelines on State aid to airports and airlines – Key features

- Permitting investment aid if there is a genuine transport need in view of ensuring the accessibility of a region.
  - maximum permissible aid intensities depending on the size of an airport
- operating aid to regional airports (>3 million passengers per year) for a transitional period of 10 years
  - business plan allowing for full coverage of operating costs at the end of the transitional period
  - higher aid intensities and a reassessment after 5 years applicable to airports with annual traffic of less than 700,000 passengers
- start-up aid to airlines to launch a new air route, under conditions adapted to recent market developments, provided it remains limited in time

# Restructuring in the aviation industry

- Increasing need for State aid to restructure small and medium-sized traditional air carriers
- Before the crisis, the Commission dealt with several such cases of airlines receiving public support
  - Alitalia in 2005
  - Cyprus Airways in 2007
  - Olympic Airways in 2008
  - Austrian Airlines in 2009
- Since 2010 the Commission has received notifications of restructuring aid
  - Czech Airlines
  - Air Malta
  - LOT Polish Airlines
  - AirBaltic
  - Adria Airways
  - Cyprus Airways
  - Estonian Air, etc.

# Restructuring in the aviation industry

- Main elements of aviation restructuring plans
  - streamlining operations
  - improving the cost base
  - revenue initiatives (example of low cost airlines)
- Own contribution
  - For large companies: at least 50% of the restructuring costs
  - Lower contribution in justified cases (eg Air Malta - 45%)
- Limiting competition distortions
  - Capacity reduction
  - Giving up of slots at "coordinated airports"
- One time, last time principle
- Monitoring implementation

# Rescue & Restructuring Aid



# Exemptions (recap)

- Article 107(2) TFEU (exempt by law)
  - a) aids of a social character to individual consumers
  - b) natural disasters or other exceptional occurrences
  - c) *division of Germany*
  
- Article 107(3) TFEU (exclusive competence of the Commission and broad discretion)
  - a) regions with abnormally low standard of living and serious underemployment
  - b) important project of European interest or to remedy a serious disturbance in the economy of a Member State
  - c) certain activities – certain economic areas
  - d) culture – heritage conservation
  - e) other categories by decision of the Council: shipbuilding

# General remarks

- Derogation from the general principle of prohibition
  - aid "*to facilitate the development of certain economic activities*" can benefit from an exemption if trading conditions are not adversely affected to an extent contrary to the common interest (Article 107(3)(c) TFEU).
- Case-by-case assessment by the Commission
- General advice is given by the Commission in the "framework" and "guidelines"
- Assessment by the Commission according to the category of aid (block exemptions)

# Overview

- 2004 guidelines: validity extended until 9/10/2012 and then until replacement by new rules
- 2009: Oxera study on counterfactual scenarios to restructuring aid
- 5 November 2013: proposal for consultation until 31/12/2013
- 9 July 2014: New guidelines adopted
- Applicable to Non-financial firms only (ref. to August 2013 Banking Communication and 2009 Viability and Restructuring Banking Communication)

# Rationale of control

- Most distortive type of State aid
  - keep inefficient firms instead of more efficient/innovative ones
- Issues
  - Does R&R necessarily cause significant distortions of competition and effects on trade (limited regional or niche markets)?
  - Should the economic crisis have been more factored in?
  - Often diverging opinions amongst Member States about the objective of R&R

# Structure – General Principles

- 2014 Guidelines
  - Definition of undertaking in difficulty §19 - 24
  - Rescue : transitional character
  - Restructuring : Long term viability target
  - «One time, last time» principle
    - Applicable to rescue & restructuring aid
    - 2 exceptions:
      - rescue + restructuring = a single operation
      - Exceptional and unpredictable circumstances independent from the beneficiary
  - Examples:
    - Guidelines 1999: credit granted to Sabena in 2001, Crédit Lyonnais, Holzman, Olympic Airways, Bull, British Energy, ALSTOM
    - Guidelines 2004: Northern Rock, IKB, FagorBrandt
    - Particular case of financial crisis (see below)

# Definition of "undertaking in difficulty" (§19 – 24)

- More objective concept of "undertaking in difficulty"
- An objective rule that makes sure State aid is a last resort
- Soft criteria ("usual signs of difficulty") removed
- Economic death certain w/o State intervention (§20)
  - Undertaking unable, with own resources or third parties, to stop losses
- Presumption of difficulty (§20 (a) – (d))
  - limited liability company: +50% of its subscribed share capital has disappeared as a result of accumulated losses. **New: no requirement for 25% to be lost within past year**
  - company where at least some members have unlimited liability: + 50% of its capital has disappeared as a result of accumulated losses.
  - If undertakings are subject to collective insolvency proceedings or fulfil the criteria to be classified as such under national law.
  - For large undertakings, where for the 2 past years:
    - undertaking's book debt to equity ratio has been greater than 7,5 and
    - the undertaking's EBITDA interest coverage ratio has been below 1,0.
- Limited exception for rescue aid or TRS to firms facing acute liquidity needs due to exceptional and unforeseen circumstances

# Undertaking in difficulty: example

- Some firms that were in difficulty under the soft criteria would not have been in difficulty under the new rules
  - Classen-Pol S.A. ( $D/E < 7.5$ )
  - Abbanoa S.p.A. ( $D/E < 7.5$ ,  $EBITDA/\% > 1$ )
- Some others will now be caught by the hard criteria, due to the deletion of the requirement to lose 25% within a year
  - Elgo
- Exception is not a blank cheque
  - are the exceptional circumstances really the cause of difficulties?

