

EU State Aid Litigation

Enforcement of State aid law in national
court proceedings

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Outline

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



Main sources

- Articles 108(2) — 260(2) TFEU (Article 108(3): national courts)
- Council Regulation (EU) 2015/1589 – Articles 12, 13, 16, & 17
- 2019 Recovery Notice (2007 Notice replaced in July 2019)
- 2009 Enforcement Notice
- Study on the enforcement of State aid rules and decisions by national courts, 2019
 - <https://ec.europa.eu/competition/publications/reports/kd0219428enn.pdf>
 - Online database: <https://state-aid-caselex-accept.mybit.nl/>
- 2006 and 2009 studies
 - Part I, Application of EC State aid rules by national courts
 - http://ec.europa.eu/competition/state_aid/studies_reports/study_part_1.pdf
 - Part II, Recovery of unlawful State aid: enforcement of negative Commission decisions by the Member States
 - http://ec.europa.eu/competition/state_aid/studies_reports/study_part_2.pdf
- Update of the 2006 Study on the Enforcement of State Aid Law at National Level, 2009
 - http://ec.europa.eu/competition/state_aid/studies_reports/enforcement_study_2009.pdf
- National Court judgments on State aid:
 - http://ec.europa.eu/competition/court/state_aid_judgments.html



2019 private enforcement study

- Confirmed increase of national State aid enforcement
- Prevalence of *private* enforcement over *public* enforcement
 - BG, CR, LU: no *private* enforcement
 - DK, HU, IR, LA, LE, LU, MA: no *public* enforcement
 - Cases in most MS and no longer only in a restrained group
 - Fragmentation of procedures and empowered courts confirmed – often until last resort
 - Recovery actions majority of actions
 - Interim relief seldom granted
 - Damages very rarely sought and granted
 - 6 cases in France only (CAA Marseille, CAA Pau, CA Versailles, TA Bastia, Conseil d'Etat - 2)
 - Fragmentation of national recovery procedures
 - But trends to specific national legislations
 - BE (ad hoc), SP, SK, NL, FI



Public enforcement



When does the Commission order recovery?

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



Recovery policy

- Systematic recovery in all cases of unlawful and incompatible aid
- No means of defence
 - except for absolute impossibility
 - see recent examples:
 - C-63/14, *Commission v. France*
 - C-481/16, *Commission v. Greece ('Larco')*
 - C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori*
- Political context of a negative decision
 - Member State has not notified the aid
 - Grantor / “violator” has to recover the aid
 - Beneficiary the actual “victim”
 - Generally no legitimate expectations of the beneficiary

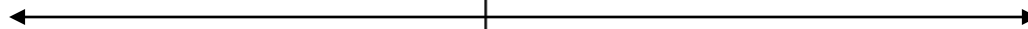
Distinct but complementary roles (see yesterday's presentation)

