



Documentation

THE ROLE OF THE NATIONAL JUDGE IN THE ENFORCEMENT OF EU STATE AID RULES

SEMINAR FOR THE DUTCH JUDICIARY*

*open for participation of eligible judges from other EU Member States

Utrecht, 20 – 21 June 2022
222DV40f



Funded by the European Union
Service Contract DG COMP/2017/015 - SI2.778715

This document has been prepared for the European Commission. However, it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

Table of Contents

THE ROLE OF THE NATIONAL JUDGE IN THE ENFORCEMENT OF EU STATE AID RULES

SEMINAR FOR THE DUTCH JUDICIARY*

Utrecht, 20 – 21 June, 2022

*open for participation of eligible judges from other EU Member States

Speakers' Contributions

- Pieter Kuypers	
	<ul style="list-style-type: none">• PPT Main objectives of EU State aid control. Overview of Articles 107-109 TFEU• PPT Main elements of the notion of Aid<ul style="list-style-type: none">○ Undertaking and Economic activity○ State resources and Immutability to the State
- Cees Dekker	
	<ul style="list-style-type: none">• PPT Main elements of the notion of Aid<ul style="list-style-type: none">○ Advantage○ Selectivity○ Effect on trade and competition• PPT The role of the national judge in the enforcement of EU state aid rules<ul style="list-style-type: none">○ The direct effect of Article 108 (3) TFEU.○ The role of the Commission and of national courts○ Claims for damages and interim measures.
- Doortje Ninck Blok	
	<ul style="list-style-type: none">• PPT De Minimis and General Block Exemption Regulations• Workshop exercise• PPT Using the search tools of the online databases
- Diana Calciu	
	<ul style="list-style-type: none">• PPT Recovery of unlawful and incompatible aid• PPT Cooperation with the European Commission• Workshop exercise

General Information

Speakers' Contributions

Pieter Kuypers



akd benelux
lawyers

INTRODUCTION TO EU STATE AID LEGISLATION

Prof. P.H.L.M. (Pieter) Kuypers

Professor of European and National Procurement Law
Radboud University, Nijmegen

Lawyer-Partner
AKD



Funded by the European Union

Service Contract DG COMP/2017/015 - SI2.778715

This document has been prepared for the European Commission. However, it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein

akd benelux
lawyers

Agenda

akd benelux
lawyers

1. Key objectives of EU State aid review

2. Summary of Articles 107-109 TFEU

3. Key elements of the notion of aid (3/6):

☐ Undertaking and economic activity

☐ State resources

☐ Imputability to the State

|

3

Key objectives of EU State aid review

akd benelux
lawyers

|

4

Objectives

akd benelux
lawyers



A level playing field for undertakings:

- Article 101 TFEU: cartelisation
- Article 102 TFEU: abuse of dominant position
- Article 106 TFEU: public undertakings
- Article 107 TFEU: state aid

- Prevention of distortion of competition among certain undertakings

|

5

Objectives

akd benelux
lawyers



Preservation of the European internal market

- Prevention of neo-protectionism and 'subsidy wars' among Member States
- Only aid by Member States
- Foreign Subsidies Regulation
- National champions

|

6

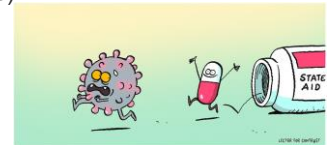
Objectives

akd benelux
lawyers



Realising European objectives

- Starting point: European Commission = regulatory authority
- Review: notification by Member State to European Commission
- Identifying and allowing 'appropriate State aid' in pursuit of European objectives:
 - ✓ Innovation
 - ✓ European cohesion policy
 - ✓ Services of general economic interest
 - ✓ Covering consequences of emergencies (COVID, war in Ukraine)



7

Objectives

akd benelux
lawyers



Effectiveness

- Preventing waste of public funds

8

Objectives

akd benelux
lawyers

- Legal protection: dual
- European Commission
 - Articles 107 and 108 TFEU
 - Request for enforcement (= complaint)
 - Incompatibility
- National courts
 - Article 108(3) TFEU
 - Standstill
 - Guidelines on enforcement of State aid rules by national courts [https://eur-lex.europa.eu/legal-content/NL/ALL/?uri=CELEX:52021XC0730\(01\)](https://eur-lex.europa.eu/legal-content/NL/ALL/?uri=CELEX:52021XC0730(01))
 - Role of the national courts, cooperation and consequences



9

State aid in TFEU

akd benelux
lawyers

- Article 107 TFEU - substantive aspects
- Article 108 TFEU - procedural aspects
- Article 109 TFEU - legislative procedure

|

10

Article 107(1) TFEU

When does a measure qualify as State aid?

- Undertaking and economic activity
- State resources
- Imputability to the State
- Advantage
- Selectivity
- Effect on interstate trade and competition



11

Article 107(2) TFEU

Is the State aid compatible with the internal market?

Aid measures that are **always** compatible with the internal market:

- Non-discriminatory aid measures of a social nature to individual consumers
- Aid measures to make good the damage caused by natural disasters or other exceptional occurrences
- Aid measures related to the reunification of Germany

12

Article 107(3) TFEU

Is the State aid compatible with the internal market?

Aid measures that may be compatible with the internal market:

- Support for disadvantaged areas
- Support for important projects of European interest
- Support in the event of serious economic disturbances
- Support for culture and cultural heritage

|

13

Article 108 TFEU

How is State aid reviewed?

- Obligation for Member States to notify the Commission of any intended granting of support including standstill obligation (Article 108(3) TFEU)
- The Commission may/must initiate a formal review procedure in which interested parties may submit comments (Article 108(2) TFEU)
- The Commission keeps existing systems of aid under review (Article 108(1) TFEU)
- What do the national courts do?

|

14

Article 108 TFEU

- **Allocation of duties between the European Commission and the national courts**

- European Commission: compatibility
- National courts: lawfulness

- **Who does what?**

- Commission Notice on the enforcement of State aid rules by national courts (2021) (emphasis on private enforcement):

"While the Commission must examine the compatibility of an aid measure with the internal market, even where it has established its implementation in breach of Article 108(3) TFEU, the primary role of national courts is to preserve the rights of individuals faced with that breach. (...) Their contribution to the State aid control system is especially necessary in cases where unlawful aid is granted, in the absence of a final Commission decision on the same measure or until the adoption of such decision, as well as in cases where a possibly compatible aid has been granted in violation of the standstill obligation."

- Commission Notice on the recovery of unlawful and incompatible State aid ('administrative enforcement')

|

15

Article 109 TFEU

Legislative procedure enabling the Council to:

- set detailed rules for the application of Article 108 TFEU
(*Council Regulation (EU) 2015/1589*)
- enable the Commission, pursuant to Article 108(4) TFEU, to exempt certain categories of State aid from the notification duty
(*Council Regulation (EU) 2015/1588 and Commission Regulation (EU) 651/2015 (General Block Exemption Regulation)*)

|

16

Key elements of State aid (1)

- Undertaking and economic activity
- State resources
- Imputability to the State

- *Advantage*
- *Selectivity*
- *Effect on interstate trade and competition*

|

17

'Undertaking'

- State aid legislation only applies to aid measures granted to undertakings

- But what is an undertaking?



|

18

'Undertaking'

Step 1:

- CJEU C-41/90, *Höfner en Elser*:
 - 'Any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed'

Step 2:

- CJEU C-222/04, *Cassa di Risparmio di Firenze SpA*:
 - 'Any activity consisting in offering goods or services on a given market is an economic activity'

|

19

'Undertaking'

Characteristics:

- An autonomous European-law notion
- A functional notion: it is not the status of the entity in national law that is decisive
- A profit motive is not required; competition in the market is sufficient
 - CJEU C-49/07, *MOTOE*
- The notion is broadly interpreted by the Court of Justice
 - CJEU C-475/99, *Firma Ambulanz Glöckner*



|

20

'Undertaking'

akd benelux
lawyers

Case

- Can an organisation without a commercial motive that focuses on a purely internal need of, e.g., an undertaking qualify as a public undertaking?
- Which key criterion of an undertaking is relevant here?



I

21

'Undertaking'

akd benelux
lawyers

Case answer

Not decisive:

- The presence or absence of a commercial motive: competition in the market is sufficient

Decisive:

- The question as to whether services are provided to third parties: internal services within the same organisation/ community are, therefore, not covered by the definition of 'economic activity' (thus, no undertaking)

See also: The Hague District Court 24 January 2018 (*Schoonmaakbedrijven / State*)

I

22

'Undertaking'

akd benelux
lawyers

What if a single entity engages in both economic and non-economic activities?

- The entity only qualifies as an undertaking for the economic activity on the condition that separate records are kept in respect of the various funding elements, so that any risk of cross-subsidisation is eliminated

See also: CJEU C-74/16, *Congregación de Escuelas Pías*

|

23

'Undertaking'

akd benelux
lawyers

Case

The German government transfers, free of charge, a number of areas to nature conservancy organisations, which are subsequently responsible for caring for such areas

- Are nature conservancy organisations undertakings?



|

24

'Undertaking'

Case answer

- Nature conservancy organisations may carry out activities of a purely social nature, but may also engage in activities that should be deemed to constitute economic activities, such as timber trade
- The fact that nature conservancy organisations do so without a profit motive is irrelevant because they compete with undertakings that do have a profit motive

(See also: Court EU T-347/09 *Germany/Commission*, Court EU T-79/16, *VGG / Commission* and CJEU C-817/18 P, *Vereniging tot Behoud van Natuurmonumenten in Nederland et al./Vereniging Gelijkberechtiging Grondbezitters et al.*)

|

25

'Undertaking'

Case

- The Dutch Employee Insurance Agency (UWV) is responsible for various duties relating to unemployment and occupational disability legislation. UWV has a 'Werkbedrijf' division which engages in job placement and re-integration. A 'Werkbedrijf' is established in '*werkpleinen*' in cooperation with the relevant municipality where the Werkbedrijf is established.
- The municipality purchases an office building and offers it to UWV for sublease.
- A competitor of the seller of the office building is of the opinion that this constitutes State aid granted by UWV to the municipality. The competitor argues that the municipality is leasing the space to UWV at too high a (i.e. non-arm's-length) rent price.
- Is the municipality an undertaking?



|

26

'Undertaking'

Case answer

- In principle, a government agency can act as an undertaking.
- However: if there is an economic activity that cannot be separated from the exercise of powers of public authority, the government agency is not acting as an undertaking.
- In this case: UWV is required by law to work together with the relevant municipality. The lease agreement may form part of that cooperation so that, when entering into that agreement, the municipality does not act as an undertaking.

(See: Amsterdam Court of Appeal, 11 June 2019, ECLI:NL:GHAMS:2019:1954 (*Metroprop/UWV/Municipality of Heerlen*; with reference to: C-138/11 *Compass Datenbank*, legal grounds 35-38)

|

27

'Economic activity'

Case

- A hospital receives funding from the local authorities. Patients can go to the hospital without paying, for the hospital operates on the basis of the principle of solidarity. The local authorities contract with the hospitals in the area, so that patients can receive care. To control the costs, patients are encouraged to choose between various hospitals, and hospitals are given more control of the way in which the funds are spent.
- Does the funding of the hospitals qualify as State aid?



|

28

‘Economic activity’

akd benelux
lawyers

Case answer

- If healthcare in a Member State is organised on the basis of the principles of solidarity and universal coverage, i.e. healthcare is provided to patients free of charge, there is no economic activity.
- Even where reforms are implemented in the healthcare system, introducing elements of market operation into the system, for the question as to whether there is economic activity, what is decisive is whether the system is still based on the principles of solidarity and universal coverage.

