

## Current Intelligence

# Recovery of Unlawful State Aid and Determination of Beneficiaries: Guidance for National Courts

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*Case C-275/10 Residex Capital IV CV v. Gemeente Rotterdam*, 8 December 2011.

**National courts' obligation to order any appropriate measure to eliminate the distortion of competition resulting from an unlawfully granted aid requires the determination of the actual beneficiaries of the aid in question.**

### Legal context

In its *Residex Capital* judgment of 8 December 2011, the Court of Justice of the European Union (CJEU) was asked to clarify the extent of powers of national courts when seized of actions relating to the granting of unlawful aid.

An unlawful aid is aid granted in violation of the Member State's obligations (i) to notify the European Commission of any draft State measure intended to provide State aid and (ii) not to implement such measure until the Commission's compatibility assessment is carried out, leading to the approval of the measure in question.

An 'unlawful aid' is to be distinguished from an 'incompatible aid'. The latter is an aid (unlawfully or lawfully granted) which cannot be exempted from the prohibition set out in Article 107(1) TFEU, further to a compatibility assessment, under Article 107(3) TFEU, for which the Commission is exclusively competent (national courts have no powers under Article 107(3) TFEU; however, they are entrusted with large powers and obligations to implement the notion of aid (Article 107(1) TFEU) and the notification and standstill obligations under Article 108(3) TFEU).

### Facts

The CJEU had to respond to preliminary reference questions from the Hoge Raad (Supreme Court of the Netherlands) relating to its competence to cancel a guarantee which was provided illegally by a public authority in order to cover a loan granted by a finance company to an undertaking which would not have been able to obtain such financing under normal market conditions, and on its obligation to cancel a guarantee obtained in such conditions.

### The cancellation of an unlawful guarantee is not necessarily a sufficient and effective remedy

In this case, the Hoge Raad asked if the cancellation of the guarantee constituted an effective measure to restore the competitive situation existing prior to the provision of the loan, in particular for the protection of the interests of the parties affected by a distortion of competition resulting from the grant of this loan (the cancellation of the guarantee not resulting in the correction of the distortion of competition, namely the loan which the beneficiary of the guarantee would not have been able to obtain in normal market conditions).

In setting out the applicable rules, it is important to note that the CJEU made reference (at paragraphs 25, 26, and 29 of the judgment) to the 2009 Enforcement Commission Notice (Commission notice on the enforcement of State aid law by national courts, OJ C 85, 9.4.2009, pp. 1–22). The CJEU confirmed the full competence of the Hoge Raad to draw all the consequences arising from the unlawfulness of the aid, including those concerning the validity of measures, which implemented the guarantee in question.

Regarding the question of whether European Union law requires national courts to cancel a guarantee provided in conditions such as those in the main proceedings, the Court returned to the fundamental principle according to which '*the logical consequence of a finding that aid is unlawful is to remove it by means of recovery in order to restore the situation previously obtaining*' (at para. 33 of the judgment; see also Case C-403/10 P *Mediaset v Commission*, judgment of 28 July 2011, para. 122). The main objective pursued in recovering unlawfully paid State aid is '*to eliminate the distortion of*

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competition caused by the competitive advantage which such aid affords', the beneficiary forfeiting 'the advantage which it had over its competitors on the market, and the situation prior to payment of the aid is restored' (at para. 34 of the judgment; see also Case C-350/33, *Commission v Italy*, judgment of 4 April 1995, para. 22).

### **An effective remedy depends on the exact determination of the beneficiaries of the unlawful aid in question**

At this stage, it should be emphasized that the CJEU clarified, on its own initiative, the Hoge Raad regarding the question of the identity of the beneficiaries. Indeed, although the question of the Hoge Raad did not deal with this issue, the CJEU invited it to examine it since it is closely linked to the question raised, which concerned the cancellation of the guarantee and whether this constitutes an effective means or not to recover the aid. The CJEU notes that '*in order to carry out this repayment, it is essential that the national courts identify the beneficiary or, as the case may be, the beneficiaries of the aid. In the case where aid is granted in the form of a guarantee, the beneficiaries of that aid may be either the borrower or the lender or, in certain cases, both of them together*' (para. 37 of the judgment).

In this case, the lender, Residex, would have been able to obtain an economic profit from the guarantee since the borrower found itself in a financial situation in which it would not have been able to obtain a loan on the financial markets, and Residex would not have been able to offer it a loan at a preferential rate to that in force on the market unless the guarantee was in place. The CJEU requested the referring court to examine these questions in order '*to effect ... recovery of the total amount of the aid in question*' (para. 43 of the judgment).

Against that background, the CJEU ruled that irrespective of who the beneficiary of the aid may be, European Union law does not impose the annulment of any specific act (in this case the guarantee in question). However, the measures taken by national courts with regard to the validity of the abovementioned acts must have the objective of restoring the competitive situation existing prior to the payment of the aid in question. As a consequence, the cancellation of a guarantee is not necessarily the most effective measure, and the cancellation of the underlying contract '*in so far as this is liable to lead to the mutual restitution of the services performed by the parties or the disappearance of an advantage for the future, may be better able to achieve the objective of restoring the competitive situation which existed before the aid was granted*' (paras 44–47), because it will allow the recovery of the total sum in question, which was not limited to the guarantee but to the loan which was able to be granted because of that.

### **Practical significance**

National courts have very wide powers and obligations with respect to the recovery of unlawful aid. EU law provides for a result to be attained: the restoration of the competitive situation, which existed before the unlawful granting of the aid. To this end, national courts should use their powers not only to deal with the unlawful act itself but also with the consequences thereof, in dealing with, as in the present case, the underlying contract (the loan) which could not have been possible without the provision of the State guarantee (the unlawful aid).

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