Commission

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

National courts

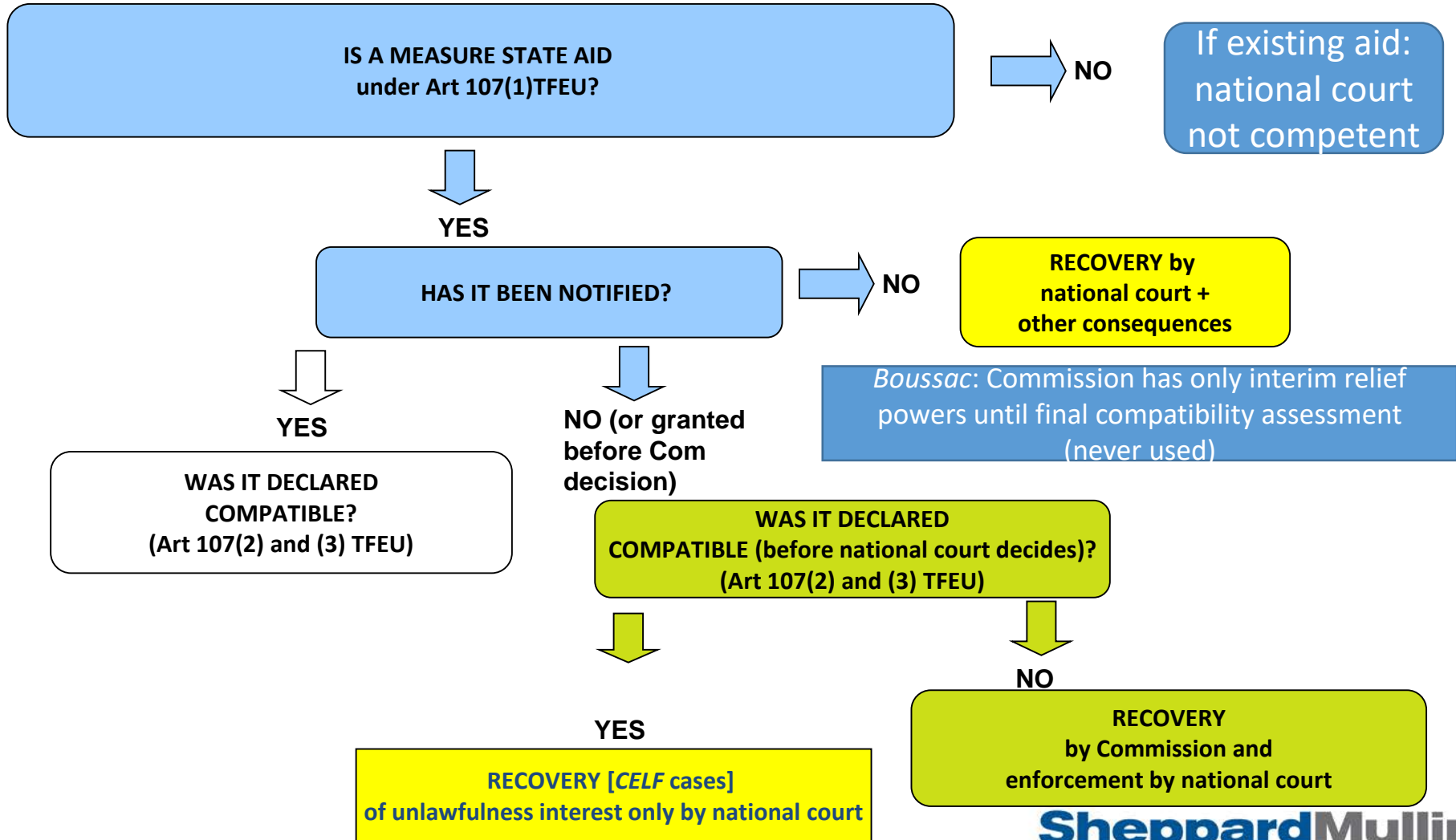
- notion of aid and block exemption regulations
- safeguarding individual rights in case of unlawful aid only
- enforcement of negative Commission decision
- Article 108 (3) TFEU



Interaction: Article 107 (1) TFEU

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

Recovery of unlawful aid: Commission / national courts





Main principles

- **Commission orders recovery**

- With interests for period between disposal and recovery of the aid
- Guidance on calculation of interest rate
- 10 year statutory limitation
 - C-627/18, *Nelson Antunes*: only to the relationship between the Commission and the Member State
 - T-291/17, *Transdev a.o. v Commission*: not when the Commission has acknowledged that unlawful aid is compatible with the internal market after it was granted

- **National courts order recovery**

- Same general principles
- Except: *CELF* case
- National rules on statutory limitation: C-349/17, *Eesti Pagar* (subject to equivalence and effectiveness principles)
- C-627/18, *Nelson Antunes*: the application of a national limitation period is precluded if the period has expired before the adoption of the Commission decision ordering the recovery, or due to the delay of the Member State in implementing that decision
- 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).
 - Immediate and effective (“provided that”: set aside contrary national law)
 - All necessary measures to ensure recovery
 - Loyal cooperation: “good faith”



