

STATE AID PROCEEDINGS AND LITIGATION

Recovery of unlawful and incompatible aid (European Commission)

ERA – Brussels, 19 May 2016

Jacques Derenne

Partner, Sheppard Mullin, Brussels

University of Liège & Brussels School of Competition

Outline

- Main sources
- Context of a negative Commission decision
- Principles governing recovery by the Commission
 - (by the national courts: see other session)
- Recovery in practice
- Selected recent case law on recovery issues
- Sanctions for non recovery

Main sources

Main sources

- Articles 108(2) — 260(2) TFEU (Article 108(3): national courts)
- Council Regulation (EU) 2015/1589 (replacing Regulation 659/1999) – Articles 12, 13, 16, & 17
- Recovery Notice (OJ C272/4, 15.11.2007)
- Enforcement Notice (OJ C 85, 9.4.2009)
- 2006 Study on the application of State aid at national level (updated in 2009)
 - Part II: recovery (enforcement of negative decisions)
- State aid scoreboards

Context of negative Commission decisions

When does the Commission order recovery?

- Commission has found new aid is unlawful and incompatible
- Commission has to order recovery
 - Art. 16(1) Reg 2015/1589
 - obligation except statutory limitation and general principle of law
 - Contrast with case law pre-Reg 659 (now 2015/1589)
 - logical consequence of unlawfulness - faculty
- Objective is to re-establish *ex ante* situation
 - not a sanction
 - interest rate applies (compound interest since 2003)

Recovery policy

- Systematic recovery in all cases of unlawful and incompatible aid
- Limited exceptions to recovery – Art. 16(1) and 17 Reg 2015/1589
 - limitation period of 10 years
 - general principles of EU law (eg legal certainty)
- No means of defence
 - except for absolute impossibility
(see, for no absolute impossibility, e.g., C-63/14, Commission v. France)
- Political context of a negative decision
 - Member State has not notified the aid
 - Grantor / “violator” has to recover the aid
 - Beneficiary the sole “victim”
 - Generally no legitimate expectations of the beneficiary

Distinct but complementary roles of the Commission and national courts for recovery

Commission

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

National courts

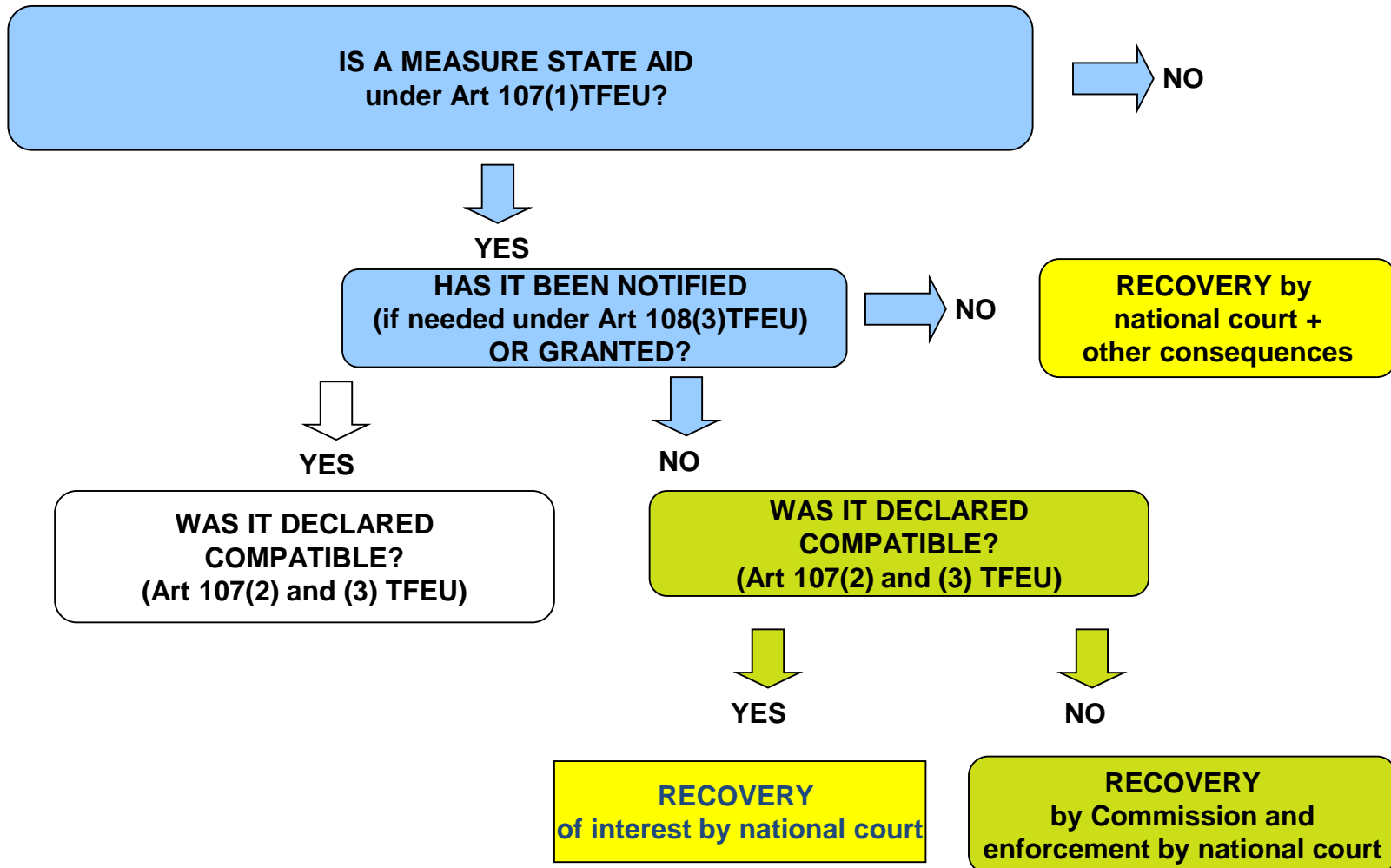
- notion of aid and block exemption regulations
- safeguarding individual rights in case of unlawful aid only
- enforcement of negative Commission decision
- Article 108 (3) TFEU