# Definition of "undertaking in difficulty"

- **Newly created undertaking (§21)**
  - not eligible for aid under the guidelines
  - even if its initial financial position is insecure
    - new undertaking emerges from the liquidation of a previous undertaking reprise des seules actifs
    - takes over that undertaking's assets
    - in principle for the first three years following the start of operations in the relevant field of activity
  
- **Company belonging to or being taken over by a larger business group (§22)**
  - not eligible for aid under the guidelines
  - except where it can be demonstrated that the company's difficulties:
    - are intrinsic
    - are not the result of an arbitrary allocation of costs within the group
    - are too serious to be dealt with by the group itself



# 3 Types of Aid

Restructuring  
aid

Rescue aid

Temporary  
Restructuring  
Support (**New**)

Only for SMEs and  
smaller State-owned  
enterprises

# Rescue aid

- **Definition (§26)**
  - Temporary
  - Reversible
  - Minimum necessary (formula)
- **Conditions** for approval:
  - Social hardship or market failure (**New**)
  - Form: loans or guarantees
  - Duration: max. 6 months
  - Remuneration: 1-year IBOR + 400 bps (**Revised**)

# Follow-up to rescue aid

6 months



→ Proof that the loan has been reimbursed or that the guarantee terminated **or**

→ Communication of a liquidation plan

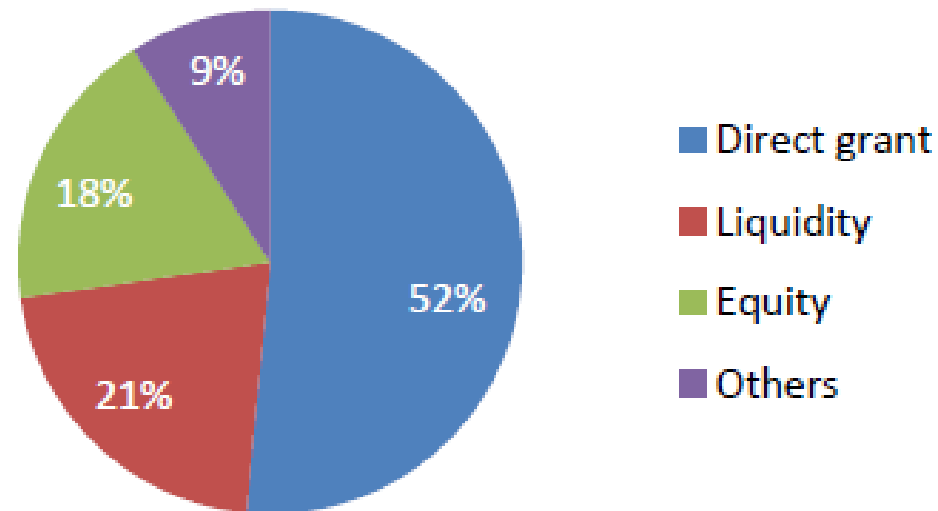
**or**

→ Communication of a credible and substantiated restructuring plan (+ increased remuneration of rescue aid by at least 50 bps (New))

# Temporary restructuring support (New)

Aim: to improve incentives for use of liquidity support

**Form of aid in restructuring cases  
decided in 2012**



# Temporary restructuring support (New)

- Definition (§28)
- As part of schemes for SMEs and smaller State-owned undertakings
- Liquidity aid: loan guarantees or loans
- Limited to 18 months less any period of rescue aid
- Remuneration: 1-year IBOR + 400 bps (+ 50 bps after 12 months)
- After 6 months the Member State must approve a simplified restructuring plan
- After 18 months: aid terminated/restructuring plan/liquidation plan
- Limited to SMEs and small State-owned enterprises

# Temporary restructuring support (New) - comments

- Appropriate instrument in the wake of financial crisis
- SMEs face greater need for liquidity
- Ease process for undertaking which could recover quickly and easily

# Restructuring Aid

- Definition (§27)
- **Conditions**
  - Restructuring plan
    - Long term viability
  - Aid limited to the minimum
    - Significant contribution of the beneficiary– normally at least 50%
    - Minimum thresholds depending on the size of the company: 25, 40 or 50%
- **Avoidance of undue distortions of competition**
  - Counterfactuals/ compensatory measures
    - connected with long-term viability
    - softer approach (Restructuring in assisted areas, SME, social costs)

# Viability (Annex II)

- **Limited duration**
  - Three years in principle – business plan-
- **Realistic scenario, market surveys**
  - Essentially internal factors
  - External factors to the extent they refer to generally accepted principles
- **Description of the sources of the beneficiary's difficulties**
- **Plan restoring completely the situation**
  - Return to competition on the merits (own contribution and burden-sharing measures)
- **Remedies in terms of governance**



# Negative effects: measures to limit distortions of competition

- **Structural Measures:**
  - Divestments and reduction of profitable business activities
  - In the market where the undertaking will have a significant market position after restructuring
  - Divestments should favor new entry: beneficiary should sell a viable stand-alone business (New)
- **Behavioural Measures (New):**
  - Acquisition ban, no publicity using State support: always required
  - Exceptionally: restrictions on prices/commercial behaviour
- **(Possibly) Market opening Measures**

# Negative effects: measures to limit distortions of competition (2)

- **Factors to take into account in assessing the degree of competition measures:**
  - Absolute and relative amount of aid (New)
  - Size and relative importance of the beneficiary on its market(s)
  - Moral hazard concerns, with reference to degree of own contribution and burden sharing (New)

# "One time, last time" principle

- 10 Years
- Exceptions:
  - Where restructuring aid follows the granting of rescue aid as part of a single restructuring operation
  - Where rescue aid or temporary restructuring support has been granted in accordance with the guidelines and that aid was not followed by restructuring aid, if:
    - it could reasonably have been believed that the beneficiary would be viable in the long term when the aid pursuant to these guidelines was granted, and
    - new rescue or restructuring aid becomes necessary after at least five years due to unforeseeable circumstances for which the beneficiary is not responsible;
  - in exceptional and unforeseeable circumstances for which the beneficiary is not responsible.

# Objective of common interest: return to long-term viability

- **Restructuring** plan endorsed by the Commission (Annex II of the R&R Guidelines)
  - Market survey
  - Analysis of sources of difficulties
  - Solutions
  - Scenario analysis
  - Reasonable time-frame
- Ultimate goal: **Long-term viability**

# Objective of common interest: Social hardship or market failure (New)

- The failure of the firm would likely involve **serious** social hardship or **severe** market failure:
  - High and persistent unemployment (compared to EU or national average)
  - Risk of disruption to an important service
  - Important systemic role in the region or sector
  - Risk of interruption of SGEI
  - Failure of credit markets
  - Irremediable loss of technical knowledge/expertise
  - Other similar situations

# Objective of common interest: Social hardship or market failure - SMEs (New)

- The failure of the firm would likely involve social hardship or market failure:
  - Exit of innovative SME or SME with high growth potential
  - Exit of SME with extensive local or regional links
  - Failure of credit markets
  - Other similar situations