Need for clarity of Commission decisions

- Identification of beneficiaries
 - Large number of beneficiaries (schemes, eg tax cases)
 - Notion of "effective beneficiary" – further guidance provided in the 2019 Recovery Notice
- Amount to recover
 - Issue of aid schemes (e.g. tax cases, national tax authorities should carry out internal tax audits, 2019 Recovery Notice)
 - Commission not required to state amount to be recovered;
 - information needed to determine if the amounts is sufficient
 - quantification must be based on the methodology of the recovery decision
 - Calculation of interest rate
 - tool for the calculation: 2019 Recovery Notice



Other issues related to the recovery order

- Responsible authorities:
 - Federal authorities
 - Regional authorities
 - Local authorities
- Timing
 - Deadline for recovery
 - Length of national administrative procedures



Possible remedies to these issues

- 2019 Recovery notice
 - Commitment to precise and complete decisions
 - Further guidance on how the Commission may assist Member States in the recovery phase (i.e., kick off meetings, sharing documents)
 - Specific guidance to determine amount and identity of beneficiaries and to implement recovery in case of tax reliefs, insolvency proceedings and restructuring
 - 2+2 months deadline (possibility to request an extension in exceptional circumstances)
 - Provisional repayment of the aid
 - Recovery of net amount only
 - deduction of tax: *Brussels Region/Siemens*, 1995
- Other remedies
 - Independent State aid authorities
 - Tasks: detection, advice, recovery of unlawful aid
 - e.g. in Poland, Czech Republic, Hungary, Cyprus, Lithuania, Slovenia
 - Ad hoc recovery legislation in several Member States
 - e.g. State aid recovery Act of 21 Feb 2018 in NL
 - Direct applicability of the recovery decisions



Issues regarding "*immediate*" recovery (1)

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



Issues regarding "*immediate*" recovery (2)

C-232/05 *Commission v France (Scott I)*

- Context
 - Negative Commission decision and recovery order (preferential land price)
 - Action for annulment before GC (no suspension requested)
 - National action against national administrative order to repay
 - Automatic suspensory effect under French law
 - Stay of proceedings pending the judgment of GC
- Application of national procedures subject to "*immediate and effective*" recovery: "*All necessary measures*" includes leaving unapplied national rules impeding recovery
- Stay of proceedings: Commission decision cannot be called into question before national courts (except if 267: *Foto Frost*), only before GC



Outstanding issues

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



Persons obliged to reimburse (1)

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



Persons obliged to reimburse (2)

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

Persons obliged to reimburse (3)

- *Electrabel et Dunamenti v Commission* (C-357/14 P)
 - The Court clarifies in favour of *Germany v Commission*: ref to the previous paras
 - Market price protects the buyer but not the undertaking bought (the "activity" bought)
 - The Court refers to legal personality whilst the treaty refers to "undertaking"
 - "*the legal forms of the entity that committed the infringement and the entity that succeeded it are irrelevant. Imposing a penalty for the infringement on the successor can therefore not be excluded simply because, as in the main proceedings, the successor has a different legal status and is operated differently from the entity that it succeeded*" (C-280/06, *Autorità Garante della Concorrenza e del Mercato v ETI a.o.*, para 43)
 - What matters: economic continuity of the activity subsidised



Persons to reimburse (4)

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



Persons to reimburse (5)

- *Fortischem v Commission* (T-121/15)
 - Acquisition of the assets of the company in liquidation that received the unlawful aid
 - Transfer price consistent with market conditions
 - does not in itself rule out the existence of economic continuity
 - does not prevent, in some circumstances, extension of the recovery obligation
 - The scope and the economic logic of the transaction are indicators of economic continuity
 - The fact that the sale of assets was carried out with a view to circumventing the recovery decision is not relevant



Economic continuity - references (1)

- Judgments
 - *Mory o.a. v Commission*, C-33/14 P
 - *Italy and SIM 2 Multimedia Spa v Commission*, C-328/99 & C-399/00
 - *Germany v Commission*, C-277/00
 - *Greece v Commission*, T-415/05, T-416/05 & T-423/05
 - *Commission v France*, C-214/07
 - *Fortischem v. Commission*, T-121/15
- Decisions of the Commission
 - 2 June 1999, *Seleco SpA*, OJ L 227 of 02.06.1999
 - 1 October 2014, SA.31550, *Nürburgring*, OJ L 34 of 10.2.2016
 - 4 April 2012, SA.34547, *Sernam* (*sui generis* decision on continuity)
 - 31 July 2014, SA.34791, *Val Saint- Lambert*, OJ L 269 of 15.10.2015
 - 31 August 2014, SA.38810, *Val Saint-Lambert* (*sui generis* decision on continuity)