(See: T-223/18 *Casa Regina Apostolorum della Pia Società delle Figlie di San Paolo*)

|

29

‘State resources’ and ‘imputability to the State’

akd benelux
lawyers

- **Cumulative or alternative conditions?**
- CJEU in the *Stardust Marine* judgment:
"However, for advantages to be capable of being categorised as aid (...), they must, first, be granted directly or indirectly through State resources (...) **AND**, second, be imputable to the State"
- State resources: was the advantage funded out of State treasury?
- Imputability: is the legal act granting the advantage imputable to the State?



|

30

'State resources'

akd benelux
lawyers

- **When is an advantage deemed to have been funded out of the State treasury?**
- A positive transfer is not necessary: a waiving of income by the State is sufficient (see CJEU C-83/98P, *Frankrijk/Ladbroke Racing Ltd*)
 - Thus, also true for fiscal aid (CJEU C-387/92, *Banco Exterior de España*)
 - As well as for parafiscal charges (CJEU C-34/01 et al., *Enirisorse*)
- A (potential) additional charge borne by the State is sufficient (CJEU C-399/10P and C-401/10P, *Bouygues SA*)



31

'State resources'

akd benelux
lawyers

- **Case**
- The State requires energy companies to purchase green energy from wind farms at a minimum price determined by the State. This reduces the profit of energy companies so that they pay less tax.
- Does this constitute funding out of State resources?



32

'State resources'

akd benelux
lawyers

- **Answer: no State resources**
- The obligation to purchase at minimum prices does not entail a transfer of State resources to producers
- The reduction of tax receipts is inherent in the scheme and is not a means to grant producers a certain advantage at the expense of the State
- See CJEU, C-379/98, *PreussenElektra AG*



33

'State resources'

akd benelux
lawyers

Case

- A Member State founded a public broadcasting organisation which operates under an obligation to produce and broadcast national and regional television programmes. The public service obligation is determined by the Minister of Culture. Several commercial broadcasters are also active on the market for audiovisual products and broadcasting services.
- When the public broadcaster was founded it received an interest-bearing loan from the State in order to commence operations, in addition to that it was financed through funds received from obligatory licence fees paid by the general public. A national court also determined that the public broadcaster was allowed to generate revenue by offering slots for advertisements during broadcasts.
- Can the revenue generated by the offering of slots for advertisements be considered state resources?

34

'State resources'

akd benelux
lawyers

Case answer

- Relevant criterion: is the income from advertising subject to control by the State?
- Commission: yes, it is, because it is income subject to the statutory provisions on management of such income
- Court: the income did not originate from the State but from private individuals. No control by the State: the statutory provisions merely set an upper limit, which is not sufficient for control by the State.



(See also: Court, 24 September 2015, ECLI:EU:T:2015:684 (*TV2/Danmark A/S*))

|

35

Imputability to the State

akd benelux
lawyers

- **Are the acts of a public undertaking imputable to the State?**
- The fact that the advantage has been granted by a public undertaking is insufficient to conclude that it is imputable to the State
- See CJEU, C-482/99 *Stardust Marine*, legal ground 51

|

36

Imputability to the State

akd benelux
lawyers

- **Are the acts of a public undertaking imputable to the State?**
- **Indicators** of imputability to the State:
 - Could the public undertaking make the decision without considering the requirements set by the government?
 - Are there any organisational elements connecting the public undertaking to the State?
 - Did the public undertaking have to consider any guidelines set by administrative bodies?
 - What is the legal status of the public undertaking?
 - Is the public undertaking integrated in the structure of the public administration?
 - To what degree does the government control the management of the public undertaking?
 - What type of activities does the public undertaking carry out?
 - Are there any other indications showing that the government is involved in the determination of a measure?

(See CJEU, C-482/99 *Stardust Marine*, legal grounds 55-56)

|

37

Imputability to the State

akd benelux
lawyers

- **Case**
- The Dutch State is the majority shareholder of a (fictitious) bank: NLBANK N.V. Although the majority of the directors of NLBANK N.V. have been appointed by the State, in principle, the directors perform their duties independently NLBANK N.V. provides an interest-free loan to a soccer club. Is the provision of such interest-free loan imputable to the State?

|

38

Imputability to the State

akd benelux
lawyers

- **Case answer**
- Probably not, but it depends on the exact circumstances
- Not decisive: the fact that the State is the majority shareholder of NLBANK N.V.
- Counterindications of imputability:
 - The legal status (public company with limited liability)
 - No guidelines and large degree of control of the management of NLBANK N.V.

|

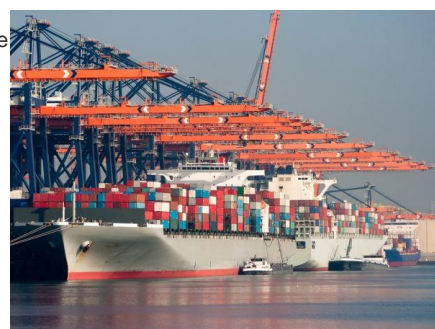
39

'Imputability'

akd benelux
lawyers

Case

- The bank makes a credit facility available to Scheepsafval BV; the Rotterdam Port Authority (Havenbedrijf Rotterdam) – a service branch of the municipality of Delfzijl – signs a guarantee under which Havenbedrijf Rotterdam guarantees performance of the obligations under the credit facility. The port authority is then privatised in a separate public company with limited liability of which the municipality of Rotterdam is the sole shareholder.
- Subsequently, the bank provides two further credit facilities, this time to two other private companies with limited liability for which the public company issues a guarantee. The bank then terminates all three credit facilities and demands repayment. No repayment is made and the public company – Havenbedrijf Rotterdam – is called upon. Havenbedrijf Rotterdam does not pay.
- The director of Havenbedrijf Rotterdam keeps the issue of the guarantees secret. Later, the Supervisory Board approves the guarantees.
- Are (all three of) the guarantees provided imputable to the State?



|

40

'Imputability'

- **Case answer**

- CJEU: "In the light of that case-law, it is for the referring court to determine whether, in the present case, imputability to the State of guarantees provided by Havenbedrijf Rotterdam may be inferred from the body of evidence arising from the circumstances of the case in the main proceedings and the context in which they were provided. To that end, it is necessary to determine whether that evidence demonstrates, in the circumstances, that the public authorities were involved or that it was unlikely that they were not involved in the provision of those guarantees. (...) In addition, it is to be considered that the fact that the sole director of the public undertaking acted improperly does not, of itself, exclude such involvement (...) Nevertheless, in the present case, the referring court points out that the sole director not only acted improperly and disregarded that undertaking's statutes, but also deliberately kept the provision of the guarantees at issue in the main proceedings secret, because, in particular, of the fact that there are grounds for presuming that the public authority concerned, namely, the municipality of Rotterdam, would have opposed the provision of those guarantees, had it been informed of it." (grounds 34-36)

- Amsterdam Court of Appeal: in this case, the circumstances eventually still indicate that the municipality of Rotterdam was involved in the provision of the guarantee; example:

- Guarantee approved by the Supervisory Board;
- Supervisory Board members appointed by the municipality of Rotterdam

(See also: Amsterdam Court of Appeal, 9 July 2019, ECLI:NL:GHAMS:2019:2263 (*Commerzbank/Havenbedrijf Rotterdam*); CJEU 17 September 2014, Case C-242/13, ECLI:EU:C:2014:224 *Commerz Nederland NV/Havenbedrijf Rotterdam NV*)

|

41

Any further questions?

- pkuyppers@akd.eu

- + 32 496 12 21 94



|

42

Cees Dekker

THE ROLE OF THE NATIONAL JUDGE IN THE ENFORCEMENT OF EU STATE AID RULES

Main elements of the notion of Aid (2)



Funded by the European Union

Service Contract DG COMP/2017/015 - SI2.778715

This document has been prepared for the European Commission. However, it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein

Cees Dekker | 20 June 2022

 **nysingh**
advocaten en notarissen

1

2

Programme

- ❖ Advantage
- ❖ Selectivity
- ❖ Distortion of competition
- ❖ Effect on interstate trade

 **nysingh**

2

Article 107(1) TFEU

Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which **distorts or threatens to distort competition by favouring certain** undertakings or the production of certain goods shall, in so far as it **affects trade between Member States**, be incompatible with the internal market.

The advantage criterion

[...] in order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage **which it would not have obtained under normal market conditions**.

CoJ 11 July 1996, C-39/94, SFEI

Advantage – effects based doctrine

As the Court emphasized in its judgment of 2 July 1974 (Case 173/73 *Italy v Commission* [1974] ECR 709), the aim of Article 92 is to prevent trade between Member States from being affected by benefits granted by the public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods.

That article does not therefore distinguish between the measures of State intervention concerned by reference to their causes or their aims but defines them in relation to their effects. In this case the amount granted reduced the investment costs to be borne by the applicant and therefore favoured it in comparison with other producers in the sector.

The general objectives of the national rules forming the legal basis of the grant in aid are not in themselves sufficient to put it outside the scope of Article 92.

CoJ 24 February 1987, Deufil, Case 310/85

Advantage

In particular, measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid.

CoJ 19 September 2000, C-156/98, Germany v. Commission

Advantage

What if public authority purchases goods it does not need?

[...] the mere fact that a Member State purchases goods and services on market conditions is not sufficient for that transaction to constitute a commercial transaction concluded under conditions which a private investor would have accepted, or in other words a normal commercial transaction, if it turns out that the State did not have an actual need for those goods and services.

GC 5 August 2003, joined cases T-116/01 and T-108/01, P&O Viscaya

Advantage

- Central issue: market conformity
- If public authorities act as market operators there will be no state aid
- → Market Economy Operator Principle
- (market economy investor principle, market economy creditor principle, private vendor test etc.)

Compliance with market conditions

- ❖ How do you comply with market conditions?
 - ❖ Sales:
 - ❖ Purchases:
 - ❖ Loans:
 - ❖ Investments

Acting like a market operator (?)

...as the Commission in essence observes, the applicability of the private investor criterion requires that it be established, **unequivocally and on the basis of objective and verifiable evidence, that there was an evaluation comparable to one to which a private operator would have had access** prior to or at the point of adoption of the measure at issue

GC 22 May 2019, T-791/16, Real Madrid Club de Fútbol, par. 51.

Selectivity

- Certain undertakings
- Categories of undertakings
- Certain economic sectors
- 'All undertakings in a certain sector,' or even 'several sectors can fulfil the selectivity criterion'
- Overall reduction of corporate tax?

Selectivity

61. It follows that Black Cabs and minicabs are in factual and legal situations which are sufficiently distinct to permit the view that they are not comparable and that the bus lanes policy therefore does not confer a selective economic advantage on Black Cabs.

CoJ 14 January 2015, C-518/13, Eventech

Selectivity

58. It is clear from the Court's settled case-law that the assessment of that condition requires it to be determined whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation.

CoJ 20 December 2017, C-70/16P, Comunidad Autónoma de Galicia

Selectivity

The advantage granted by the measure is selective, since it is awarded only to certain undertakings that fulfil the criteria described in recitals (11), (12) and (15) and excluding the financial sector and undertakings whose principal activity is holding activities.

Commission 9 March 2021, SA.61330, Régime d'aides destinées à compenser les coûts fixes non couverts des entreprises

Selectivity

- Regional selectivity
- Selectivity in taxes or levies

Distortion of competition

- If the state measure is not in conformity with market conditions, a distortion is given
 - If: advantage to an undertaking in a liberalised sector where there is or could be competition
- Burden of proof is very low. Commission should, however state and more or less explain that the circumstances give room for competition

Effect on interstate trade

Compare text of Article 101 and Article 107

Article 101 TFEU

1. The following shall be prohibited as **incompatible** with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which **may affect trade between Member States** and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which [...]

Article 107 TFEU

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it **affects trade between Member States**, be **incompatible** with the internal market.

Effect on interstate trade

- Differing criteria?

[...] for the purpose of categorising a national measure as State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition.

CoJ 14 January 2015, C-518/13, Eventech

Effect on interstate trade (Eventech)

- In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid
- In that regard, it is not necessary that the beneficiary undertakings are themselves involved in intra-Community trade. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced

Appreciable effect on interstate trade

[...] there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected.