# Need for State intervention & Incentive effect (New)

- Comparison with a credible alternative scenario not involving State aid
- Demonstration that the objective of common interest would not be attained or to a lesser degree

# Appropriateness

- Member States can choose the form that restructuring aid takes (e.g. loan, grant, equity)
- They must ensure that the instrument chosen is appropriate to the problems (liquidity or solvency?)  
(New)



# Proportionality

- **Restructuring aid limited to the minimum necessary**
- **Own contribution**
  - Normally at least 50% of restructuring costs (or less in exceptional cases, e.g. where location in an assisted area makes funding hard to find)
  - Should normally be comparable to the aid granted in terms of effects on solvency or liquidity (→ where aid enhances equity position, the own contribution should include similar measures) **(New)**
  - Contributions must be real, excluding future profits and free of aid
- **Burden sharing **(New)****
  - If aid enhances the beneficiary's equity position, shareholders and (where necessary) subordinated creditors must absorb losses in full
  - No dividends during restructuring period
  - State should receive a reasonable share of future gains

# Transparency (New)

- As with all the new SAM instruments, transparency is required:
  - All aid grants over EUR 500 000 must be published within 6 months of grant
  - Information to be published includes text of the granting decision; identity of the granting authority; identity, size, region and sector of the beneficiary
  - Requirement comes into force on 1 July 2016

# Evaluation (New)

- As with all the new SAM instruments, schemes where the risk of distortions is particularly high may require evaluation
  - Schemes with large budgets or novel characteristics, or where significant changes are anticipated
  - The EUR 150m threshold in the GBER allows for simple, automatic application: it should not be seen as a general threshold below which evaluation is unnecessary
  - Primary aim of evaluation: to assess to what extent schemes produce the desired effects and to help improve design of schemes so those effects are achieved at least cost

# Flexibility for SGEI (New)

- Viability can be dependent on continuing SGEI compensation under a valid entrustment
- Restructuring costs do not include SGEI delivery costs
- Divestments not required if they would prejudice SGEI delivery but other measures required instead (greater market opening)
- Transitional aid allowed where strictly necessary
- Aid granted before 31 January 2012 need not comply with R&R guidelines

# Simplified conditions for smaller firms

- State-owned firms of SME size assimilated to SMEs (New)
- Aid to SMEs should usually be granted under schemes (New)
- Lower own contribution requirements
- No measures to limit distortions of competition for small firms
  - Examples
- Alumast (aid EUR 1.2m, 29 employees, turnover EUR 2m)
- ZNMR (aid EUR 91 000, 80 employees, turnover EUR 1.3m)

# Date of application

- The R&R Guidelines apply from 1 August 2014 to:
  - Notifications made after that date
  - Non-notified aid where some or all of the aid has been granted after publication of the R&R Guidelines in the OJ, i.e. after 31 July 2014
  - The R&R Guidelines will expire on 31 December 2020

# One recent restructuring aid case: T-511/09, Niki Luftfahrt v Commission (13 May 2015)

- GC confirmed Commission decision approving restructuring aid for Austrian Airlines (AA)
- Restructuring aid (€500m) granted in the context of the acquisition of AA by Lufthansa
- A private investor would have preferred to close down the company
  - Austrian State did not act as a private investor
- State aid rules do not require that aid is granted to a specific part of the restructuring plan
  - every restructuring plan contains an operational part and a financial part.

# Role of National Courts



# Unlawful aid v. Incompatible Aid

## • Unlawful Aid

- Aid not notified
- Aid notified but implemented before Commission decision
- Misuse of existing Aid

## • Incompatible Aid

- Lawful or unlawful Aid
- Aid not exempted
- Article 107(2) or (3) TFEU
- Article 106(2) TFEU

## • 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

## • Exclusive powers of Commission

- prohibition to implement incompatible aid
- obligation to order recovery if aid is unlawful

# 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 Vs Incompatible Aid

# 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

# Relevant legislation

# 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 – 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 and complementary roles of national courts and European Commission

# Case 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



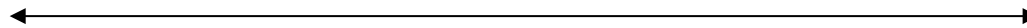
# Distinct but complementary roles

## 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

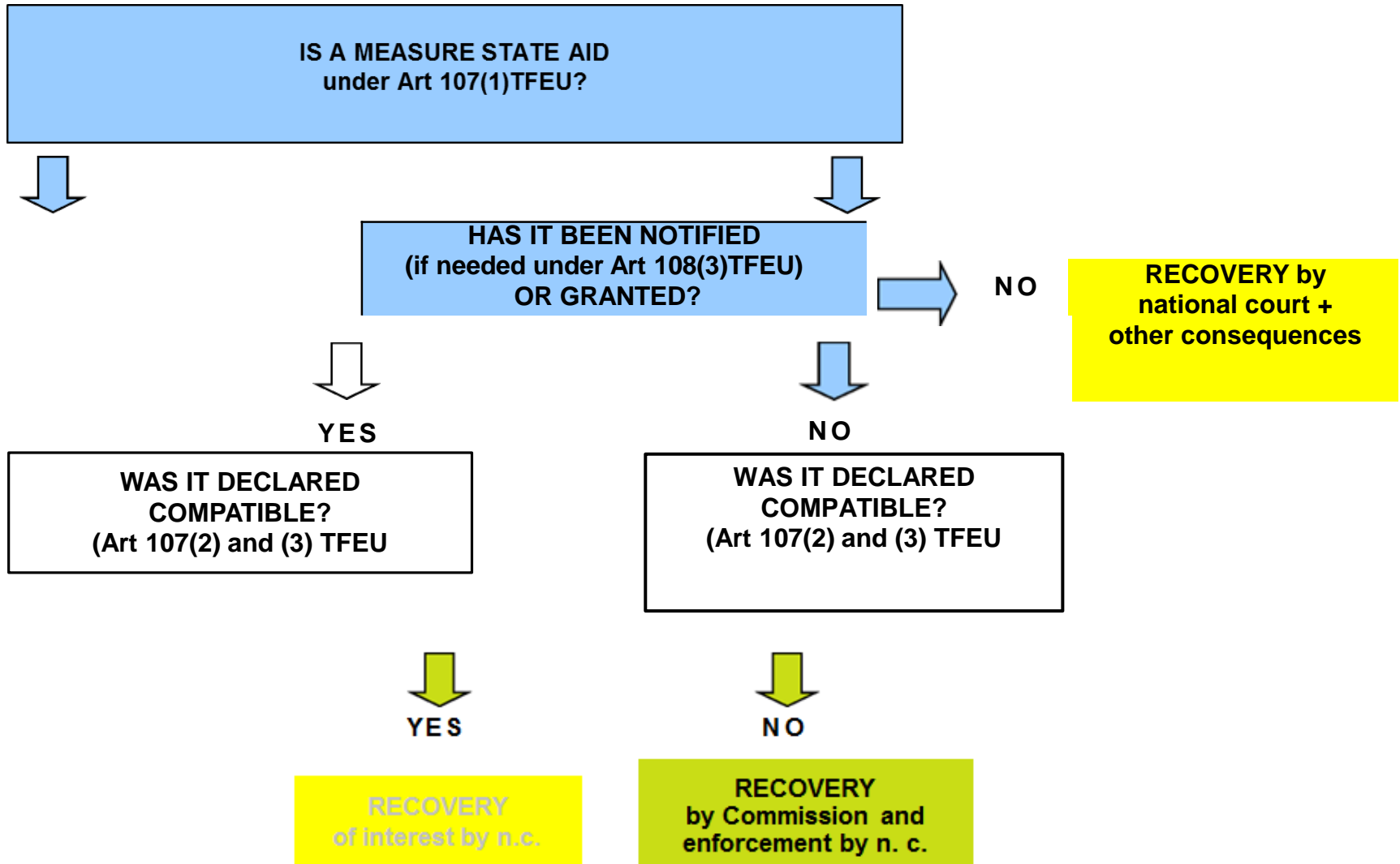
- application of notion of aid and block exemption regulations
- safeguarding individual rights in case of unlawful aid only
- enforcement of negative Commission decision
- Article 108(3) TFEU



