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Outline

- Legal framework – reminder
- National courts and the Commission: distinct and complementary roles
- Obligations of national courts
- Enforcement Notice: main elements
- Selected comments
- Types of actions before national courts
- Selected national cases

Legal framework – reminder

- Article 108(3), last sentence, TFEU
 - 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.: 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 (C-235/05, *Scott I*)
- Regulation 2015/1589, Article 16 (recovery) – 29 (cooperation)
- Recovery and Enforcement Notices

National courts and the Commission: distinct and complementary roles (1)

- **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

National courts and the Commission: distinct and complementary roles (2)

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

Obligations of national courts

- *SFEI C-39/94 (CELF II, C-1/09; Deutsche Lufthansa, C-284/12)*
 - no stay of proceedings if Commission reviewing (the judge has to rule on the notion of aid)
 - however, if formal investigation procedure initiated: the judge is bound by the qualification of aid by the Commission (Lufthansa)
 - if formal investigation procedure concerns the qualification of aid: the judge should not stay and act with prudence (*amicus curiae* / Article 267 TFEU)
 - immediate action (interim relief if appropriate)
 - qualification of aid
 - preliminary reference to CJEU
 - question to Commission
 - obligation to recover if no exceptional circumstances
 - damages if necessary
 - beneficiary liable of unfair competition act under national liability law
 - obligation of diligence of the beneficiary
 - no obligation on the beneficiary: the State must notify (but the judge should be cautious on the effect of its decision – see DEI)
 - only interest recovery if unlawful and compatible aid (*CELF I, C-199/06*)
 - no ex-post regularisation of unlawful aid by positive decision of the Commission – see *CELF*
 - case of decision annulled ex tunc (*Tempus Energy*): no legitimate expectation in validity if decision challenged or deadline of action not expired
 - other: enforce negative decisions of the Commission - 314/85 *Foto Frost* otherwise

Enforcement Notice: main elements

- Published in July 2021 – see text in documentation pack
- Useful guidance / “advocacy paper” before national courts
- Lessons from studies
 - remedies, damages awards, cooperation underused
- General principles
 - Cooperation: Article 4(3) TEU
 - Equivalence and effectiveness: limits to procedural autonomy
 - “Provided that” – “No delay” – Recovery objective
 - Locus standi, Jurisdiction, Res judicata
- More guidance as to
 - what to do following a Commission decision
 - 108(2) TFEU, compatible aid, incompatible aid
 - GBER
 - Existing aid
 - Damages awards (conditions, estimation)
 - Risk of new aid by judgments
- Lack of guidance (reluctance?) on certain actions (see below)
 - competitor v beneficiary
 - beneficiary v State

Enforcement Notice: lessons from studies (2)

- Increase of State aid cases before national courts
- 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))
 - Italian case (Traghetti)
- Fragmentation of national recovery procedures
- But trends to specific national legislations (BE (ad hoc), SP, SK, NL, FI)

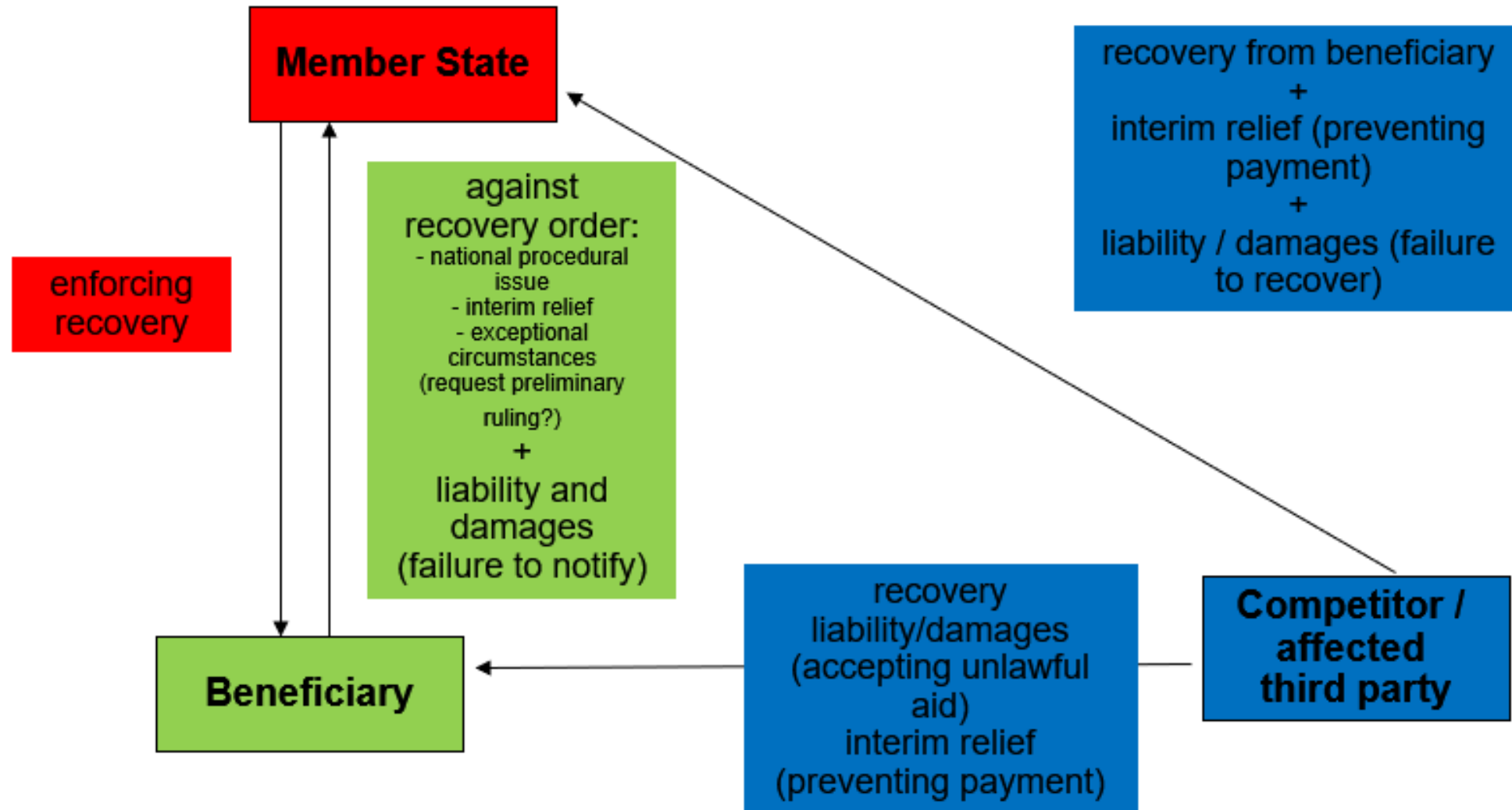
Enforcement Notice: selected comments (3)