CoJ 24 July 2003, C-280/00, Altmark

De minimis aid

- No threshold, but:
- Commission Regulation (EU) No 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ 2013 L 352/1:
 - aid lower than € 200.000 per 3 years is considered to not fulfil all the criteria of Art. 107(1) TFEU (€ 100.000 with regard to road transport)
- De minimis in agricultural sector: € 15.000/3 yrs
- De minimis in fisheries sector: € 30.000/3 yrs

Local activities (?)

Commission: no effect on interstate trade, if

- the beneficiary
 - supplies goods or services to a limited area within a Member State
 - and is unlikely to attract customers from other Member States,
- it cannot be foreseen that the measure would have more than a marginal effect on the conditions of cross-border investments or establishment.
- What about Leisure Pool Dorsten?

Questions? Discussion?

THE ROLE OF THE NATIONAL JUDGE IN THE ENFORCEMENT OF EU STATE AID RULES

The Role of the National Courts and the Commission



Funded by the European Union

Service Contract DG COMP/2017/015 - SI2.778715

This document has been prepared for the European Commission. However, it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein

Cees Dekker | 21 June 2022

 **nysingh**
advocaten en notarissen

1

2

Programme

- ❖ Roles of national courts and European Commission
- ❖ What does a national judge need in order to play its role?
- ❖ (Interim) measures and damage claims
- ❖ Counterintuitive thinking

 **nysingh**

2

What roles may the national courts play in state aid law?

- ❖ Recovery after negative decision of the European Commission
- ❖ Review of decisions of state bodies implying aid (e.g. subsidies)
(administrative law)
- ❖ Contract law disputes (civil law)

Role of the national judge

Direct effect Article 108(3) TFEU

By so expressly undertaking to inform the Commission 'in sufficient time' of any plans for aid, and by accepting the procedures laid down in Article 93, the States have entered into an obligation with the Community, which binds them as States but creates no individual rights except in the case of the final provision of Article 93(3)

CoJ 15 July 1964, 6/64, Costa v. ENEL

Direct effect of Article 108(3) TFEU

'Only' relevant question for national court:

Has Article 108(3) been complied with?

Has Article 108(3) TFEU been complied with?

- Only relevant when the measure or transaction involved is a state aid measure
- **All** criteria of the notion of State Aid must be fulfilled

Role of the national judge

- ❖ Is a national measure or transaction state aid or not?
 - ❖ Application of criteria of Article 107(1)
- ❖ If so, does the aid qualify as unlawful?
 - ❖ Is it granted in compliance with the stand still provision?
 - ❖ **OR:** does it fit in the GBER (or other BER)?
- ❖ If so, what are the consequences?
- ❖ **Not: is the aid compatible or not**

What does a national judge need in order to play its role?

- ❖ Knowledge of the concept of state aid (Article 107(1) TFEU)
- ❖ Knowledge of how to deal with GBER (if GBER is invoked)
- ❖ Readiness for economic thinking rather than applying legal concepts
- ❖ Readiness for counterintuitive thinking

Knowledge of the concept of state aid (Article 107(1) TFEU)

What sources should you use?

- Case law of the Court of Justice and General Court
- Commission Notice on the Notion of State Aid?
 - Status?
 - Be critical

The Role of the Courts and European Commission

"[...] State aid [...] is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Community courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article [107](1) of the Treaty."

CoJ 16 May 2000, C-83/98P, France and Ladbroke Racing v Commission, par. 25

EC as amicus curiae

- ❖ Certainly: huge expertise
- ❖ Good source of information
- ❖ However: administrative body with sometimes its own interpretation of concept of aid
- ❖ In the end: Court of Justice determines the ambit of the concept of State aid
- ❖ Stay critical

Knowledge of how to deal with GBER (if GBER is invoked)

Difficult concepts

- Transparency
- Incentive effect
- Eligible costs
- Etc.
- e.g. incentive effect



CoJ 05 March 2019, Eesti Pagar, C-349/17

Knowledge of how to deal with GBER (if GBER is invoked)

EestiPagar

- Agreement to acquire from Kauko-Telko Oy a tin loaf and sandwich loaf bread production line for the price of €2770000
- Buyer: EestiPagar, supplier Kauko-Telko Oy
- September 2008: leasing contract between EestiPagar and AS Nordea Finance Estonia
- 13 October 2008: tripartite sale contract, whereby Kauko-Telko undertook to sell the bread production line to Nordea Finance Estonia, which undertook to lease the line to EestiPagar. That contract took effect upon signature.
- 24 October 2008: application for aid with respect to the acquisition and installation of that bread production line.

Knowledge of how to deal with GBER (if GBER is invoked)

Court of Justice:

In those circumstances, it must be held that Regulation No 800/2008 confers on the national authorities not the task of verifying whether or not the aid at issue has a genuine incentive effect, but the task of verifying whether or not the applications for aid that are submitted to them satisfy the conditions, laid down in Article 8 of that regulation, that govern whether aid can be considered to act as an incentive.

CoJ 05 March 2019, Eesti Pagar, C-349/17




15

16

What should M prove?

- ❖ State resources involved?
- ❖ Beneficiary is an undertaking?
- ❖ (selective) Advantage?
- ❖ Distortion of competition?
- ❖ Effect on interstate trade?



16

Effect on interstate trade?

P argues:

- P is a very small company, only active in M. It does not undertake any activities that compete with companies established abroad. If these companies already know at all who P is, they will not see her as a threat because of her size.
- Furthermore, the alleged advantage that P would have had would not enable her to influence inter-state trade. The return that P achieves on its activities is by no means sufficient for this. Furthermore, the number of parking spaces that P operates only represents a very small, even negligible, part of the total number of parking spaces in the Netherlands. On that basis, it is not expected that there will be any effect on inter-state trade.

Effect on interstate trade

- P is based in M. Its geographical scope is limited to M. It does not operate activities outside of M. M is situated far from any member-state's border. There is no question of any competition with parking facilities established abroad. On that basis too, an effect on interstate trade will not be plausible.
- No foreign operator of parking facilities was interested in operating these facilities in M.
- Finally, the alleged support will not make P more attractive for visits by foreign tourists. The parking facilities that P operates are focused on parking for the port terminal and the crossing to the islands. Tourists make a conscious choice to visit the islands. Only then do they look at what the parking options are.

Effect on interstate trade

- Q-Park, Interparking and Apcoa, among others, are active in several EU member states and are also active in The Netherlands
- Support to a local company can make it more difficult for operators from other Member States to enter the market because the local supply is maintained.
- In addition to the fact that foreign companies are active in the Dutch market for parking, the value of the exploitation also indicates that there is a possible interstate effect. That investing could have been attractive appears from the potential revenue from the operation. The total value of the concession – the total turnover of the concession during the term of the contract – would be many tens of millions if it relates to a duration of 25 or 50 years, given that the revenue in 2018 amounts to EUR 2,639,697.

Distortion of competition

- P is the only operator of parking facilities in M
- M is the only place from which ferries depart to the island
- So: no competition at all?

Advantage

- How should we deal with the MEOP?
- Who has to prove what?

Counterintuitive thinking

- **Burden of proof**
 - ❖ Rule: the one that claims must give evidence of the facts on which its claims are based
 - ❖ If Member State claims the grant of an advantage (no compliance with the MEOP)?

Counterintuitive thinking

CoJ 20-09-2017, Frucona Kosice, C-300/16P



24. As a result, where it appears that the private creditor test might be applicable, it is for the Commission to ask the Member State concerned to provide it with all the relevant information enabling it to determine whether the conditions for applying that test are satisfied

Counterintuitive thinking

Burden of proof re MEOP

Evidence showing that the decision is based on economic evaluations comparable to those which, in the circumstances, a rational private investor in a situation as close as possible to that of the Member State would have had carried out, before making the investment, in order to determine its future profitability (cf. GC Frucona Kosice, T-103/14)

Case

- ❖ M had an expert report drafted in 2016 from which it appears that the rental price P pays is below market price. A market price would have been € 900.000 per year (€ 675.000 for the terrain, € 225.000 for the garage)
- ❖ M had a second expert report drafted on the market conformity of the rental price in 2008-2018.

Argument P:

- when leasing commercial property, the revenue to be generated is not the starting point for determining a market-based rental price. This is because the starting point is the invested capital, the desired return and the available area to be rented out. It is precisely in parking facilities that the area to be used is decisive, since the area determines how many cars can use the parking facility.

Case - advantage

- Several comments on the expert reports
 - P claims:
 - reports take as basis that garage could be managed from a distance whereas P employs 2 fte for managing the garage
 - P employs 4 fte for the terrain whereas the reports only count with 1 fte
 - Reports are based on experience of the experts with other operators of parking facilities
- P: This means that the municipality cannot prove, that there is an advantage for P.
- What about this burden of proof?

Advantage - questions

- ❖ What should be the point in time for assessing whether or not the agreement was in conformity with the market? 1990?
- ❖ What about the fact that the expert reports only go back to 2009?
- ❖ What arguments could be given for the claim that the agreement did not reflect market value in 1990?
- ❖ Question is: would a private owner of the terrain and garage enter into this agreement under these conditions?

State aid - consequences

- ❖ Could P invoke the GBER?
- ❖ Or claim that M (the Member state) should notify the agreement under the GBER?
- ❖ Is the agreement null and void?
- ❖ What remedies should the national court use?

Measures – interim measures

In case of granting of aid contrary to Article 108(3) or where there is a risk of aid being granted:

- order for recovery of aid already paid
- prohibition on (further) payment of aid
- Halt of a project?

» (The European Commission almost never uses the power to impose interim measures)

Consequences: damages

- Can the beneficiary claim damages if the aid measure is reversed?
- Can a competitor of a beneficiary claim damages if aid is unlawfully granted?

Counterintuitive thinking

- What about: pacta sunt servanda?
- Not only the agreement between undertaking and public body is relevant
- Not only the costs of *this* undertaking are relevant
- Abstract from the specific undertaking
- Assess maximum rent on the base of an efficient undertaking
- Be aware that you should compare with an 'abstract' efficient undertaking
- **Compare with what possible yield could be obtained and what room would be left for the rent, given an efficient operator**

Counterintuitive thinking

Burden of proof

- ❖ Rule: the one that claims must give evidence of the facts on which its claims are based
- ❖ If Member State claims the grant of an advantage (no compliance with the MEOP)?

Counter intuitive thinking - example

EU law precludes, in circumstances such as those at issue in the main proceedings, the application of a rule of national law enshrining the principle of res judicata from preventing a national court which has held that contracts forming the subject-matter of the dispute before it constitute State aid, within the meaning of Article 107(1) TFEU, implemented in breach of the third sentence of Article 108(3) TFEU, from drawing all the consequences of that breach because of a national judicial decision which has become definitive, which court, without examining whether those contracts constitute State aid, has held that the contracts remain in force.

CoJ 11-11-2015, Klausner Holz, C-505/14 (rule)

Role of the National Courts

- As with all EU-Law: domestic courts play an important role in the proper application of EU-Law
- Readiness for economic thinking rather than applying legal concepts
- Readiness for counterintuitive thinking
- Way of thinking may differ from legal thinking in 'other' cases

Questions? Discussion?

THE ROLE OF THE NATIONAL JUDGE IN THE ENFORCEMENT OF EU STATE AID RULES

21 June 2022

Cees Dekker

Case

Facts case Municipality M v Private Party P

1990: Municipality M and private party P enter into an agreement providing the following:

1. M lets an asphalted terrain to P, intended to be used as a car park (for tourists that take the ferry from M to an island that is a popular touristic destination).
2. M also lets a parking garage, also intended to be used for tourists.
3. The rent to be paid by P is € 450.000 (rental price 1) for the parking lot and € 250.000 (rental price 2) for the parking garage.
4. Half of the rental price 1 is indexed in such a way that € 225.000, will be adapted once in five years according to the general price index, for the first time in 1995.
5. The agreement applies for 25 years. After 23 years P may exercise an option to extend the agreement for 25 years.
6. The agreement cannot be terminated by either party (unless under certain circumstances that are not relevant for this case).

M did not carry out a prior valuation of the parking lot and parking garage. The agreement was entered into without a prior tender procedure.