## 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 will national courts be dealing with?



# Article 108(3) TFEU: principles developed by case 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. Case C-235/05, *Scott* : 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*, Case C-39/94, 11.7.1996 and *CELF II*, Case C-1/09, 11.3.2010, *Deutsche Lufthansa*, Case 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)
- **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*, Case C-39/94)
- **No *ex post* regularisation of unlawful aid by positive decision of the Commission**
  - however, *CELF I*, Case C-199/06: national courts must only order interest recovery (not the principal of the unlawful and compatible aid – see below)

# Locus standi

## C-174/02, Streekgewest (13.1.2005)

- 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* (7.9.2006)

- 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



# Primacy

## Case C-119/05, *Lucchini*, 18 July 2007

- 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



# Res judicata v Primacy of EU State aid law?

Case C-505/14, Klausner Holz / Land Nordrhein-Westfalen

11 November 2015 (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?

# Case C-505/14, Klausner Holz / Land Nordrhein-Westfalen

## 11 November 2015 (2)

- Obligation of compliance interpretation – Effectiveness
- National exception to *res judicata* should apply:
  - State aid rules were not raised until the definitive declaratory judgment
  - The enforcement of the contract amounts to illegal State aid.
- 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

# Powers and obligations of national courts

# What powers do national courts have?

- Obligation to recover unlawful aid under national law
  - Recovery order (including interest)
  - Interim measures
  - 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

# Outline

- Current situation in the Member States
  - 2006 Study
  - 2009 update
  - Recovery and Enforcement Notices
- Typology of actions before national courts
- A few examples of cases before national courts

# Current situation in Member States Results of the 2006 and 2009 Studies

# 2009 update on private enforcement Study

## ■ Objectives - Sources

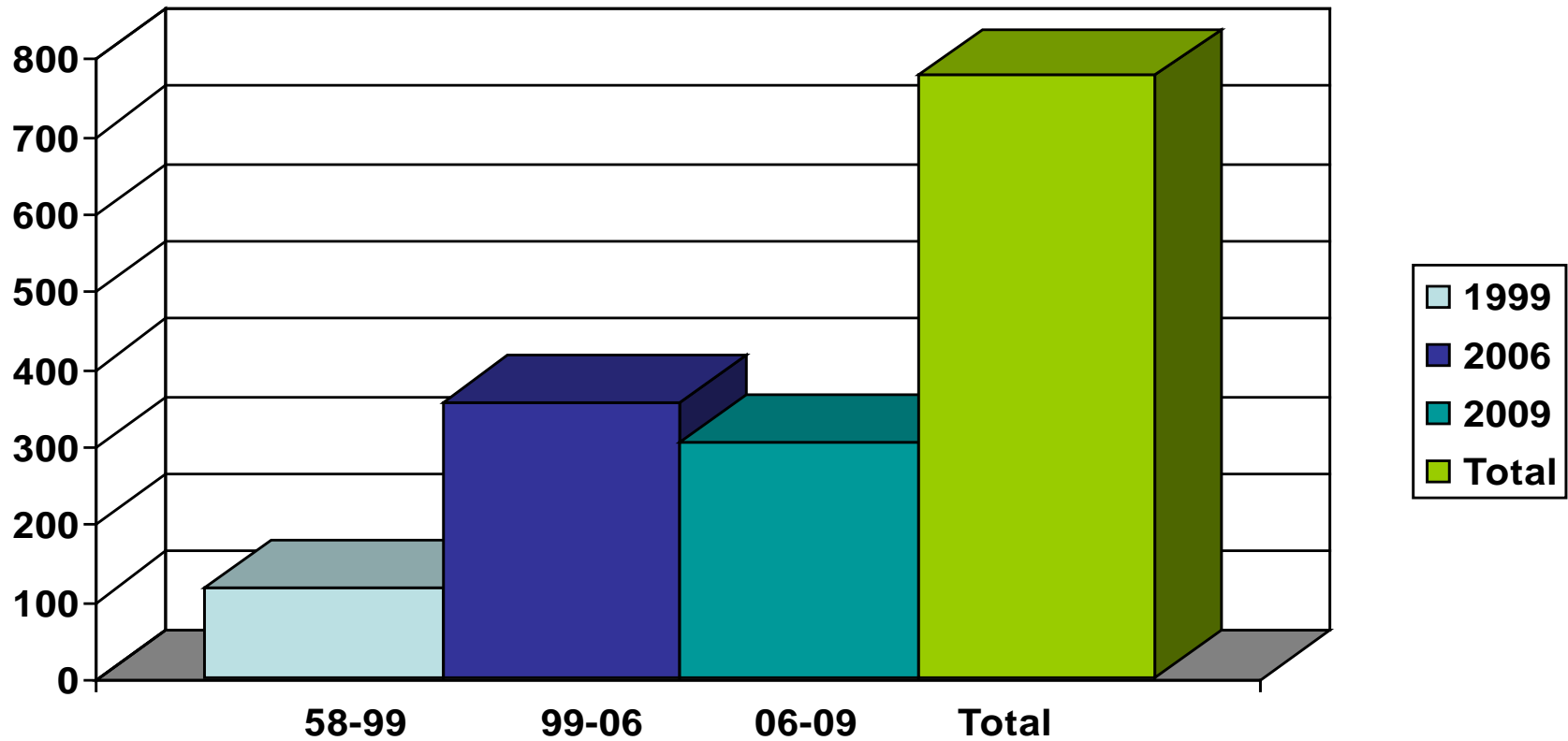
- studies to support DG COMP's transparency initiatives
  - 2006: exhaustive analysis of all (+/- 400) cases: see DG COMP website
  - 2009: update with major (+/- 80) cases: see DG COMP website
- new pages on DG COMP website on national courts cases
- parallel (private) *State Aid Thesaurus* Project (*e-Competitions*):
- [www.concurrences.com](http://www.concurrences.com)
- NB.: book published by Lexxion in 2010 (27 MS reports)