Interaction: Article 107 (1) TFEU

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

Recovery of unlawful aid by the Commission and by national courts



Main principles of recovery

Recovery: Commission / Member States

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

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" (e.g. transfer of assets)
- Amount to recover
 - Issue of aid schemes (e.g. tax cases)
 - Commission is not required to state amount to be recovered; method to determine the amount is sufficient
 - Calculation of interest rate
 - Recovery of net amount only

Commission decision of 11 January 2016 on the excess profit exemption State aid scheme implemented by Belgium (1)

Article 1

The Excess Profit exemption scheme [...] pursuant to which Belgium granted tax rulings to Belgian entities of multinational corporate groups [...] constitutes [...] aid [...] that is incompatible with the internal market and that was unlawfully put into effect by Belgium [...].

Article 2

1. Belgium shall recover all incompatible aid granted under the scheme referred to in Article 1 from the recipients of that aid.
2. Any sums that remain unrecoverable from the recipients of the aid granted under the scheme, following the recovery described in the paragraph 1, shall be recovered from the corporate group to which the recipient belongs.
3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Regulation (EC) No 271/2008.

Article 3

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

Commission decision of 11 January 2016 on the excess profit exemption state aid scheme implemented by Belgium (2)

Article 4

1. Within two months from notification of this Decision, Belgium shall submit the following information to the Commission:
 - a. the the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;
 - b. the total amount (principal and recovery interests) to be recovered from each beneficiary;
 - c. a detailed description of the measures already taken and planned to comply with this Decision;
 - d. documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Belgium shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by 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 beneficiaries.

Article 5

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels.

Recovery in practice

Issues related to the procedural autonomy

- **Responsible Authorities**
 - Federal authorities
 - Regional authorities
 - Local authorities
- **Applicable law: civil or administrative law?**
 - Depends on aid granted
 - Situation of the beneficiary: e.g. insolvency proceedings
- **Timing**
 - Problem of the length of national administrative procedures
 - Deadline for recovery: 2 + 2 months not realistic
- **Cooperation with the Commission**
 - Information on status
 - Information in case of delay / difficulties
 - Negotiation of a solution

Issues related to procedural autonomy - "*effective*" recovery in insolvency procedures (1)

- Recovery in the context of restructuring / liquidation proceedings
- Conflict in objectives
 - Commission: re-establish *ex ante* situation, whatever the situation of the company, even if recovery leads to liquidation
 - Member States: preserve economic activity and jobs

Issues related to procedural autonomy - "*effective*" recovery in insolvency procedures (2)

- Registration of recovery claims by the State (in time and properly ranked in the list of claims)
- Preferential treatment of State recovery claims?
 - Request priority to be given to the recovery claim, whatever type of claim
- Participation in definition of the restructuring plan?
 - Negotiation over recovery claims?
 - Challenge decision to restructure if no total recovery within deadline
- Continuation only if restructuring plan provides for total recovery; if not, preference for liquidation
- When assets are sold, sale should be under market terms and open and transparent procedure

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^o (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)

Economic continuity

- Factors for the assessment of an economic continuity
 - the subject-matter of the transfer
 - assets and liabilities
 - maintenance of the workforce
 - grouped assets
 - the price of the transfer
 - the identity of the shareholders or the owners of the undertaking which takes over and of the initial undertaking
 - the time at which the transfer takes place (after the beginning of the investigation, the opening of the procedure or the final decision)
 - the economic rationale of the operation

Economic continuity – recent cases (1)

Val Saint Lambert (2014) - two Commission Decisions:

- SA.34791: the Commission found that incompatible aid was granted to VSL by the Walloon Region and ordering VSL to pay it back; VSL declared bankruptcy & certain of its assets were sold (T-761/15: pending action for annulment brought by the Walloon Region).
- SA.38810: the Commission concluded that the repayment obligation would not be transferred to the buyer of those assets owing to the absence of economic continuity with VSL in view of the limited extent of the assets purchased.