Although the agreement does not grant P an exclusivity, in effect P will be the only party that can offer long stay parking space for island visitors.

P exercised its option, so the agreement will run until 2040.

M wants to end the agreement although it is not possible to terminate it. Therefore, M claims that the agreement contravenes the state aid rules.

Doortje Ninck Blok



The De Minimis- and the General Block Exemption Regulation

Doortje Ninck Blok, 20 June 2022



Gefinancierd door de Europese Unie

Dienstencontract DG COMP/2017/015 - SI2.778715

Dit document is opgesteld voor de Europese Commissie. Het weerspiegelt evenwel alleen de meningen van de opstellers, en de Commissie is niet aansprakelijk voor het gebruik dat kan worden gemaakt van de daarin vervatte informatie

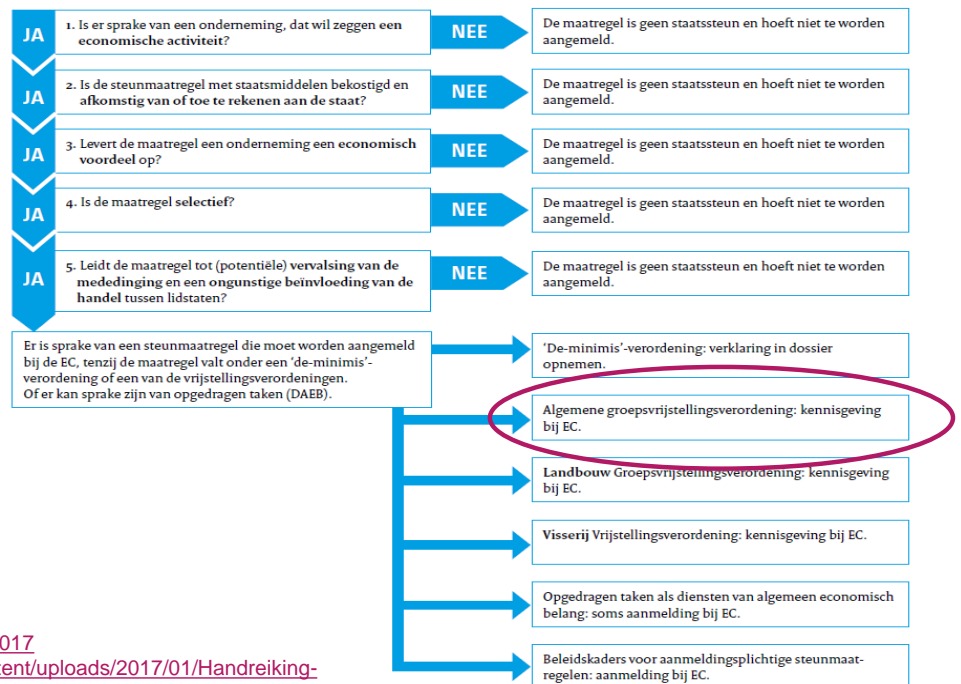


Contents

- State aid flow chart
- General Block Exemption Regulation (GBER)
 - General Conditions
 - Aid Categories
 - Amendments to the GBER
 - European Jurisprudence
 - National Jurisprudence
- The De Minimis Regulation
 - Preconditions
 - Jurisprudence

State aid

Flow chart



Help in national aid for the public authority 2017

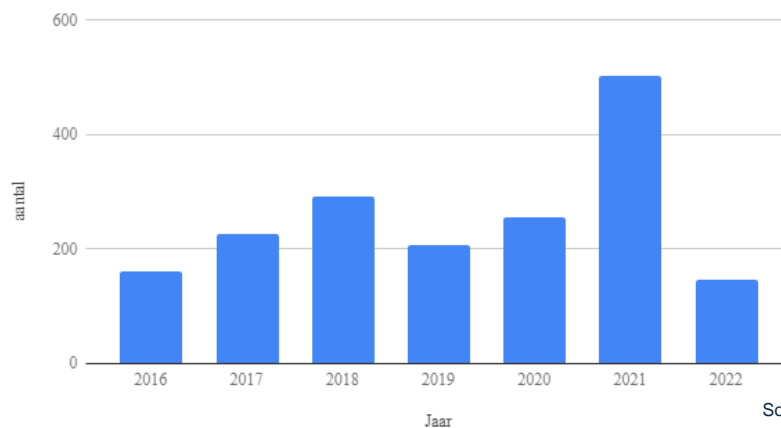
For info: <https://europadecentraal.nl/wp-content/uploads/2017/01/Handreiking-Staatssteun-2016.pdf>

General Block Exemption Regulation (GBER)

- (EU) Regulation no. 651/2014 from the Commission, thereafter amended by (EU) Regulation no. 2017/1084 and (EU) Regulation no. 2021/1237.
- 1 July 2014 – 31 December 2023
- Aid categories exempted from the Notification obligation
- A declaration will suffice
- GBER Checklists Commission:
<https://europadecentraal.nl/onderwerpen/staatssteun/vrijstellingen/checklists-agvv/#link>
- General Block Exemption Regulation (GBER) Guide:
https://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf

General Block exemption Regulation (GBER-NL)

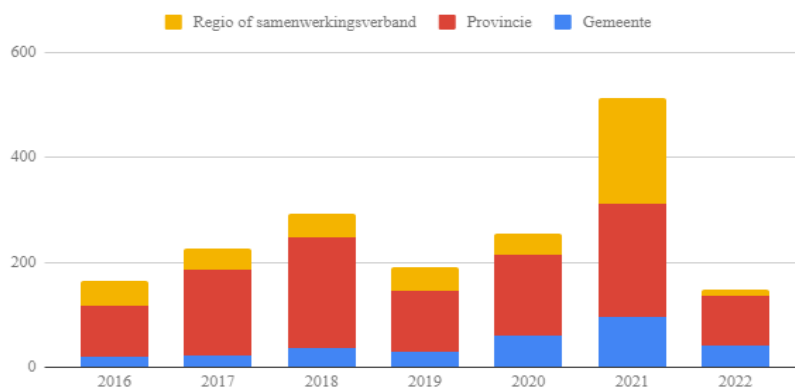
Aantal kennisgevingen CSDO per jaar



Source: Knowledge Centre for Europe Decentralised

General Block exemption Regulation (GBER-NL)

Aantal kennisgevingen per overheid



Source: Knowledge Centre for Europe Decentralised

GBER - General Terms & Conditions

Chapter I - General Terms & Conditions (including):

- Notification thresholds
- Cumulative Criteria
- The Incentive Effect
- Transparency Obligations
- In principle, no assistance for businesses in difficulties.
 - Except during 2021 because of the CORONA crisis, see Commission Regulation (EU) no. 2021/1237.
- No aid for businesses where current recovery orders exist
- The applicability in regards to various sectors

Chapter II - Monitoring

- Notification within 20 working days of taking effect
- Reporting
- Monitoring by the Commission.

Chapter III - Specific Conditions

- Specific conditions for various aid categories

Commission Regulation (EU) 651/2014, art. 3:
Violations **Chapter I and III** → the aid measure is unlawful to be investigated by the Commission.

AGVV - Categories

The AGVV is applicable in the following assistance categories

Regional aid	Section 1	Aid over a wide infrastructure	Section 10
Aid for Small to Medium-sized Businesses (MBK-NL): investment assistance, exploitation assistance and access to funding	Section 2 and 3	Aid for culture and the preservation of heritage	Section 11
Aid for environmental protection	Section 7	Aid for sport infrastructure and multifunctional recreational infrastructure	Section 12
Aid for research & development and innovation	Section 4	Aid for local infrastructural facilities	Section 13
Aid for courses and training	Section 5	Aid for regional airports	Section 14
Aid on behalf of vulnerable employees and disabled/disadvantaged employees.	Section 6	Aid for ports	Section 15
Aid for repairs after damages due to certain natural disasters	Section 8	Aid for projects promoting European territorial collaboration (New)	Section 16
Aid for social transport on behalf of those residing in remote areas	Section 9	Aid covered by financial products supported by the InvestEU Foundation (New)	Section 16

GBER - Aid for sport and and multifunctional recreational infrastructures

Article 55

Aid for sport and multifunctional recreational infrastructures

1. Aid for sport and multifunctional recreational infrastructures shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty, provided that the conditions laid down in this Article and in Chapter I are fulfilled.
2. Sport infrastructure shall not be used exclusively by a single professional sport user. Use of the sport infrastructure by other professional or non-professional sport users shall annually account for at least 20 % of time capacity. If the infrastructure is used by several users simultaneously, corresponding fractions of time capacity usage shall be calculated.
3. Multifunctional recreational infrastructure shall consist of recreational facilities with a multi-functional character offering, in particular, cultural and recreational services with the exception of leisure parks and hotel facilities.
4. Access to the sport or multifunctional recreational infrastructures shall be open to several users and be granted on a transparent and non-discriminatory basis. Undertakings which have financed at least 30 % of the investment costs of the infrastructure may be granted preferential access under more favourable conditions, provided those conditions are made publicly available.

GBER - Aid for sport and and multifunctional recreational infrastructures

5. If sport infrastructure is used by professional sport clubs, Member States shall ensure that the pricing conditions for its use are made publicly available.
6. Any concession or other entrustment to a third party to construct, upgrade and/or operate the sport or multifunctional recreational infrastructure shall be assigned on a open, transparent and non-discriminatory basis, having due regard to the applicable procurement rules.
7. The aid may take the form of:
 - (a) investment aid, including aid for the construction or upgrade of sport and multifunctional recreational infrastructure;
 - (b) operating aid for sport infrastructure;
8. For investment aid for sport and multifunctional recreational infrastructure the eligible costs shall be the investment costs in tangible and intangible assets.
9. For operating aid for sport infrastructure the eligible costs shall be the operating costs of the provision of services by the infrastructure. Those operating costs include costs such as personnel costs, materials, contracted services, communications, energy, maintenance, rent, administration, etc., but exclude depreciation charges and the costs of financing if these have been covered by investment aid.
10. For investment aid for sport and multifunctional recreational infrastructure, the aid amount shall not exceed the difference between the eligible costs and the operating profit of the investment. The operating profit shall be deducted from the eligible costs *ex ante*, on the basis of reasonable projections, or through a claw-back mechanism.
11. For operating aid for sport infrastructure, the aid amount shall not exceed the operating losses over the relevant period. This shall be ensured *ex ante*, on the basis of reasonable projections, or through a claw-back mechanism.

GBER - Amendment

New as per (probably 2023):

- Regional aid
 - The expansion of the possibility for awarding operating aid to prevent or to limit depopulation, by also granting aid to (already) 'sparsely populated' regions and not just 'very sparsely populated' regions. (art. 15, section 3 GBER) and
 - the adjustment to registration thresholds and the specification of aid intensities for regional aid (art. 4a) GBER.
- Aid for Venture Capital
 - The itemising of the Venture Capital Aid category in (i) aid for intermediaries and (ii) fiscally stimulating measures for public (privately owned) investors.
 - Modifications in runway for those enterprises which might be being considered for venture capital aid.
 - Expansion of the Aid for Start-ups category.
- Aid for research & development and innovation
 - Mainly involves clarification of definitions, such as 'industrial research' and 'experimental development',
- Aid for Environment and Energy
 - expansion of the possibilities for investment aiming on supporting the reduction of CO2 emissions (in regards to CO2 interception prior to use (CCU) and interception prior to storage (CCS);
 - enabling investment aid for clean or emission-free modes of transport;
 - in accordance with the regulations on energy tax to energy intensive business users;
 - aid for energy from renewable sources, district heating and energy infrastructure, including hydrogen.
- 'Preliminary Draft Commission Regulation', 'Clarifications' and 'Public consultation input' available via:
https://ec.europa.eu/competition-policy/public-consultations/2021-gber_nl

EU Jurisprudence (1/3)



Dilly's Wellness Hotel I (HvJEU, 14th November 2019, case C-493/14)

- The national law contains no reference to Commission Regulation (EU) no. 800/2008 (forerunner to no. 651/2014);
- no remittance of notification to the Commission took place within 20 working days of it taking effect;
- the publication of the text of this national law could not be consulted via the URL that was sent to the Commission.