## ■ Scope

- 27 Member States (2006: 15 MS)
- Selection out of +/- 305 cases

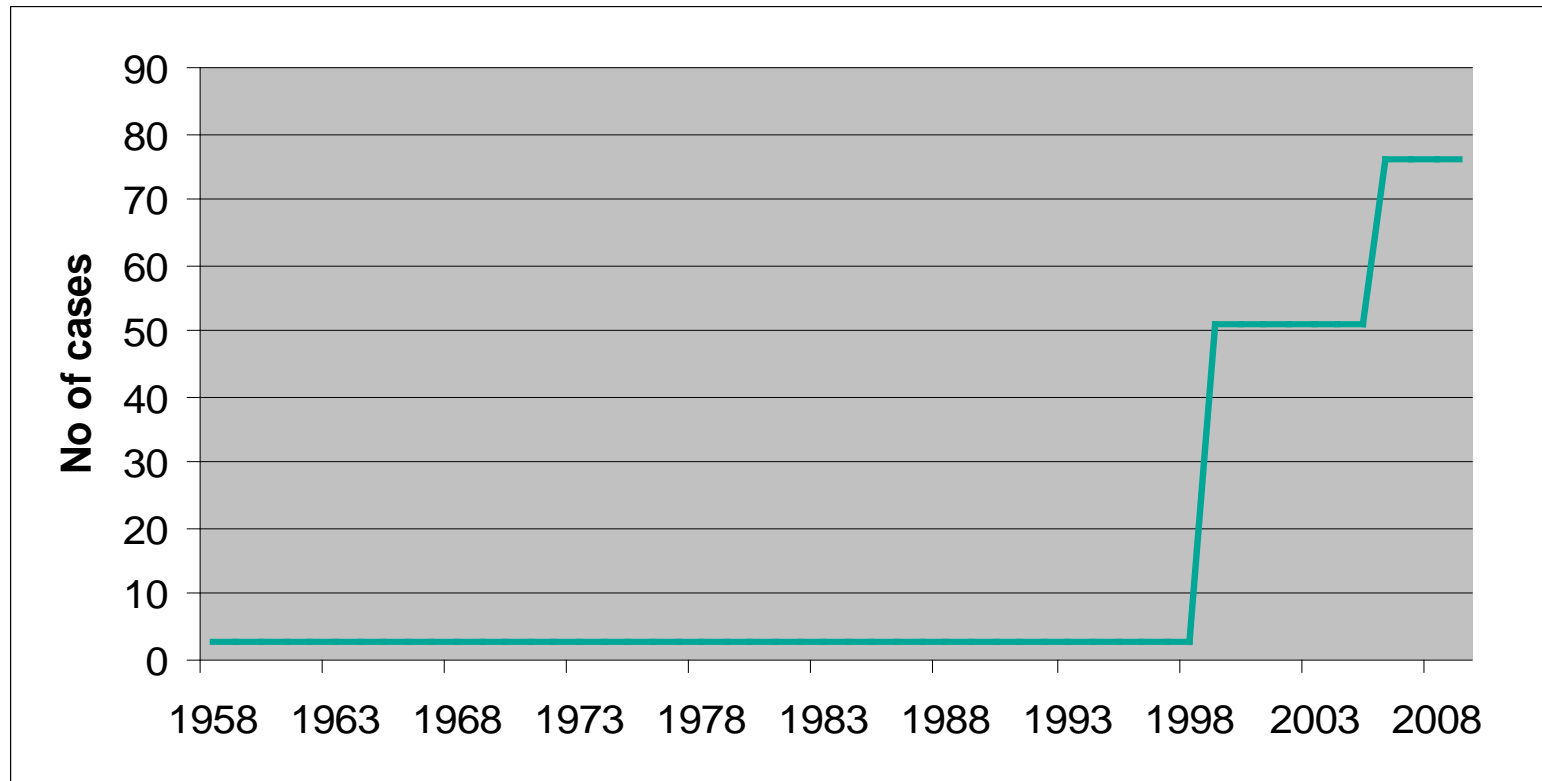
## ■ Major 2006 trends confirmed

# 2009 Update – number of cases (1)

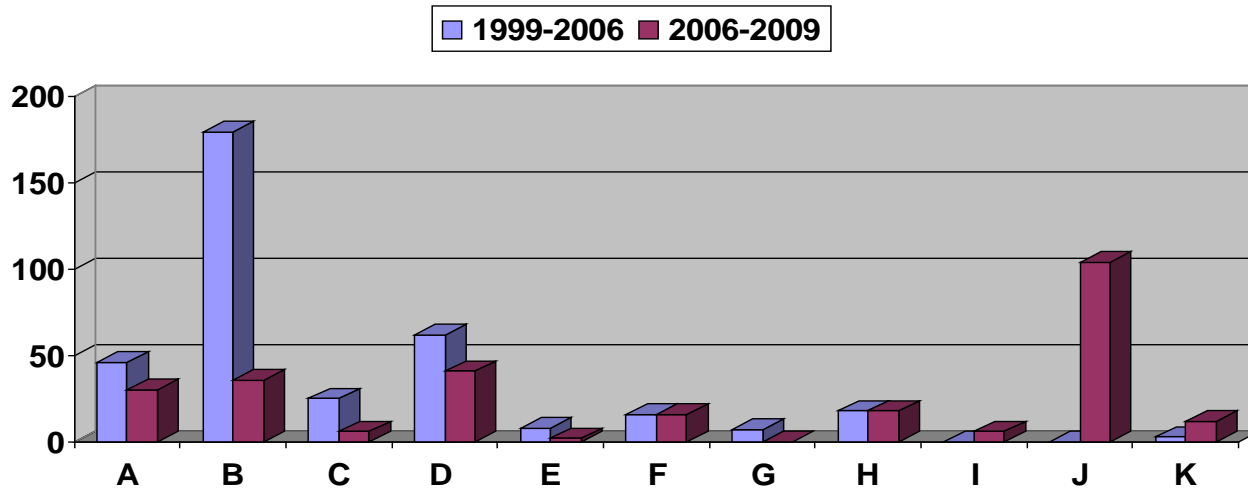




# 2009 Update – number of cases (2)



# Categories of cases



- A Member State v Beneficiary (recovery)
- B Tax cases
- C Institutional cases
- D Competitor v Member State (recovery, injunction)
- E Competitor / Beneficiary v Member State (damages)
- F Competitor v Beneficiary (recovery, injunction)
- G Competitor v Beneficiary (damages)
- H Public procurement
- I Potential beneficiary
- J Other (ex ante compliance, etc. )
- K Successful competitor [double counting]

# Main findings of the 2006 Study confirmed in 2009

- More cases than in antitrust + increase in cases
- Much more complex than in antitrust
- Differences in judicial traditions and systems of MS due to principle of procedural autonomy
- Main themes
  - classification of different types of actions
  - analysis of enforcement of recovery decisions

# Main findings of the 2006 Study confirmed in 2009

## ■ Main conclusions

- **procedure / conditions / legal basis depends on type of aid and MS**
- civil or administrative proceedings
- type of action, rules of procedure
- lengthy procedures
