



Four questions on recovery of unlawful State aid

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Reminder (1) – The basics: unlawful aid recovery

- State aid? Article 107 (1) TFEU (national court + Commission: competing powers)
- New aid measure - Article 108 (3) TFEU: notification + *standstill* obligations
 - The MS respects both obligations: EC examination
 - Possible outcomes:
 - No State aid ✓
 - State aid, compatible with the internal market (positive decision) ✓
 - State aid, incompatible with the internal market (negative decision) ✗
 - Compatible aid: **existing aid, national court not competent**
 - or verify compliance with de minimis, GBER, SGEI decision
 - The MS violates its obligation(s)
 - **Unlawful aid** (Article 1 (f) Procedural Regulation) – EC *ex officio* investigation or after a complaint
 - Possible outcomes:
 - No State aid ✓
 - State aid, compatible with the internal market (positive decision) ✓
 - State aid, incompatible with the internal market (negative decision) ✗ **EC: recovery decision**
 - **But... recovery can also be ordered by the national court: civil or administrative cases**
 - Independently from EC decision
 - Following EC negative decision

Reminder (2) – The basics: unlawful vs. incompatible

Compatibility assessment: EC

- **Incompatible**
 - Article 107 (1) TFEU
 - No exemption
- Exclusive powers of EC
 - Recovery obligation if incompatible aid is unlawful

Lawfulness: **national court**

- **Unlawful**
 - Article 107(1) TFEU
 - Article 108 (3) TFEU
 - Violation by MS
- EC
 - recovery decision if unlawful and incompatible aid
 - EC public enforcement
- **National court**
 - recovery order if unlawful aid
 - National public & private enforcement

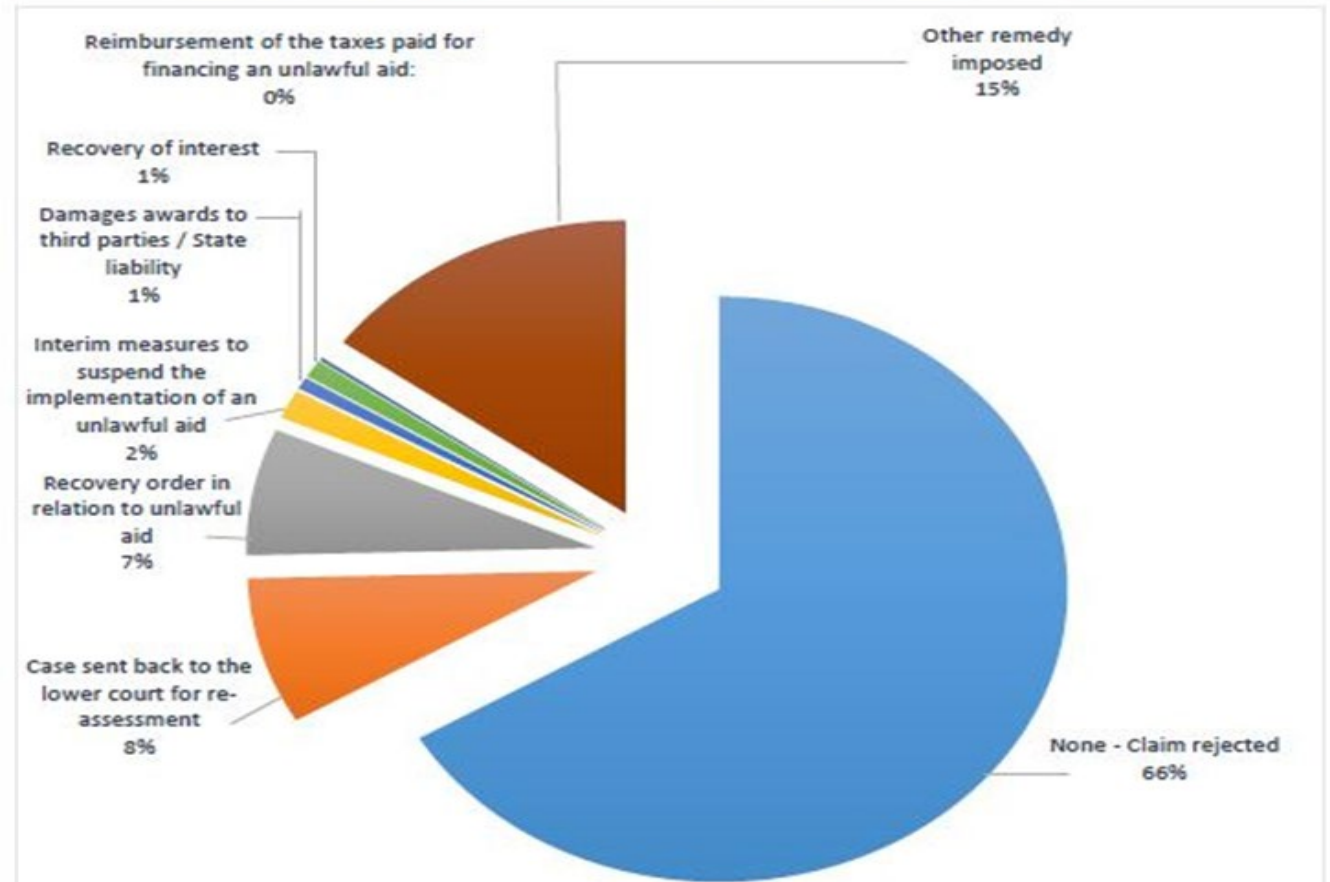
Q1 – How should national courts deal with recovery issues in practice? (1)