→ The preconditions of the GBER, which are a liberalisation of the general regulation to do with notification obligation as per art. 108, para 3 TFEU, must be precisely clarified.

EU Jurisprudence (2/3)



Dilly's Wellness Hotel II (HvJEU, 14 November 2019, case C-585/17)

- When national law changes a state measure, thereby changing the circle of beneficiaries of this aid, the obligation to notify (art. 108, para 3 TFEU) applies.
- Art. 58, para 1, of the GBER must consequently be explained to read that state aid awarded before this regulation came into effect, made based on an aid regulation (i.c. Austrian Energy Regulations), by virtue of the GBER Registration Obligation as per art. 108, para 3, TFEU, may now be exempted.
- Art. 44, para 3, from Commission Regulation (EU) no. 651/2014 must consequently be explained to read that aid given to cover the reimbursement of the energy tax was explicitly documented in a calculation formula laid down in national law which was utilised for same and is compatible with the criteria.

EU Jurisprudence (3/3)



Eesti Pagar (ECJ 5th of March 2019, case C-349/17)

- Incentive effect: with 'diligence on the project or activity' a start is considered to have been made when an initial order is placed for any equipment necessary for this project or activity as a result of the unconditional, legally binding approval that was given before the request for aid;
- The national authorities should, of their own volition, reclaim all aid that was granted if it is discovered that the GBER preconditions were not complied with;
- The national authorities lending the assistance in accordance with the GBER are unable to trust that the aid was legally given;
- The national authorities reclaiming all granted aid of their own volition, from the beneficiary, must charge interest from the start date of same.

Enforcement of the GBER by national courts



- The national courts are authorised to enforce the regulations.
 - Request for advice or information to the Commission (art. 29, para 1 Council Regulation (EU) no 2015/1588).
 - Preliminary Questions (art. 267 TFEU)
- Minimal National Jurisprudence
 - Court of first instance Gelderland (NL) 8th of May 2019, ECLI:NL:RBGEL:2019:1970 (GS Gelderland);
 - Appeals Board for Trade & Industry (CBb NL) 14th of September 2021, ECLI:NL:CBB:2021:880 (Appellant/Minister of Economic Affairs and Climate (EZK NL)),
 - Appeals Board for Trade & Industry (CBb NL) 10th of July 2018, ECLI:NL:CBB:2018: 392 (Dutch Flower Group B.V. and others/Minister for Economic Affairs (EZ NL)),
 - Appeals Board for Trade & Industry (CBb NL) 29th of December 2017, ECLI:NL:CBB:2017: 412 (Appellants/Secretary of State for Economic Affairs (EZ NL))
- Remarkable?
- In 2019, 96.8% of the total number of assistance measures fell under the GBER (State aid Scoreboard 2020).

State aid – Flow chart



Help in national aid for the public authority 2017
 For info: <https://europadecentraal.nl/wp-content/uploads/2017/01/Handreiking-Staatssteun-2016.pdf>

The De Minimis

- The De Minimis Regulation
 - Regular: Commission Regulation (EU) no. 1407/2013.
 - For Farming: Commission Regulation (EU) no. 1408/2013.
 - For Fisheries: Commission Regulation (EU) no. 717/2014.
 - For Services of General Economic Interest (SGEI): Commission Regulation (EU) no. 360/2012
- 1 July 2014 – 31 December 2023
- Aid measures 'assumed not to unduly influence trade between the member states and to not falsely compete nor threaten to compete in any way deemed false.'
- Exempt from Notification Obligation by the European Commission.

The De Minimis - Threshold

- Aid for a total of EUR 200,000 over three fiscal years.
 - Dutch public authorities use the De Minimis declaration
- Other thresholds apply for:
 - Farming (EUR 15,000.00)
 - Fisheries (EUR 30,000.00)
 - DAEB (EUR 500,000.00) and
 - Third-party road freight transport (EUR 100,000.00).
- Calculation of the De Minimis threshold on a rolling basis.
- Cumulative with other forms of state aid
- Per enterprise (per member state)

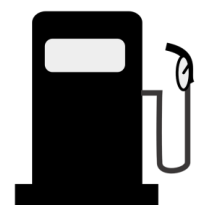
The De Minimis - Conditions

1. Does the advantage stay under the De Minimis threshold?
2. Is the expression 'single enterprise' correctly determined?
3. Does the enterprise indeed work in the sector upon which the De Minimis Regulation is applied?
4. Is account kept of the cumulative?
5. Is the aid transparent?

EU Jurisprudence

The Netherlands/Commission (ECJ EG, 13th of June 2002, case C-382/99)

- Commission: When the retailer is the owner of the petrol station which he exploits at own risk, the De Minimis Regulation applies. Also when the retailer is but the tenant of the petrol station which he exploits at own risk, the De Minimis Regulation applies.
- In cases where the petrol station(s) is/are exploited by employees of the Oil Company and these employees do not exploit the place at own risk, neither do they have a choice on who their suppliers are, it can be concluded that the Oil Company receives state aid already above the De Minimis threshold. State aid in such a case does not support the petrol station(s), but the Oil Company which is the owner of same.
- ECJ EG: The Commission rightly came to this conclusion.



Enforcement of the De Minimis by national courts

- Commission in 2012: *Big on big, small on small.*
- Supplementary supervisory role for the national courts
- Competitors as Stakeholders
 - Often relatively small sums
 - Lack of information
 - Fouling their own nest?
- Practically speaking, sometimes, but has not been extensively tested
- E.G. CBb NL 29th of December 2017, ECLI:NL:CBB:2017:412 (*Schaapkuddes*)



Doortje Ninck Blok

Senior Associate

European and Competition law

T 010 2617 500

d.ninckblok@windtlegal.com



Windt Le Grand Leeuwenburgh

Coolsingel 104

3011 AG Rotterdam

T 010 2617 500

info@windtlegal.com

**Windt
Le Grand
Leeuwenburgh**
ADVOCATEN
windtlegal.com





Case study Football stadium

Doortje Ninck Blok, 20 juni 2022



Gefinancierd door de Europese Unie



Dienstencontract DG COMP/2017/015 - SI2.778715

Dit document is opgesteld voor de Europese Commissie. Het weerspiegelt evenwel alleen de meningen van de opstellers, en de Commissie is niet aansprakelijk voor het gebruik dat kan worden gemaakt van de daarin vervatte informatie



Agenda

- Introduction
- State Aid and football
- State Aid to football clubs and stadiums in the Netherlands
- Case-study



2

Football and the state aid criteria

- **Undertaking**
 - Is the club engaged in economic activities? Professional football clubs v. amateur clubs
- **State resources**
 - When, for instance, a municipality transfers governmental funds ('cost of the state')
- **Advantage**
 - When does a municipality grants an advantage to a professional football club? Economic advantages undertakings would not have obtained under normal market conditions
- **Selectivity**
 - A state aid measure favours certain undertakings or the production of certain goods. Grants of a municipality to a professional football club always have a selective character.
- **Distortion of competition and effect on trade between member states**
 - The Commission: all professional clubs can potentially play European tournaments. Also sponsor-, transfer-, merchandising-, advertisement- and mediacoverage market are relevant for the assessment.

State aid to football clubs and stadiums in The Netherlands

- **Proces:**
 - The Commission received complaints from civilians in 2010.
 - The Dutch Governments received a REQ in 2011
 - The formal investigation procedure was opened in March 2013 (including the football club Vitesse)
 - Three years of correspondence and meetings in Brussels with the Commission followed.
- **Football decisions d.d. 4 July 2016:**
 - MVV in Maastricht (SA. SA.41612) (rescue- and restructuring aid)
 - PSV in Eindhoven (SA. SA.41613) (no aid, MEO-principle)
 - FC Den Bosch in Den Bosch (SA.41614) (rescue- and restructuring aid)
 - NEC in Nijmegen (SA.41617) (rescue- and restructuring aid)
 - Willem II in Tilburg (SA. 40168) (rescue- and restructuring aid)

Case study State aid to a football stadium

- Council meeting of 27 June 2022 of the Municipality of Utrecht
- The municipal executive board proposes a decision to the Council
- Will the Council decide to grant the aid to renovate and expand the stadium in the town of Utrecht?

Case study State aid to a football stadium


General questions:

- Advise the Executive board on the scenario's to make the aid in compliance with the state aid rules.
 - Explore the possible state aid solutions.
 - What are the pro's and con's of the solutions?
 - What would be the best solution?

Case study State aid to a football stadium

GBER questions:

- Is the financial position of the beneficiary relevant for the decision of the municipality to grant the aid?
- Could the municipality grant aid in the form of "equity" instead of a loan?
- Could the municipality grant aid in the form of a (100%) guarantee?
- In what way could the beneficiary fulfil the condition 'multifunctionality'?



**Windt
Le Grand
Leeuwenburgh**
ADVOCATEN
windtlegal.com


Dorthe Nino Blok
Senior associate
European and Competition law
T 010 2617 500
d.ninoblok@windtlegal.com

 Windt Le Grand Leeuwenburgh
Coolingsel 104
3011 AG Rotterdam
T 010 2617 500
info@windtlegal.com

Case study

FC Utrecht United



Doortje Ninck Blok



Funded by the European Union

Service Contract DG COMP/2017/015 - SI2.778715

This document has been prepared for the European Commission. However, it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein

To the Council of the Municipality of Utrecht

Subject: Loan to the stadium of FC Utrecht United

Responsible Alderman: Mr. J. Qruijff

Summary: The undertaking owning the football stadium of FC Utrecht United has changed his plans. The undertaking is not to build a new stadium on a new location, but is instead requesting the Municipality of Utrecht to provide a loan in order to realize the expansion and renovation of the current stadium.

Proposed decision: To take a principal decision on the request of the owner of the football stadium to grant a loan of EUR 7,5 million for a duration of 20 years. The loan will cover the renovation and expansion.

Reasoning: The question at stake is: can the loan be provided for the expansion and the renovation of the stadium and if so, under what conditions?

Reasons for the Municipality not to grant the loan

- The Municipality usually does not support an undertaking with commercial goals.
- The financial situation of the Municipality of Utrecht is vulnerable.
- The future of professional football is uncertain. Experts predict that the amount of professional football clubs will decrease in the future. Financial survival is increasingly more difficult. If FC Utrecht United degrades from the major league to the premier league, it might not be able to pay back the loan.
- In a worst case scenario, the Municipality owns a football stadium which can't be sold.

Reasons for the Municipality to grant the loan

- The Municipality has financially contributed to new plans for the stadium in the past.
- The owner of the football stadium has proven to be a trustworthy partner.
- The Municipality has confidence in the business case of the owner to which large companies have expressed their commitment.
- According to the Dutch Football Association the football club fulfils all financial conditions.
- The new plan will stimulate the development of the city of Utrecht.
- The Municipality stimulates the reuse of intangible assets.
- The Municipality will acquire a new loan for this purpose. The financing of the stadium will not affect other projects in the Municipality in a negative manner.
- FC Utrecht United is a strong player in the major league and the renovation, and the expansion will make sure that FC Utrecht United can continue to manifest its team at the highest level.
- FC Utrecht United promotes social cohesion within the local community of Utrecht.