Economic continuity – principles (2)

- Purpose of the transfer
 - assets and liabilities, continuity of the workforce, bundled assets
- Transfer price
- Identity of the shareholders or owners of the acquiring undertaking and of the original undertaking
- Moment at which the transfer was carried out
 - after the start of the investigation, the initiation of the procedure or the final decision
- Scope and economic logic of the transaction
- *‘A decision on economic continuity must be regarded as a decision which is ‘related and complementary’ to the final decision preceding it on the aid concerned’ (NeXovation v Commission, T-353/15 DEP)*



Sanctions for non implementation and ways to enforce negative decisions

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

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



Private enforcement



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

11 July 1996

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



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

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



Article 108(3) TFEU (2)

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



Article 108(3) TFEU (3)

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



What powers do national courts have?

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



Locus standi C-174/02, *Streekgewest*

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



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

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



Miscellaneous

- Formalistic unlawful aid
 - C-493/14, *Dilly's Wellnesshotel*
 - Lack of express reference to the GBER in an aid scheme [previous GBER]
- Action by the judge can create an aid
 - C-590/14 P, *DEI & Commission v. Alouminion tis Ellados*
 - A national court adopting an interim relief cannot provide for measures having the effect of transforming an existing aid into a new aid
 - T-541/11 RENV, *Alouminion tis Ellados VEAE v Commission* (2018)
 - Classification of the order granting interim measures as constituting new aid
 - Classification of the preferential tariff as State aid
 - Advantage
 - Obligation to recover
 - Rejection
 - C-332/18 P – appeal dismissed (December 2019)

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

C-119/05, *Lucchini*

- Context of the case
 - National court decided *Lucchini* could be granted aid
 - Negative Commission decision
 - National law- principle of *res judicata*- preventing recovery
- Should the application of this principle be set aside in order to allow recovery?
- Community law precludes the application of a national law preventing recovery
- See also C-587/18 P, *CSTP Azienda della Mobilità v Commission*
 - principle of *res judicata* cannot prevent the Commission from finding the existence of unlawful State aid
 - even if this qualification had been previously ruled out by a national court of last instance