- National courts as ‘guardians’ of the notification/*standstill* obligations
 - *Costa/ENEL*, 6/64: direct effect of [Article 108(3)TFEU] – *this is not new!*
 - *SFEI*, C-39/94: respective roles of national courts v. Commission
 - Recovery order?
 - (i) clear State aid qualification, (ii) unlawful aid, (iii) no exceptional circumstances preventing recovery (*CELF II*, C-1/09)
 - recovery with (compound) interest (or, e.g., blocked account) (*CELF II*, C-1/09)
 - only interest if "compatible unlawful aid" (*CELF I*, C-199/06)
 - Parallel EC investigation / complaint?
 - *SFEI*, C-39/34: national court cannot wait for EC acting
 - *Deutsche Lufthansa*, C-284/12
 - if EC formal investigation initiated: State aid qualification binds national court
 - national court to suspend measure implemented, recovery and interim measures (to safeguard parties' interests and effectiveness of (future) EC decision)
 - National court's obligations
 - must set aside any national law preventing recovery
 - must raise on its own motion EU competition and internal market law violations (public policy pleas)
 - EC Notices on Recovery (2019) and on national courts State aid enforcement (2021)

Study on the enforcement of State aid rules by national courts (2019) (2)

- National courts rarely award damages in private enforcement cases
 - Explanation: no aid measures, plaintiff was a beneficiary seeking to extend the aid, burden of proof
 - If a remedy is awarded
 - Mostly recovery of the unlawful aid
 - Award of damages? Only in 6 (French) cases (e.g., Corsica Ferries)

Figure 25 - Remedies awarded by national courts in cases of private enforcement of State aid rules - percentage at EU level (data extracted from the list of relevant rulings in Annex 2)



Q1 – How should national courts deal with recovery issues in practice? (3)

- Do it yourself, you have full powers! Need help?
- The European Commission (Article 29 of Procedural Regulation, cooperation principles)
 - Request for information
 - e.g., has a measure been notified? When is a decision to be expected?
 - Documents, e.g., statistics, economic analysis
 - Request for advice
 - e.g., is the aid measure unlawful? Are there exceptional measures making recovery inappropriate?
 - *Amicus curiae* observations
 - EC can, on its own initiative, submit written applications and plead in court (if authorised)
 - Due process: see national judiciary code (EC as an intervener, re-opening of hearing)
- CJEU: preliminary reference (note: specific admissibility rules on reference on validity of EC decision)
- Belgium?
 - EC rarely used as an aid line (*amicus curiae*: *Micula* BE/LU), but frequent references to CJEU
 - See W. DE COCK, *Belgische rechtscolleges als Europese staatssteunrechtters*, Intersentia, 2023, 562 p.

Q2 – How should national courts deal with proposed takeover by third parties of recipients of unlawful aid under insolvency proceedings? (1)

- **Principle:** recovery of unlawful (and incompatible) aid from the undertaking carrying the economic activity that initially enjoyed the aid, where the actual advantage follows the undertaking acquired (*Seleco* case)
- **In practice:** *sui generis* decisions by the EC to assist the national court, assessing the **economic continuity** between the undertakings, in the light of:
 - **subject matter of the transfer**
 - assets and liabilities, maintenance of the workforce, bundled assets
 - **transfer price**
 - market price?
 - **identity of the shareholders** or owners of the acquiring undertaking and of the original undertaking
 - **moment of the transfer**
 - after the commencement of the EC investigation, opening of the procedure or the final decision
 - **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, T-353/15 – partially annulled, not on this point: C-665/19P (*Nürburgring* case)

Q2 – How should national courts deal with proposed takeover by third parties of recipients of unlawful aid under insolvency proceedings? (2)

■ Judgments

- *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
- *Mory o.a. v Commission*, C-33/14 P
- *SNCF Mobilités v Commission*, C-127/16 P
- *Fortischem v Commission*, C-890/19 P