- issue of conflict of interest

## ■ Main areas of difficulties

- interim relief
- proving causation and losses in damages cases
- legal basis of action, eg damages against beneficiary
- access to information for competitors / beneficiaries

# Additional findings in 2009

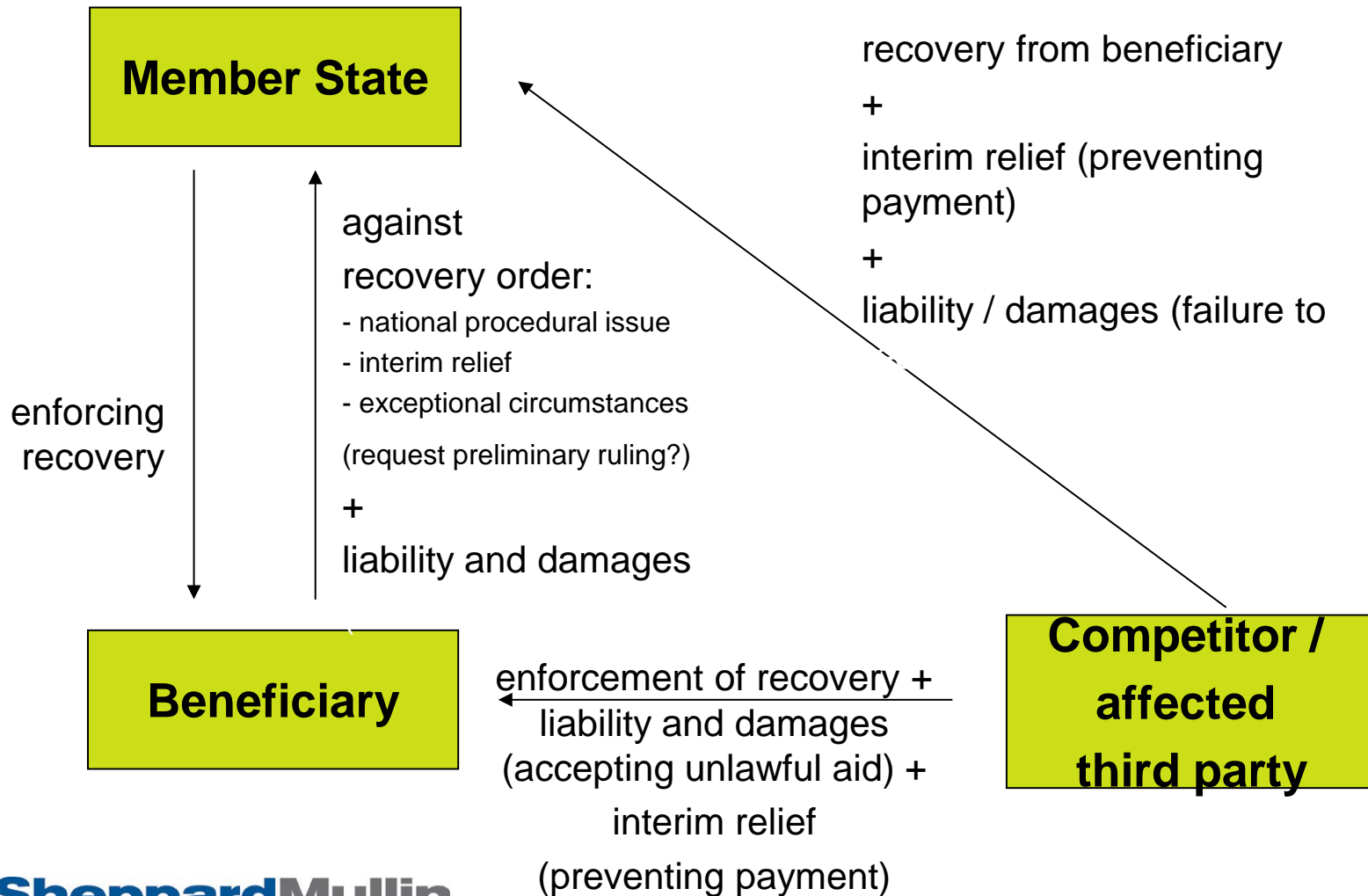
- Very few cases in "new" Member States
- Most cases in following Member States:
  - F, IT, D, NL, SP, S, AU
- Many cases finding unlawful aid should be recovered
- More cases from competitors (suspension, recovery)
- No successful damages cases
- "*Locus standi*" issues (Germany)
- Higher courts involved

# Typology of actions before national courts

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

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

# Actions before national courts





# Main classification

- 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

# Recovery – Cease and desist orders

# 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

# National recovery order – Scott case

## Case C-210/09 20.5.2010

- 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 16(3) Reg 2015/1589: *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 16(3) of Regulation No 2015/1589 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

Unlawful but compatible aid:  
recovery?