- Deterrence and efficiency?
 - Recovery may not be sufficient
 - Ultimate sanction
 - Member State's liability - Conflict of interest
 - Beneficiary's liability
 - Parallelism with cartel's policy
- Amicus curiae – reluctance?
 - judge v administration syndrome?
 - attitude Commission?
 - due process
- National courts do not provide copies / information to Commission
- Compare with antitrust damages directive...
- Damages actions not encouraged (v. beneficiary / v. State)
- Arbitration

Legal means before national courts

- 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

Legal means before national courts



Selected national cases (1)

- C-349/17, *Eesti Pagar*
 - national authority must recover on its own initiative unlawful aid (GBER mistake – no legitimate expectation)
 - limitation period: national rules and equivalence and effectiveness principles
- C-627/18, *Nelson Antunes*
 - national limitation period applies (not Reg 2015/1589 – 10 y: Commission)
 - except if the period has expired before the Commission decision, or delay in implementing that decision
- *Tempus Energy* (English High Court, 2019)
 - Compatible aid annulled ex tunc: unlawful aid situation
 - Race national court v. new Commission decision
 - *CELF* principles: beneficiaries should be careful

Selected national cases (2)

■ Damages actions

- Competitor v Beneficiary

- « unfair reception » of unlawful aid (*SFEI*) / incompatible aid

- Competitor v Member State

- Unlawful aid, Incompatible aid, Misuse of aid
- Violation of Article 108(3) TFEU

- EU liability law: *Francovich, Brasserie du Pêcheur, et alii*

- » Art. 108(3) confers rights on individuals
- » breach is sufficiently serious (no discretion)
- » direct causal link violation/loss-damage

- National liability law

- » Damage, fault, causation

- All bodies of the State: legislative, executive and judicial powers (*Köbler*)
- Violation of Article 107(3) TFEU?

- Beneficiary v Member State

- Same as above – see below

- Specific case: beneficiary of unlawful aid v advisor (no liability)

- Paris, 16.2.2012, *EptaRack* (Concurrences n°1-2012, pp. 178-179)

Selected national cases (3)

▪ Damages Competitor v State

- France - 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

- Italy - Cassazione civile sez. III, 16.10.2020, n°22631 (C-387/17, *Traghetti*)

- State/Judge, violation of Art. 267 TFEU and Art. 4,3 TEU (loyal cooperation) : rejected
- State/Legislator, illegal law granting aid: confirmed (fault, damages, causal link proved)
- State/Administration: rejected
- € 2.330.355,78 damages granted

Selected national cases (4)

■ Damages Competitor v State

- France – Conseil d’Etat, 7.6.2017, *Le Muselet Valentin*
 - No liability in the event of delayed recovery by beneficiary
 - Recovery is EU law obligation (but question concerned granting not recovery)
- France – Cassation, 23.6.2021, *Erisay* (also Cass., 12.5.2021)
 - No damages for the loss of opportunity to benefit from an unlawful aid
 - Solar renewable energy – « décret moratoire » on purchase obligation at price higher than market price (Cass., 18.9.2019: unlawful aid)
 - See *Epta Rack mutatis mutandis*

■ *De minimis* aid

- Italy – Supreme Court (7.4.2021, INAIL – see C-608/19)
- Beneficiary can waive aid to avoid exceeding threshold

■ Greece – Athens Administrative Court of Appeal, 22.4.2021

- Investment aid – recovery – C-354/10

Selected national cases (5)

- Damages Beneficiary v State
 - Principle of effectiveness? This action should not put into question the effectiveness of recovery order
 - Damage compensated should be clearly separate from the aid recovery (no circumvention)
 - Recovery is not a sanction - Damages do not equal to aid (106/107, *Asteris*)
- Enforcement Notice still does not mention this category (only point 98 indirectly)
- However, there are cases useful for deterrence against States
- French Borotra cases (5.5.1999, 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

Selected national cases – recovery (6)

- Member State v beneficiary
- French State (DGAC) v Ryanair (unlawful and incompatible aid granted by Charente region)
- 2014 Commission Decision - Poitiers Administrative Court: recovery
- Appeal but interim relief Poitiers: 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...