■ Decisions of the Commission

- Seleco, SA.5552 (1999)
- Sernam, SA.34547 (2012) – sui generis decision
- Val Saint-Lambert, SA.34791 (2014)
- Val Saint-Lambert, SA.38810 (2014) – sui generis decision
- Nürburgring, SA.31550 (2014)

Q3 – How should M&A due diligence integrate State aid issues? (1)

- **Acquired undertaking received aid?**
 - Unlawful? Compatible? Ongoing investigation? Recovery order, escrow agreement? *Deggendorf* principle, etc.
 - Conditions precedent
- **Recovery risk for the acquirer?**
 - Economic continuity test – *sui generis* decision
 - Takeover before commercial court (insolvency cases)
- **Indemnity clauses between private operators**
- **Foreign Subsidies Regulation**
 - Acquisition and EU tender (thresholds)
- **Decision declaring the aid compatible being challenged**
 - Risk of annulment (decision valid until retroactive annulment...)
 - National judicial review in case of annulment
 - Timing! No legitimate expectation if positive decision still challengeable when implemented (*CELF*)
- **Transaction with State's involvement of the State – MEOP?**
- **Check the targeted undertaking is not in difficulty**
 - If in difficulty, need for R&R aid and strict conditions to fulfil
 - restructuring plan, restructuring period, divestment conditions, one time last time, etc.
 - 2014 R&R Guidelines

Q3 – How should M&A due diligence integrate State aid issues? (2)

- **Don't** include indemnity clause in the deed of sale of a State-owned undertaking
 - providing that any important financial events occurring in consequence of acts prior to the sale of the company are to be borne by the seller (State) – *Hytasa*, 92/317/EEC
 - whereby the seller guarantees the buyer in case of aid recovery, unless you can prove it was accounted for in the sale price – *Helsinki kaupunki*, T-597/19.
- **Do** take the risk into account
 - by lowering the transfer price or including an indemnity clause between private companies (possible use of escrow account)
 - by making the transaction conditional on the aid received by the seller being approved or being recovered if incompatible
 - by providing for arbitration clauses
- If conditional aid, check for **conditions** to comply with (size-related conditions !)

Q4 – How do tax issues interact with recovery situations?

(1) The recovery of unlawful fiscal State aid in Belgium

- What if the national court orders the recovery of unlawful fiscal State aid? Many questions that remain unanswered...
 - Legal basis for the payment of the sums to be recovered?
 - Article 108 (3) TFEU is only directed towards the MS – need for a suitable legal basis in national law
 - Legal basis for the interest payment?
 - What if the judgment does not concern an individual undertaking, but a provision in the Tax Code?
 - Qualification of the amount to be recovered?
 - Tax?
 - Impact on the tax assessment?
 - Modification? Applicable legal framework?
 - Quantification of the amount to be recovered?
 - Impact of other tax measures, e.g., alternative benefit which has not been claimed?
 - National court? Role for the tax administration?
 - Powers of investigation?
 - Enforcement measures?
 - Role for the tax administration? Applicable legal framework?

Q4 – How do tax issues interact with recovery situations? (2)

- Legal uncertainty when the EC orders the recovery of unlawful fiscal State aid
- Recovery according to actual civil law procedures? Many pitfalls...
- Recovery according to actual tax law procedures? Many pitfalls...
 - waiting delays (in the procedure for the modification of a tax assessment, in an enforcement procedure)
 - the sum to be recovered does not qualify as a tax
 - quantification of the amount to be recovered (alternative tax deduction)
 - interest payment
 - right to be heard,...
- Solution of the legislator... *ad hoc* legislation...
 - Maribel
 - Excess Profit Rulings: Program Law of 25 December 2016
- ... is this really the most suitable approach?

Q4 – How do tax issues interact with recovery situations?

(3) Towards a new legal framework for the recovery of unlawful fiscal State aid in Belgium

- PhD: focus on recovery procedures in the execution of an EC recovery decision
 - Pressing need for a new legal framework
 - But suitable legal provisions for recovery orders by the national court are also needed
 - Recommendations for a new legal framework
 - Recovery according to tax procedures
 - General legal framework
 - Integration in existing Tax Codes
 - Some recommendations regarding income taxes
 - Equalization of the amount to be recovered with a tax
 - Non-application of tax assessment periods, introduction of an adapted delay of investigation
 - Grant the tax administration the possibility to apply tax deductions
 - Introduction of adapted interest calculation rules
 - ...
 - See J. LEROY, *Terugvordering van onrechtmatige fiscale staatssteun in België*, Kluwer, 2021, 637 pp.

Q&A

Thank you for your attention!

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&

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