During an earlier meeting with the Council in February, the Council expressed support on condition of the following:

	Financial terms loan	
1	Ceiling of the loan	The loan shall be granted in compliance with state aid rules. The loan should be combined with loans of private investors.
2	Duration of the loan	The duration of the loan is the same as the duration of the loan of the other investors.
3	Rate of the loan	When the duration of the loan is 15 years, the municipality will charge 1,5% on top of the rate which the municipality would have to pay for the loan.
4	Form of the loan	Linear
5	Existing guarantee	The existing guarantee for the current loan will remain the same (EUR 2,5M). The total amount of the new loan and the existing guarantee cannot exceed the value of the stadium.
6	Collateral	The loan will be granted on condition of a collateral of a mortgage on the stadium.
7	Granting of the loan	The Council will have to agree with all the terms before signing the loan agreement.
	Business case terms	
8	Municipal preparation costs	These costs will come to the expenses of the owner of the stadium.
9	Feasibility plan	A second opinion is required.
10	Operational plan of the stadium	The exploitation of the stadium should be profitable.
11	Operational plan of the FC	The exploitation of the FC Zaltbommel should be profitable.
	Other terms	
12	Public safety	The owner of the stadium will provide a report on the safety aspects of the stadium
13	Social involvement	The Football Club will increase social involvement in the community. Agreements will be made on the Municipal Social Agenda on a structural basis.
14	Multifunctional stadium	The stadium will be made available for matches of nonprofessional clubs every Saturday morning.
15	Sustainability	The plans have to be in conformity with the municipal policy on sustainability.

Decision

The Board of Mayor and Aldermen proposes the Council:

1. to continue with the steps mentioned above;
2. to reconfirm the terms for the financial involvement of the municipality;
3. to gather all information necessary to examine and make sure all terms are fulfilled;
4. to start negotiations with the owner of the stadium within the framework of the above mentioned terms;
- 5. to examine if the measure is state aid-proof;**
6. to give the Board the mandate to sign the loan agreement.



Solutions case study Football stadium

Doortje Ninck Blok, 20 juni 2022



Gefinancierd door de Europese Unie

Dienstencontract DG COMP/2017/015 - SI2.778715

Dit document is opgesteld voor de Europese Commissie. Het weerspiegelt evenwel alleen de meningen van de opstellers, en de Commissie is niet aansprakelijk voor het gebruik dat kan worden gemaakt van de daarin vervatte informatie



Football and the state aid criteria

- **No aid in the meaning of 107(1)TFEU** when:
 - Market Economy Operator test
 - Communication from the Commission on the revision of the method for setting the reference and discount rates (2008/C 14/02)
 - Commission regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid
 - Local (not for the major and premier league) when there's no significant distortion of competition and a limited effect on trade
- **Block exempted aid**
 - GBER, article 55, Aid for sport and multifunctional recreational infrastructures
 - Investment aid: EUR 30 mln or the total cost exceeding EUR 100 mln per project
 - Operating aid: EUR 2 mln per infrastructure per year.
- **Notifyable aid**
 - Communication from the Commission: Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01)
 - TFEU, article 107, section 3, sub c (e.g. New soccer stadium Bratislava (SA.46530))

State aid to football clubs and stadiums in the Netherlands

- Financial position beneficiary: The GBER shall not apply to aid to undertakings in difficulty (Article 1, section 4, sub c GBER).
- Equity as aid: Capital injections should not be considered transparent aid, without prejudice to specific conditions concerning risk finance and start-up aid (Article 5 GBER).
- (100%) guarantee: Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees - 2008/C 155/02 should be followed. Notice maximizes the guarantee ceiling at 80%. Therefore: No. (Article 5, section 2 sub c GBER)
- 'Non-dedicated'-condition (Article 55, section 2 GBER):
 - No exclusive use by a single professional sport organization.
 - On an annual basis at least 20% use for other organizations (time capacity).
 - If the infrastructure is used by several users simultaneously, corresponding fractions of time capacity usage shall be calculated.



Doortje Ninck Blok
Senior associate
European and Competition law
T 010 2617 500
d.ninckblok@windtlegal.com



Windt Le Grand Leeuwenburgh
Coolsingel 104
3011 AG Rotterdam
T 010 2617 500
info@windtlegal.com



Using the search function on the online database

Doortje Ninck Blok, the 20th of June 2022



Gefinancierd door de Europese Unie

Dienstencontract DG COMP/2017/015 - SI2.778715

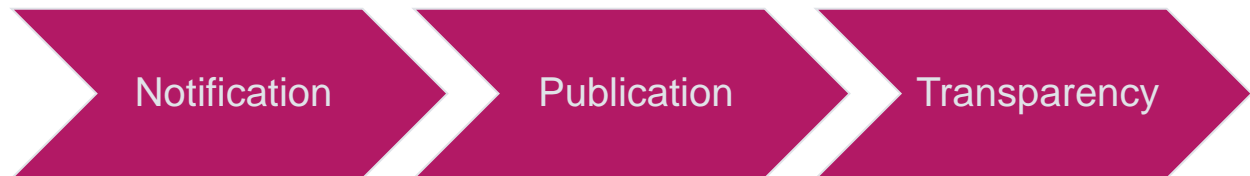
Dit document is opgesteld voor de Europese Commissie. Het weerspiegelt evenwel alleen de meningen van de opstellers, en de Commissie is niet aansprakelijk voor het gebruik dat kan worden gemaakt van de daarin vervatte informatie



Agenda

- The Notification Process (GBER) with relevant database/register
- State Aid Notifications Interactive 2
- State Aid register
- Transparency Aid Module
- E-wiki
- State aid scoreboard

Notification overview



- Notification from decentralised local authorities is obligatory when aid is given as per an exemption bylaw.

- SANI: *State Aid Notifications Interactive*

- At the end of the notification procedure, the Commission acknowledges the notification and publishes a summary.

- State Aid Register

- Obligatory publication by decentralised public authorities when the individual aid granted is higher than the threshold sum.

- For the GBER the sum of EUR 500,000.00 applies (art. 9 GBER)

- Transparency Register

SANI

SANI2

Mijn aanmeldingen Aanmeldingsformulieren

WINCK BLOK Doortje
(Onderzoekenaar)

NL

DEEL I en DEEL II van bijlage II, het formulier beknopte informatie van Verordening (EG) nr. 651/2014 van de Commissie

Opslaan Afdrukken Vorige zoekactie

Aanmeldingsteam Algemene groepsvrijstellingsverordening (AGV)

Ontwerp Gefinaliseerd Ondertekend Gevaldeerd

Aanmeldingsformulier AGV

Deel I - Algemene informatie

Deel II - Doelstellingen

Deel III - Bijlagen

1 of 3

Lidstaat Nederland

Referentie lidstaat NL

* Regio(s) ZUID-HOLLAND

Regionale-steungebied

☐ Art. 107, lid 3, onder a) - A-gebied

☐ Art. 107, lid 3, onder c) - C-gebied

☐ Niet-steungebied - N-gebied

Steuverlenende autoriteit

* Naam Gemeente Rotterdam

* Postadres

Webadres

* Benaming steunmaatregel NL_CSDO_Naam Steunverlening

* Nationale rechtsgrondslag (Vindplaats nationale officiële publicatie)

State Aid - Register

https://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=3

Search competition cases (all policy areas)

Policy Area: All • Antitrust / Cartels • Mergers • **State Aid**

Case Number:

Case Title or Company Name:

Decision Date: From To

Economic sector (NACE CODES):

Web Publication Date: From To

State Aid Advanced Search

Select only Commission cases with related court cases: ☐

Member State: Austria • Belgium • Bulgaria • Croatia

Region:

Primary Objective (Main): Agriculture; Forestry; Rural areas • Aid or disadvantaged workers and/or workers with disabilities • Airport infrastructure or equipment • Airport operation

GBER Objective: ☐ Additional costs (Art. 15(3)) • Additional costs (Art. 15(4)) • Additional costs in outermost regions (Art. 15(2)(b)) • Aid for 4G and 5G mobile networks (Art. 52a)

Primary Objective (Agriculture cases): 70-2001 Art. 5 (Consultancy and other services ...) • Additional costs in outermost regions (Art. 15(2)(b)) • Adverse climatic events (Art. 11 of Reg. (EC) No 1857/2006) • Adverse weather conditions

Decision Type: Article 10(1) - withdrawal of notification (before formal investigation procedure) • Article 10(2) - withdrawal of notification (after formal investigation procedure) • Article 11 - revocation of a decision • Article 12(3) - information injunction

EU Primary legal basis: Art. 106(2) TFEU - SGEI • Art. 107(2)(a) TFEU - Social character • Art. 107(2)(b) TFEU - Natural disasters • Art. 107(2)(c) TFEU - Certain areas of Germany

EU Secondary legal basis: 3 precedent decisions-Notice on Simplified Procedure, 2009 • Agriculture-Agricultural Block Exemption Regulation 2014-2020 (Commission Regulation No 702/2014) • Agriculture-Agricultural Guidelines 2014-2020 (European Union Guidelines for State aid in the agricultural and fisheries sectors) • Agriculture-Block Exemption Regulation 1857/2006

Aid Instrument: Debt write-off • Direct grant • Direct grant/ Interest rate subsidy • Equity instruments

Case type: Aid Hoc Case • Consultation • Full Function Joint Venture

Legislative sector: Agriculture and Rural Development DG • Competition DG • Fisheries and Maritime Affairs DG

State Aid - Register

Example:

SA.62368 COVID-19: Aid to the fireworks sector

Member state:	Netherlands
Primary objective(s):	Compensation of damage caused by natural disasters or exceptional occurrences
Legal basis primary:	Art. 107(2)(b) TFEU - Natural disasters
Legal basis secondary:	Covid-19-Temporary Framework Covid-19
Sector:	G.46.7 - Other specialised wholesale
Aid instrument:	Direct grant
Case type:	Scheme
Duration:	From 21.09.2021 to 19.08.2022
Notification / registration date:	17.03.2021
Legislative sector:	Competition DG

Decisions			
21.09.2021	Decision not to raise objections		
	Decision text(s)	10.11.2021	Letter to the Member State - working language EN (enclenw)
	Press release		IPU
	Publication in Official Journal	26.11.2021	2021/C 497/2021



EUROPEAN COMMISSION

Brussels, 21.9.2021
C(2021) 6919 final

In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...]	PUBLIC VERSION This document is made available for information purposes only.
--	---

Subject: State Aid SA.62368 (2021/N) – Netherlands
COVID-19: Aid to the fireworks sector

Excellency,

1. PROCEDURE

- By electronic notification of 13 July 2021, the Netherlands notified aid to fireworks wholesalers and certain retailers (the "beneficiaries") that import fireworks themselves (the "measure") under Article 107(2)(b) of the Treaty on the Functioning of the European Union ("TFEU") in accordance with Article 108(3) TFEU. The measure aims at compensating the beneficiaries for part of their losses due to a ban imposed on the sale of fireworks by retailers on 29, 30 and 31 December 2020.¹
- The Netherlands exceptionally agrees to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958,² and to have this Decision adopted and notified in English.

State Aid Transparency Register

<https://webgate.ec.europa.eu/competition/transparency/public/search>

EC-zoekinterface gegevens steunverlening

Land:

Steunverlenende autoriteit Regio's:

Benaming steunmaatregel:

Steunmaatregel Zaaknummer:

Referentie nummer:

Another Beneficiary Member State:

ID begunstigde:

Naam begunstigde:

Soort begunstigde:

Regio:

Activiteitssector:

Steuninstrument:

Doelstelling:

Nominaal bedrag: Valuta

Transparency Register Results

Weergeven Steunverlening [Pdf exporteren](#)

Land	Nederland
Taal	NL
Benaming steunmaatregel	COVID-19: Extension and Amendment of SA.57712 - Direct grant scheme to support the fixed costs for small and medium-sized enterprises affected by the COVID-19 outbreak
SA-nummer	SA.59535
Ref-nr.	TM-10941988
Nationale ID	63305836
Soort nationale ID begunstigde	KvK nummer
Naam begunstigde	Glazenwassersij Keane
Soort begunstigde	Kleine en middelgrote ondernemingen
Regio	Zuid-Holland
Sector (NACE)	Reiniging
Steuninstrument	Rechtstreekse subsidie

Doelstelling steun	Opheffing ernstige verstoring in de economie
Datum toekenning	30/01/2021
Steunelement, uitgedrukt in hield bedragen	15,771.00 EUR
Naam steunverlenende autoriteit	Ministerie van Economische Zaken en Klimaat
Cofinanciering	<input type="checkbox"/>
Covid-19	<input type="checkbox"/>
Het beheer belaste entiteit	
Financiële intermediairs	

E-wiki

- Digital exchange of Q&A between member states and the Commission re explanations on State Aid Law.
- The Ministry for Economic Affairs and the Ministry for Internal Affairs are who to contact in the Netherlands for Dutch central government regional and local authorities.
- Not freely accessible to just anyone.
- Selection of Q&A in the GBER-Guide (latest version): 2015:
https://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf
- New version?