# CELF cases: recovery and compatible aid

CELF I C-199/06, 10 February 2008 - CELF II, Case C-1/09, 11 March 2010

- **CELF I: unlawful aid declared compatible**
  - Context of the case
    - 1993 Commission decision approving illegal aid
    - EU court annuls Commission decision; new decision
    - EU court annuls Commission decision; new decision
    - National case requesting recovery
      - National rule regarding limitation periods set aside
      - Preliminary request from Conseil d'Etat
  - Possibility not to recover an illegal aid which has been declared compatible by the Commission?
    - unlawfulness and incompatibility are two different and independent notions
    - national court are competent to apply Article 108(3) EC and obligation to give full effectiveness – Commission has exclusive competence to apply Art. 107 EC
    - Art. 108 (3) EC does not require to recover the total amount of the unlawful but compatible aid
    - recovery of interests for the period of unlawfulness
    - period of unlawfulness = time between Commission's compatibility decision and the annulment of the decision by EC courts

# Recovery of unlawful and compatible aid

## Case C-199/06, *CELFI* – conclusion (2)

- under EU law
  - obligation to order the aid beneficiary to pay interest in respect of the period of unlawfulness
- under national law
  - the national court may
    - order recovery of the unlawful aid, without prejudice to the Member State's right to re-implement it subsequently
    - award damages for the unlawful nature of the aid
- interest to be paid for the period between the decision declaring the aid to be compatible and the annulment of that decision
- 15.4.2008: Case T-348/04 *SIDE v Commission*: (third) annulment of the positive decision
- CELF II: new questions

# Recovery and compatible aid – CELF II (3)

- Question 1 :stay proceedings on the recovery obligation until the Commission has ruled?
  - Case C-39/94 *SFEI*: "the initiation by the Commission of an examination procedure cannot release national courts from their duty to safeguard the rights of individuals in the event of a breach of the requirement to give prior notification"
  - Purpose of Article 108(3) TFEU: compatible aid alone may be implemented
  - Obligation on national courts to use any appropriate remedy so as that the unlawful aid "does not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision"
  - "a decision to stay proceedings would, *de facto*, have the same effect as a decision to refuse the application for safeguard measures" and "would amount to maintaining the benefit of aid during the period in which implementation is prohibited, which would be inconsistent with the very purpose of Article [108(3) TFEU] and would render that provision ineffective".
  - The national court cannot stay the proceedings without rendering Article 108(3) ineffective, contrary to the principle of effectiveness of the applicable national procedures
  - The annulment of a first positive Commission decision "cannot justify any different conclusion prompted by the consideration that, in that case, the aid might subsequently be once again declared compatible by the Commission"
  - Recovery with interest or blocked account with interest – interest only not sufficient
  
- *"a national court before which an application has been brought (...) 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"*.



# Recovery and compatible aid – CELF II (4)

- Question 2: exceptional circumstances limiting obligation to recover aid?
  - a positive decision cannot give rise to a legitimate expectation on the part of the aid recipient if this decision is not definitive
  - the Conseil d'État takes the view that a succession of three positive decisions might amount to an exceptional circumstance
  - the third annulment is the only new event since CELF I: this is not, in itself, liable to give rise to a legitimate expectation and to constitute an exceptional circumstance (normal operation of the judicial system)
  - so long as the Commission has not taken a decision approving aid, and so long as the period for bringing an action against such a decision has not expired, the recipient cannot be certain as to the lawfulness of the aid
  
- *"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 [108(3) TFEU]"*.

# Damages actions

# Why actions for damages?

- Recovery may not be sufficient
- Ultimate sanction
- Deterrent effect
  - Member State's liability - Conflict of interest
  - Beneficiary's liability
  - Parallelism with cartel's policy

# Why not for unlawful/incompatible State aid?

- See usual Commission's PR in cartel cases:

## **Action for damages**

- *Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages. The case law of the Court and Council Regulation 1/2003 both confirm that in cases before national courts, a Commission decision is binding proof that the behaviour took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission fine. A White Paper on antitrust damages actions has been published (see [IP/08/515](#) and [MEMO/08/216](#)).*

# Categories of possible actions for damages

- Competitor v Member State
  - Unlawful aid
  - Incompatible aid
  - Misuse of aid
- Beneficiary v Member State
  - Same as above
- Competitor v Beneficiary
  - « Unfair reception » of unlawful aid/incompatible aid

# General principles from case law (1)

- Violation of Article 108(3) TFEU
  - *Francovich, Brasserie du Pêcheur, et alii*
    - Art. 108(3) confers rights on individuals
    - the breach is sufficiently serious (no discretion)
    - direct causal link between the violation and the loss or damage sustained by the injured parties
  - National liability law
    - Damage, fault, causation
  - All bodies of the State
    - Legislative, executive and judicial powers (*Köbler*)

# General principles from case law (2)

- Violation of Article 107(3) TFEU (and misuse of aid)
  - *Francovich, Brasserie du Pêcheur, et alii*
    - Art. 107(3) confers rights on individuals (not direct effect necessarily)
    - Is the breach sufficiently serious?
      - » MS has manifestly and gravely disregarded the limits on its discretion
      - » If considerably reduced, or even no, discretion, mere infringement may be sufficient to establish the existence of a sufficiently serious breach

# General principles from case law (3)

- Factors for the breach to be sufficiently serious
  - clarity and precision of the rule infringed
  - infringement and damage caused intentionally or involuntarily
  - error of law excusable or inexcusable
  - the position taken by a Community institution may have contributed to the adoption or maintenance of national measures or practices contrary to Community law
  - violation clearly sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement
    - Direct causal link
- National liability law
  - Principles of equivalence and effectiveness