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

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

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



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

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

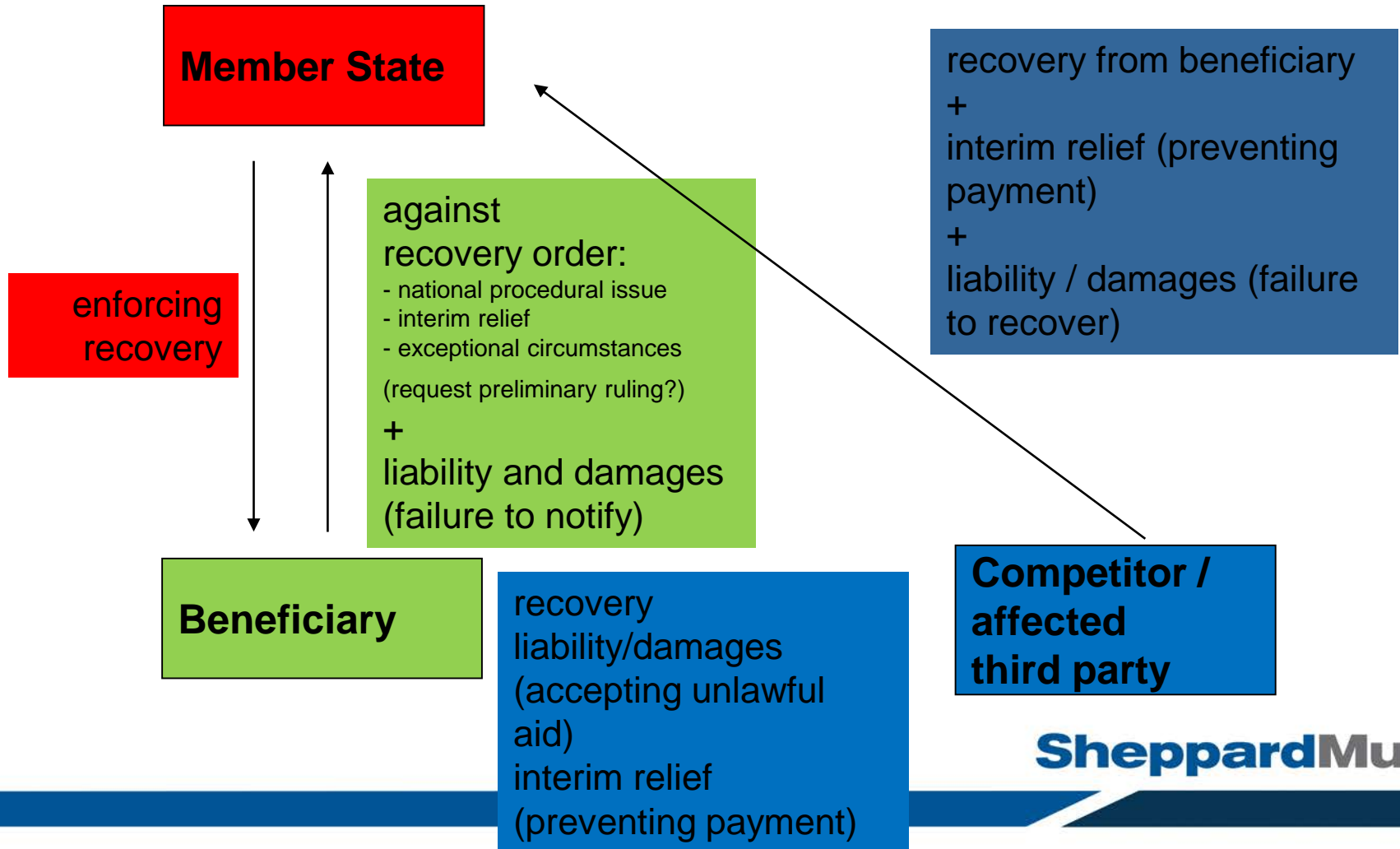
[See J. Derenne, *L'autorité de chose jugée à l'épreuve du droit de l'Union européenne – Du principe d'effectivité en général et des règles spécifiques en matière d'aides d'État en particulier*, in *Contentieux du droit de la concurrence de l'Union européenne : questions d'actualité et perspectives*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



Who can initiate a State aid action before national courts?

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

Actions before national courts (by type of actors)





Actions before national courts (by type of actions)

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



Annulment for violation of Article 108(3) TFEU

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



Recovery – Cease and Desist Order

Breda case - President Brussels Commercial Court, 1995

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



Member State v beneficiary

France (DGAC) v Ryanair

- Unlawful and incompatible aid granted by Charente region
 - 2014 Commission Decision
 - Poitiers Administrative Court: recovery (2016)
 - Appeal but interim relief Poitiers référé : recovery order
- **9 November 2018**
 - Sequestration at the Bordeaux airport of a Boeing 737 to recover €525,000
 - Baillif stopping aircraft with 150 passengers onboard
 - Payment of the aid in the morning...



Damages (*ref to following session*)

- Recovery may not be sufficient - Ultimate sanction
- Deterrent effect
- Member State's liability - Conflict of interest
- Beneficiary's liability
- Parallelism with cartel's policy
- Damages v. State
 - *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*)
 - Beneficiary v State (*Borotra* cases in France)
 - Competitor/third party v State (follow-up to Corsica Ferries / SNCM)
 - Bastia Administrative Court, 23.2.2017, n° 1500375: €84m + €219 667 audit
 - Bastia Administrative Court, 23.2.2017, n° 1501123: €369,504 (cost bid lost)
 - On appeal: Marseille Administrative Court of Appeal, Corsica Ferries France, 16.7.2018, n°17MA01655
 - Annulment - Expertise ordered
- Damages v. Beneficiary
 - *SFEI*, C-39/94, 1996, para 72-76

Thank you for your attention!

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