State Aid scoreboard

- State Aid scoreboard 2020
https://ec.europa.eu/competition-policy/state-aid/scoreboard_en
 - Increase in the volume of State Aid;
 - 51% was allocated to environment and sustainability projects;
 - Subsidies (direct grants) were the most popular form of aid;
 - State Aid in the railway sector is stable;
 - State Aid in the farming sector has dropped by one third.
 - State Aid in the fisheries and aquaculture sector is stable;
 - Use of the GBER has increased. 1473 GBER assistance measures were applied (in effect 95.5% of all assistance measures taken).

Judges using Google: is that allowed?

- State Aid cases under both Administrative Court and Civil Court
- The main rule in Dutch Civil Court: facts may not be elaborated upon (art. 24 jo. 149 Dutch Civil Procedure Act)
 - Party autonomy is paramount
 - This is a generally known fact?
- The main rule in Administrative Court: facts may be elaborated upon (art. 8:69 para 3 Dutch General Administrative Law Act)
 - Material discovery is paramount
 - Bound to adhere to the professional foundations of the plaintiff
- Interpretation, verification and official analysis
- A major litigation norm: a fair hearing and rebuttal



Doortje Ninck Blok
Senior Associate
European and Competition law
T 010 2617 500
d.ninckblok@windtlegal.com



Windt Le Grand Leeuwenburgh
Coolsingel 104
3011 AG Rotterdam
T 010 2617 500
info@windtlegal.com

Diana Calciu



Recovery of Unlawful and Incompatible State Aid

Diana CALCIU, Case Handler
DG COMP. Unit H4. Enforcement and Monitoring

ERA Webinar for Dutch Judges. 21 June 2022



Funded by the European Union

Service Contract DG COMP/2017/015 – SI2.778715

This document has been prepared for the European Commission. However, it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein

The views expressed in this presentation are purely those of the speaker and may not in any circumstances be regarded as stating an official position of the European Commission

1

Unlawful aid

- Member States shall not implement state aid before it has been notified to and approved by the Commission (Art.108(3) TFEU) – **standstill clause**
- Otherwise, the aid is unlawful (**≠ incompatible**)
- National courts must draw all the necessary consequences
 - Recovery of the measure
 - Interim measures to safeguard the interests of third parties
 - Suspending the implementation or ordering the recovery of the measure

**CELF C-1/09
paras 27-31**

Deutsche Lufthansa C-284/12, paras 42-44



2

Incompatible aid

- Commission: **exclusive jurisdiction** to determine whether aid is compatible with the internal market



- **Commission has to order recovery of any incompatible aid**, unless this would go against a general principle of EU law (interpreted strictly!) or the limitation period of 10 years



- Member States: **obligation to implement that decision**



3

Obligation to recover the aid

- The Commission has the **power to suspend the payment of unlawful aid, while investigating**

Boussac C-301/87, paras 19-20

- Member States have the **obligation to recover incompatible aid, following the negative decision of the Commission, and national courts have a duty of sincere cooperation and must draw all necessary consequences**
- **Recovery must be immediate and effective**



4

Limits to Recovery

- Proc. Reg., Article 17: limitation period (10 years)

- General Principles of EU Law:

- e.g. legitimate expectations

RSV v Commission C-223/85, paras 14-17

- e.g. absolute impossibility

Belgium v Commission C-75/97, para. 88 Ferracci v Commission T-219/13, paras 84-86; Montessori school v Commission T-220/13, paras 81-83

- *Res judicata* cannot undermine the primacy and effectiveness of EU Law

Lucchini C-119/05, paras 61-63; Commission v Slovakia C-507/08, paras 59-65; Klausner Holz C-505/14, para. 45



5

Res judicata and EU Law

- The national courts are under a duty to give full effect to the provisions of EU law

- Two different scenarios arising from case law:

- *Lucchini*: the principle of *res judicata* in State aid matters should be left unapplied

- **prevents the recovery of incompatible State aid, granted in breach of EU law**

- *Klausner Holz*: judges are called to leave this principle unapplied or to find alternative solutions by interpreting national law in conformity with EU law

Lucchini C-119/05, paras 61-63; Commission v Slovakia C-507/08, paras 59-65; Klausner Holz C-505/14, para. 45



6

Purpose of recovery

- NOT a penalty
- Re-establishing the situation that existed in the market prior to granting the aid

Tubemeuse C-142/87, para. 66;
Belgium v Commission C-75/97, paras. 64-66;
SMI C-277/00, para. 74;
New Interline C-454/09, paras 30, 35 and 37

- Amount to be recovered: aid + recovery interest
 - By paying back the unlawful aid, its recipient forfeits the advantage which it has enjoyed over its competitors.
 - By paying the recovery interest the aid beneficiary forfeits the time advantage arising from the availability of the aid in question, free of charge.

Greece v Commission T-415/05, T-416/05 and T-423/05, paras 415 and 416;
WAM T-303/10, para. 203



7

The effects of the Recovery Decision

Binding in its entirety

Article 288 TFEU)

Binding for all State bodies, including national courts

Albako v BALM 249/85, para. 17

Duty of sincere cooperation between Commission and Member States

Article 4(3) TEU

Zwartfeld C-2/88, para. 18

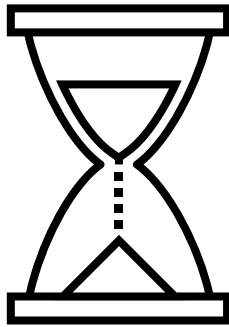
Sincere cooperation particularly important between the Commission and national courts

Eesti Pagar C-349/17, para. 89-92 and 94



8

The Recovery Procedure



- Article 16(3) Procedural Reg.: governed by national law
- Recovery must be immediate and effective
- National rules preventing effective and immediate execution should be left unapplied
- Deadlines:
 - **2 months**: measures planned or taken (quantify aid and interest, identify the beneficiaries, etc.)
 - **4 months**: completion of recovery

Olympic Airways
C-415/03, paras 42-44

Scott
C-232/05, paras 49-52

Operative part of a Recovery Decision

Article 1

The State aid amounting to EUR <amount> unlawfully granted by <Member State>, in breach of Article 108(3) of the TFEU, in favour of <identity of the beneficiary> is incompatible with the internal market.

Article 2

1. <Member State> shall recover the aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
4. <Member State> shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of notification of this decision.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. <Member State> shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, <Member State> shall submit the following information to the Commission:
 - (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. <Member State> shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to <Member State>.

Amount to be recovered

- **Quantified by the Commission**, on the basis of information available
- For **lack of a concrete amount** in the negative decision, the Member State concerned must **quantify the aid to be recovered from each of the beneficiaries**, based on the **methodology** set out in the recovery decision

Mediaset, C-69/13, para. 21

Identification of the beneficiaries

- The **Commission's** recovery decision usually identifies the aid beneficiaries
- **Schemes**: case-by-case assessment by Member States:
 - the notion of State aid and compatibility,
 - in close cooperation with the **Commission**
- **Concrete beneficiaries and schemes**
 - Principle of economic unit
 - Extension of the recovery obligation due to economic continuity

Principle of Economic Unit

- Undertakings belonging to a group may form one economic unit that has benefitted from the aid
- Recovery may be ordered from the whole group
- Joint and several liability



13

Economic Continuity

- Assessed during the implementation stage of a recovery decision or already at the stage of the investigation
- To preserve the ***effet utile*** of the Decision and **avoid its circumvention**
- The original beneficiary identified in the opening or closing decision may have conducted or be involved in:
 - Asset deal
 - Share deal
 - Mergers and other business reorganisations



14

Inability to pay back



Insolvency: practical implications 1/2

- If the aid beneficiary cannot repay the aid, the Member State has to **seize the beneficiary's assets** and **cause its liquidation** leading to:
 - Recovery of the **full recovery** amount or
 - The definitive **cessation** of the activities of the undertaking and its **erasure** from the trade register
- Interest accrues as provided for by national law for insolvency proceedings until aid is paid back
- Recovery can be considered provisionally implemented when the State aid claim is **registered** in the schedule of liabilities within the recovery deadline

Insolvency: practical implications 2/2

- The State must **register** the State aid claim in the schedule of liabilities in due time
- Ranking of the claim set by national law
- The State must **challenge** any refusal to register its claim until the national Court of last instance and, if necessary, ask that Court to lodge a request for **preliminary ruling** at the Court of Justice
- Avoiding **intractable** situations: the Member State can no longer recover the aid under national law, but this is due to its own inactions or mistakes so it does not fit with the case law on absolute impossibility



17

Restructuring or Temporary Continuation proceedings

- Insolvent companies: National Law providing for restructuring or temporary continuation proceedings must be left **unapplied** insofar as, in absence of timely recovery of the full recovery amount, **it prevents the winding up and cessation of activities of the aid beneficiary** (*Recovery Notice*, recital 131)
- Where **a plan** providing for the continuation of the activity of the aid beneficiary is proposed to the creditors' committee, the **Member State can support that plan only if it ensures full recovery within the deadline**
- A Member State **cannot waive** part of its recovery claim (principal and interest) if the aid beneficiary continues its activity
- The logic is different from that of a private creditor (i.e. maximize its claim): the company has to **exit the market**. Same principles apply to **voluntary liquidation**



18

The Role of National Courts

- Competent for the review of the national recovery orders
- Residual competence on recovery where it is not possible for the applicant to challenge the decision before EU Courts
- If a national judgment breaches EU law, the Member States must challenge it

Commission v Slovakia C-507/08



19

The *Deggendorf* Case Law

- **Obligation to suspend payment of new aid where earlier unlawful and incompatible aid has not yet been repaid**

Deggendorf case law, TWD v Commission, C-355/95 P

- **Possibility of conditional approval by the Commission** (i.e., granting of new aid suspended until previous aid is reimbursed)
- Commitment not to grant new aid until full recovery of the aid granted to any of the companies of the group for which recovery has been ordered in any of the Member States

FagorBrandt T-115/09, paras 70 and 71



20

Thank you for your attention

Contact point for queries at

comp-recovery-state-aid@ec.europa.eu

© European Union 2022

Unless otherwise noted the reuse of this presentation is authorised under the [CC BY 4.0](https://creativecommons.org/licenses/by/4.0/) license. For any use or reproduction of elements that are not owned by the EU, permission may need to be sought directly from the respective right holders.