# Competitor v Member State

- *CELF*, C-199/06, para 55 – *Traghetti*, C-173/03, para 41
- Failure to comply
  - with standstill obligation: Enforcement Notice, paras 43-52
  - with recovery order: Enforcement Notice, para 69
- Mere breach of Art. 108(3) TFEU sufficient?
  - AG Léger, C-197/99, para 74, AG Tesouro 142/107, Tubemeuse, para 7, AG Colomer, C-346/03, Atzeni, paras 192-198
  - *Contra*: AG Jacobs in *Transalpine Ölleitung*, C-368/04, para 86
- Distortion of competition and consequential damages
- Claimants other than competitors
  - *Streekgewest* principle

# Beneficiary v Member State (1)

- Principle of effectiveness?
  - This action does not put into question the effectiveness of recovery order:
    - if damage compensated is clearly separate from the recovery of unlawful aid (which must be reimbursed)
    - since recovery is not a sanction
    - since damages do not equal to aid (106/107, Asteris)
- Enforcement Notice does not mention this category

# Beneficiary v Member State (2)

- French *Borotra* cases (Commission, 5 May 1999; ECJ, C-251/97)
  - *Kélian* (15.10.03, Grenoble administrative court) - No direct causal link
  - *Fontanille* (23.09.04, 19.1.06, Clermont administrative court)
    - Legislative power not liable (confusion 107/108), only executive power
    - Shared liability (75-State/25-Beneficiary)
  - *Salmon Arc-en-ciel* (23.01.2006, Paris administrative court of appeal)
    - Idem - No damage for unlawfulness interests
  - Damages excluded: loss of profit (evidence), moral prejudice, image, reduced margins, profits (causation), costs resulting from the aid (one day off), etc.
  - Damages admitted: financial and administrative costs linked to the recovery (loan, labour cost), net costs resulting from the commitments made under the aid-convention (new recruits, training, etc.), cost of opportunity (loss of profits due to postponement of delocalisation) [eg.: Fontanille: €200.000-25%-75,000 for hazard]
  - other cases not published
    - C2S, 15.01.04; *Filature Saint Liévin*, 15.11.05; *Savebag*, 5.01.07
    - other pending cases before Paris Administrative Court

# Beneficiary v Member State (3)

- *Bundesgerichtshof, 6.11.08 (Land Brandenburg)*
  - recovery v damages claim
  - balance of interest (gross negligence of the authority v legitimate expectation, even though aid recipient should be diligent)

# Competitor v Beneficiary (1)

- Landmark precedent (but not a damages case)
  - *Breda v Manoir Industrie* (Brussels, 1995)
    - Unfair competition in public procurement case
- General principles from EU case law
  - *SFEI*, C-39/94, 1996, para 72-76
    - State aid rules do not impose any obligation on the recipient of aid – no EU law liability if failure to verify that the aid received was duly notified
    - “*That does not, however, prejudice the possible application of national law concerning non-contractual liability. If, according to national law, the acceptance by an economic operator of unlawful assistance of a nature such as to occasion damage to other economic operators may in certain circumstances cause him to incur liability, the principle of non-discrimination may lead the national court to find the recipient of aid paid in breach of Article [108](3) of the Treaty liable*”.

# Competitor v Beneficiary (2)

- General principles from EU case law (cont'd)
  - *Transalpine Ölleitung in Österreich*, C-368/04, 2006, para 56
  - *CELF*, 2008, C-199/06, 2008, paras 53 and 55
    - “[the national court] *may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid*”
- Enforcement Notice, paras 53-55
- National cases
  - *SFEI* (F, 1999; rejection)
  - *Ducros* (F, 1999; implicit solution)
  - *Betws Anthracite v DSK* (UK, 2003, rejection)

# Lufthansa: a new era for State aid enforcement?

- Judgment of 21 November 2013, C-284/12  
Deutsche Lufthansa:
  - The CJEU further defined the role of domestic courts hearing State aid cases, and
  - has clarified the legal effects that result from an Article 108(2) decision
    - formal investigation
    - qualification of aid
    - preliminary opinion on the compatibility assessment.

# Case C-284/12, Deutsche Lufthansa

(12 November 2013)

- In principle, the national court is bound by the direct effect of the Commission's decisions (Article 108)
- *Lufthansa*
  - only in case of a decision for the opening of the formal procedure
  - Preliminary reference: the court wanted to decide otherwise:
    - Obligation to refer a question to the CJEU in appreciation of the validity of the decision (Foto-Frost)
    - Implementation of the exemption regulation.



# Case C-284/12, Deutsche Lufthansa

- 37 While the assessments carried out in the decision to initiate the formal examination procedure are indeed preliminary in nature, that does not mean that the decision lacks legal effects.
- 38 It must be pointed out in that regard that, **if national courts were able to hold that a measure does not constitute aid within the meaning of Article 107(1) TFEU** and, therefore, not to suspend its implementation, even though the Commission had just stated in its decision to initiate the formal examination procedure that that measure was capable of presenting aid elements, **the effectiveness of Article 108(3) TFEU would be frustrated.**
- 39 On the one hand, if the preliminary assessment in the decision to initiate the formal examination procedure is that the measure at issue constitutes aid and that assessment is **subsequently confirmed** in the final decision of the Commission, **the national courts would have failed to observe their obligation under Article 108(3) TFEU** [...] to suspend the implementation of any aid proposal until the adoption of the Commission's decision on the compatibility of that proposal with the internal market.
- 40 On the other hand, even if in its final decision the Commission were to conclude that there were **no aid elements**, the preventive aim of the State aid control system established by the TFEU [...] requires that, following the **doubt raised** in the decision to initiate the formal examination procedure as to the aid character of that measure and its compatibility with the internal market, **its implementation should be deferred until that doubt is resolved by the Commission's final decision.**

# Case C-284/12, Deutsche Lufthansa

- 41 It is also important to note that the application of the European Union rules on State aid is based on an obligation of sincere cooperation between the national courts, on the one hand, and the Commission and the Courts of the European Union, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty. In the context of that cooperation, national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under European Union law and refrain from those which may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU. Therefore, **national courts must, in particular, refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional.**
- 42 Consequently, **where the Commission has initiated the formal examination procedure with regard to a measure which is being implemented, national courts are required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure (C-284/12, paras 37-42, emphasis added).**

# Thank You



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