Economic continuity – recent cases (2)

SERNAM (2012) – SA. 12522

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

Recent case law on recovery issues

Selection of cases

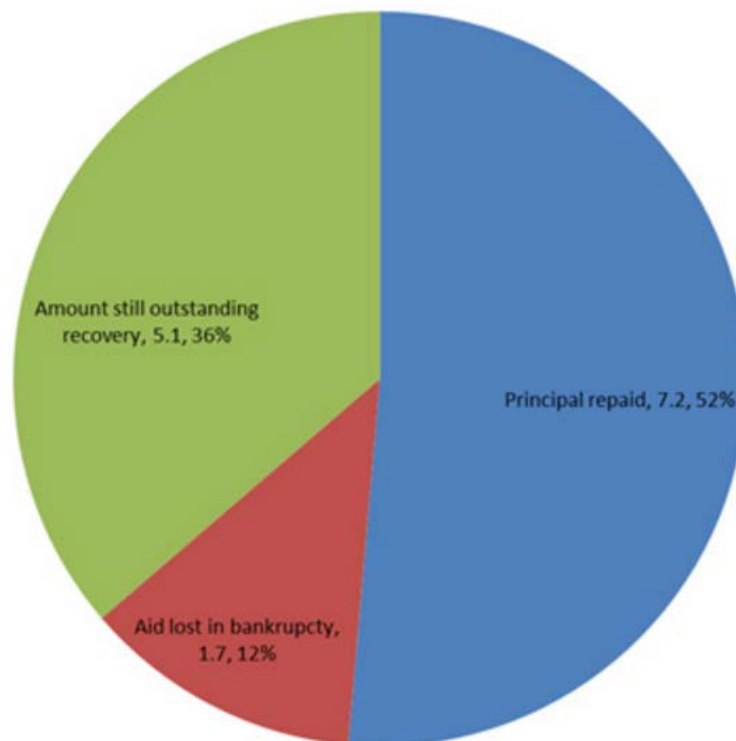
T-233/11 & T-262/11,
Greece & Ellinikos Chrysos v Commission, 9.12.2015

- Recovery of unlawful aid cannot, in principle, be regarded as disproportionate to the objectives of the Treaty.
- Legitimate expectations provided that:
 - there are sufficiently precise assurances arising from a positive action taken by the Commission
 - w/o Commission's express opinion, its silence cannot preclude recovery of that aid.
- If violation of 108(3) TFEU, a Member State may not raise the legitimate expectations of recipients to justify no recovery.

Sanctions for non implementation of negative Commission decisions and final comments

Implementation of negative Commission decisions – status (1)

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.

Sanctions for non implementation and ways to enforce negative decisions

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

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

Article 108 TFEU cases before the CJEU (1)

Recent recovery cases pending before the CJEU

- C-591/14, Commission v. Belgium

Article 108 TFEU cases before the CJEU (2)

■ Recent judgments for failure to recover

- C-354/10, Greece, 1 March 2012
- C-243/10, Italy, 29 March 2012
- C-485/10, Greece, 28 June 2012
- C-529/09, Spain, 24 January 2013
- C-613/11, Italy, 21 March 2013
- C-353/12, Italy, 10 October 2013
- C-263/12, Greece, 17 October 2013
- C- 344/12, Italy, 17 October 2013
- C-411/12, Italy, 12 December 2013
- C-527/12, Germany, 11 September 2014
- C-547/11, Italy, 5 June 2014
- C-37/14, France, 12 February 2015
- C-674/13, Germany, 6 May 2015
- C-63/14, France, 9 July 2015

Article 260 TFEU cases before the CJEU

- Recent judgments of the CJEU for failure to comply with a CJEU judgment
 - C-367/14, Italy Judgment – 17 September 2015
Fine imposed – Lump sum = €12m for every 6 months of delay
 - C-184/11, Spain Judgment – 13 May 2014
Fine imposed – Lump sum = €30m– Daily amount = €25,817
- Recent cases pending before the CJEU for failure to comply with a CJEU judgment
 - None

Thank you for your attention!

jderenne@sheppardmullin.com

IT Tower, Avenue Louise 480

1050 Brussels