

TaxLit Summit – Knect365

EU State aid: the road to recovery

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Taxation and EU State aid control

- Introduction – Basic principles
- **Alessandra Flamini, DG COMP**
 - *NL/Starbucks, Lux/Fiat Chrysler* judgments (24.9.2019)
 - Recovery of unlawful aid
- **Andrew Thomson, Sullivan & Cromwell**
 - Comments on *NL/Starbucks, Lux/Fiat Chrysler, Belgian Excess Profit* cases - Impact on policy
- **Conor Quigley QC, Serle Court**
 - *CFC* (2019) and *Gibraltar* (2018) cases
- **James Rivett QC, Pump Court Tax Chambers**
 - Comments on *CFC*, UK tax code issues, recovery by national court and Brexit



Basic principles

- Notion of State aid (Article 107(1) TFEU)
 - Advantage
 - Selective
 - Transfer of State resources – Imputability to the State
 - Likely distortion of competition
 - Potential effect on trade between Member States
- Unlawful aid (Article 108(3) TFEU)
 - Not notified aid – implemented before Commission's approval
 - National courts
- Compatible – Incompatible aid (Article 107(3) TFEU)
 - Exclusive discretionary powers of the Commission
- EU judicial review
 - GCEU (annulment)
 - CJEU (appeal on points of law – preliminary ruling to national courts)

National courts

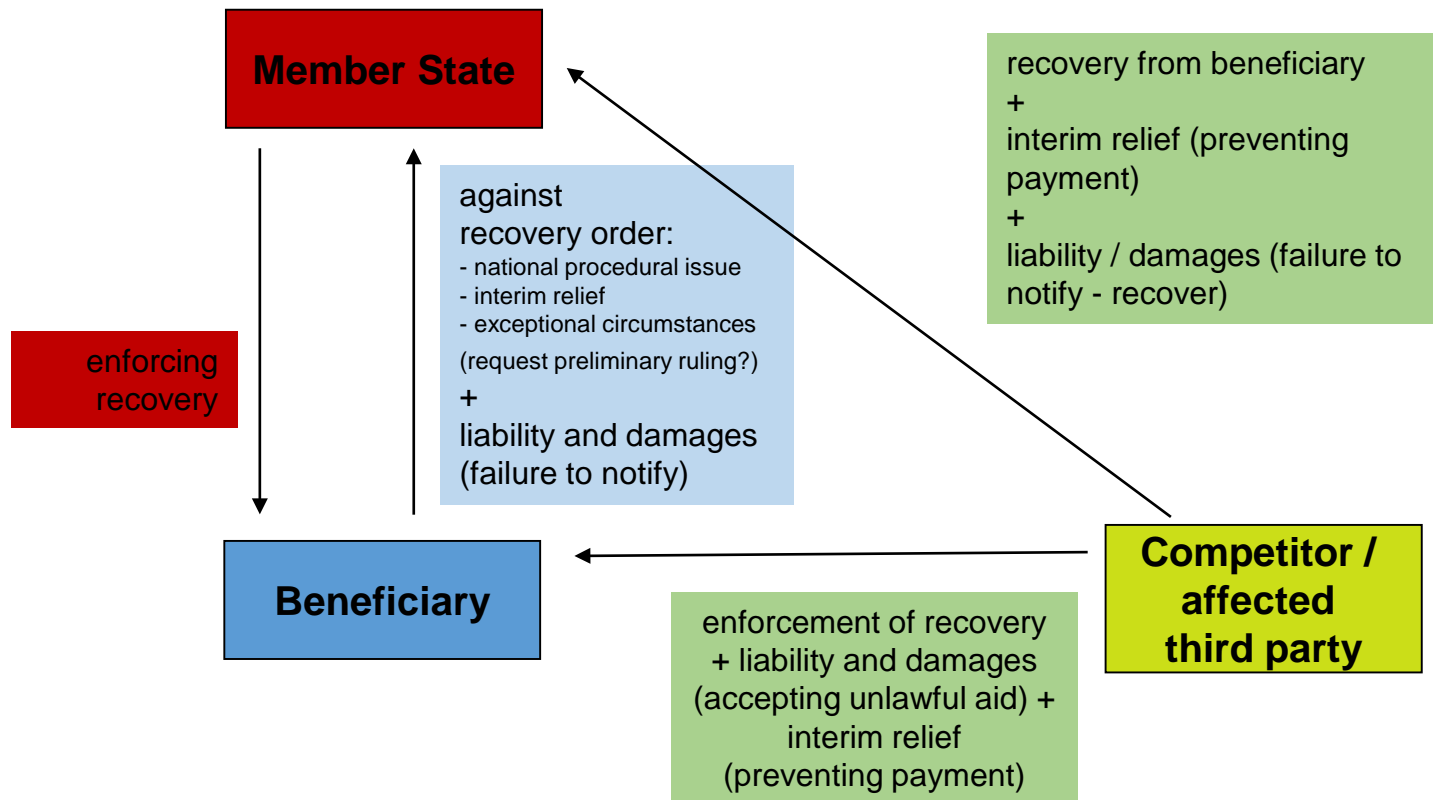
v.

Commission

Notion of aid (legal, objective notion with full judicial review)

- Unlawful aid ("illegal")
 - not notified
 - notified but implemented before Commission decision
 - misused
 - Obligation to protect subjective rights of third parties
 - cease and desist
 - interim relief
 - recovery
 - damages
 - Ensure Commission's compatibility assessment
 - No stay of proceedings
 - Enforce Commission negative decisions - GBER
- Compatible or incompatible aid
 - lawful or unlawful
 - Exclusive powers
 - prohibition to implement incompatible aid
 - obligation to order recovery if unlawful and incompatible
 - GBER
 - *Amicus curiae*

Actions before national courts





Taxation and State aid

- Advantage: normal market conditions test
 - Compare with *what the State should have done*
- Selectivity: the decisive criterion in tax cases
 - Compare with *what the State usually does in comparable situations*
 - Need for a comparator: "reference framework"
 - Discrimination assessment
- Variety of situations
 - Tax exemptions, tax deductions, tax incentives, headquarters regimes, tax rulings (outliers), tax financing aid scheme, preferential rates, progressive tax levied on turnover, etc.
- Brexit?

Thank you for your attention!

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