Enforcement of State aid rules by National Courts and cooperation tools

The New Commission Enforcement Notice 2021

Diana CALCIU, Case Handler
DG COMP. Unit H4. Enforcement and Monitoring



Funded by the European Union

Service Contract DG COMP/2017/015 – SI2.778715

This document has been prepared for the European Commission. However, it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein

1

Background

2009

Notice on the enforcement of State aid rules by national courts

- 12 years of EU case law developments

2012

State aid Modernisation

- Significant extension of the scope of the block exemption regulation (GBER): 96% of State aid is now exempt from notification
- The role of national courts has become even more prominent, as they must detect all potential breaches of exemption conditions

2015

New Procedural Regulation 2015/1589

- Article 29 codified the cooperation tools between national courts and the Commission from 2009 Notice and added the *amicus curiae* intervention

2019

Study on the Enforcement of State aid rules by national courts

- Findings on the application of State aid rules by national courts in 750 cases: limited award of remedies
- Cooperation tools under-used

2021

New notice on the enforcement of State aid rules by national courts

2



2

Purpose and Scope of the new 2021 Notice

Concrete guidance on the enforcement of State aid rules at national level focusing on cases where private parties seek remedies for the unlawful implementation of aid ("private enforcement")

Clarifications on general principles applicable based on updated case law

Clarifications on the respective roles of the Commission and of the national courts (NCs)



Reinforce the cooperation between NCs and the Commission - mutual assistance

3



3

The System of State aid Enforcement

Competences	National Courts 	Commission 
107(1) TFEU Objective notion of aid	✓	✓
108(3) TFEU Breach of the standstill obligation (no aid shall be granted until its compatibility with the internal market was assessed): for new aid, block-exempted aid and existing aid	✓	✓
Compatibility / review of existing aid	X	✓
Remedies	Recovery, suspension, termination, interim relief, damages	Incompatible new aid: Recovery decision Incompatible existing aid: Appropriate measures

4



4

The Role of National Courts

Assessing a potential breach of the standstill obligation (Section 4 of the Notice)

Existence of aid

Objective notion of aid
Reference to Commission guidance (2016 Notice on the notion of State aid)

Existing Aid

An existing aid is not subject to the standstill obligation
Definitions of Existing Aid under the Procedural Regulation do not bind NCs (C-387/17 *Fallimento Traghetti Mediterraneo*)

Block exemptions

Duty to verify compliance with all GBER conditions (strictly interpreted)
No legitimate expectations (C-349/17 *Eesti Pagar*, C-654/17 P *BMW*)
(see next slide)

New Unlawful Aid

Remedies

5



5

Block exemptions conditions

(Section 4)

C-349/17 *Eesti Pagar*

Strict interpretation of GBER conditions by NCs (no compliance with the condition relating to the incentive effect, as the aid application was submitted after the a binding order was issued to start works on the project).

Non-compliance with GBER conditions amounts to an infringement of Article 108(3) from which NCs must draw all the consequences.

Assurances by national authorities do not create legitimate expectation as to the lawfulness of State aid.

C-654/17 P *BMW*

When State aid exceeds the relevant individual value threshold set in the GBER, all the aid falls outside the scope of that regulation and cannot benefit from the exemption.

The GBER does not transfer competences to Member States.

Aid covered by the GBER does not constitute 'existing aid' and does not enjoy special protection.

Aid exempt from notification under the GBER enjoys at most a presumption of compatibility with the internal market and its lawfulness can therefore be challenged.

6



6

Remedies

(Section 4)

Duty to address the consequences of illegality of the aid

Suspension/ termination

EU law does not impose any conclusion that NC must necessarily draw on the validity of the acts implementing unlawful aid, in so far as the objective of restoring the status quo ante is achieved (C-275/10 *Residex Capital IV*)

Recovery of aid and illegality interest

Full advantage to be removed by recovering aid principal plus 'illegality interest', i.e. interest that the undertaking would have paid had it had to borrow the amount of the aid on the market during the period of the unlawfulness (C-349/17 *Eesti Pagar*)

Interim measures pending EC investigation

An ongoing Commission investigation does not release the national court from its obligation to impose remedies (C-39/94 *SFEI*)

Provisional recovery on a blocked account; interim measure preventing the disbursement of presumably unlawful aid (C-590/14 P *DEI*)

Damage compensation

Based on *Francovich* and *Brasserie du Pêcheur* case-law, MS required to compensate individuals for damage as a result of breaches of EU law
Damages against beneficiaries not directly based on EU law

7



7

Action for damages

(Section 4)

An effective tool for third parties to whom damage was caused by unlawful State aid (*SNCM*, French Council of State, September 2021)...

In exchange for operating the ferry service between Marseille and Corsica, the regional authorities granted shipping operator *SNCM* aid that was found unlawful and incompatible by the Commission.

Competitor *Corsica Ferries* filed a claim for damages, submitting an economic expert report that quantified the loss of profit caused by the aid received by *SNCM*.

Quantum of damages to be paid to *Corsica Ferries* amounted to approx. €86 million.

→ Need for economic and financial evidence translating the theory of harm into a credible quantitative assessment.

... with limitations

When ruling on the compensation to third parties for the costs incurred as a direct result of an unlawful aid, NCs must be careful not to adopt decisions having the effect of granting an aid or enlarging the circle of beneficiaries (C-106 to 120/87, *Asteris*, C-164/15 P and C-165/15 P, *Aer Lingus*).

No legitimate expectations for the beneficiary vis a vis the Member State (C-672/13 *OTP Bank*).

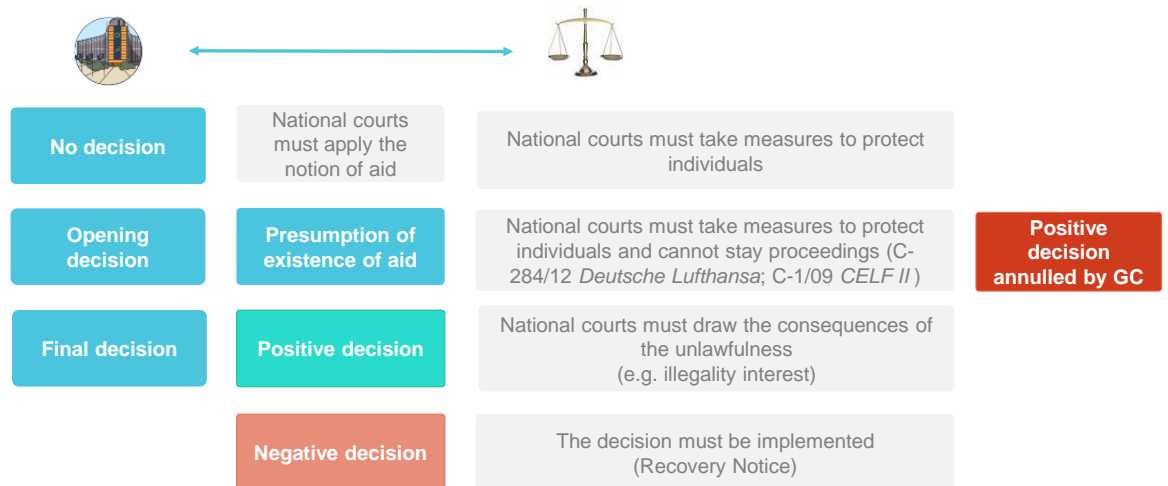


In general, NCs should be careful not to breach the standstill obligation (Art. 108(3) TFEU) by granting aid without prior approval (for instance by extending an aid, *DEI* C-590/14 P).



8

Parallel NC/Commission procedures (Section 4)

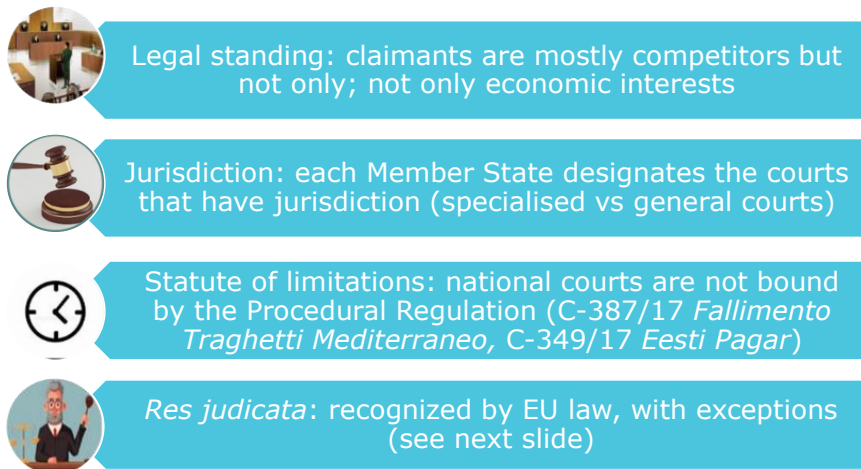


9

9

General Principles (Section 2)

- Sincere cooperation (Article 4(3) TEU)
- Procedural Autonomy, Equivalence and Effectiveness of national procedural rules



10

10

Res judicata - exceptions

(Section 2)

**C-119/05
Lucchini**

The principle of *res judicata* cannot limit the exclusive competence conferred on the Commission by the TFEU to assess State aid compatibility (conflict of competence: existence of aid was discarded despite a Commission decision finding the opposite)

**C-586/18 P
Buonotourist**

A NC decision, even if adjudicating at last instance, cannot prevent the Commission from exercising its exclusive competence to assess aid compatibility later on

**C-505/14
Klausner**

A national rule preventing NC from drawing the consequences from a breach of 108(3) TFEU because of a previous NC decision, which is *res judicata*, given in a dispute which did not have the same subject-matter and did not concern the State aid characteristics of the contract in question, is contrary to the principle of effectiveness

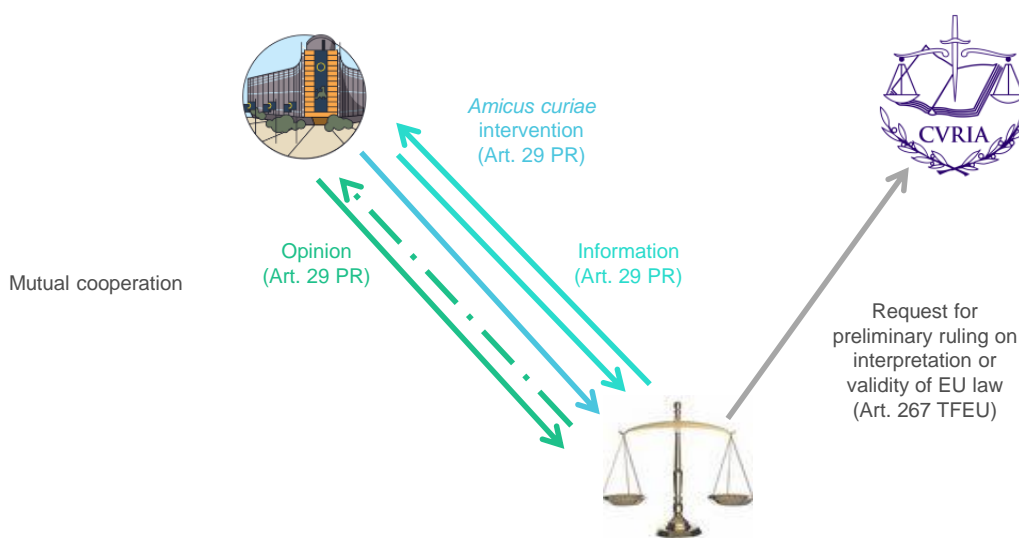
11



11

Cooperation with the Commission

(Section 5)



12



12

Request for information

(Section 5)



- ✓ Request for **information** (about the existence of a State aid procedure or investigation; about whether a Member State has duly notified an aid measure; about whether the Commission has already adopted a decision...) or for **documents** (copies of decisions, factual data, statistic, market studies, economic analyses)
- ✓ Covered: information protected by **professional secrecy**, provided it will be protected by the national court
- ✓ Usually transmitted within **1 month** from the date of the request

Information
(Art. 29 PR)



13



13

Request for Opinion

(Section 5)



Opinion
(Art. 29 PR)

- ✓ When **not enough guidance provided by case law and Commission notices and guidelines**
- ✓ About: quantification and calculation of **aid amount** and recovery interest; application of **GBER** conditions; application of **scheme** to individual measure; **exceptional circumstances** preventing recovery...
- ✓ Usually transmitted within **4 months** from the date of the request

14

✓ **Not binding on NCs**



14

Amicus curiae interventions

(Section 5)



**Amicus curiae
intervention
(Art. 29 PR)**

- ✓ Written or oral **observations** to NCs applying State aid rules
- ✓ Decision to intervene as *amicus curiae* is the **Commission's exclusive prerogative**, depending on **case's significance**, contribution to the **effectiveness of the enforcement of State aid rules**, existence of a **novel question of substance**
- ✓ **Not binding on NCs**



15



15

Other cooperation channels with the Commission

(Section 5)



Mutual cooperation



National courts' assistance to the Commission

- ✓ Communication by NCs of a copy of any written judgment issued following the provision by the Commission of information, opinion or *amicus curiae* observations
- ✓ Member States can set up coordination points for national judges dealing with State aid issues, for a more effective and consistent application of State aid rules

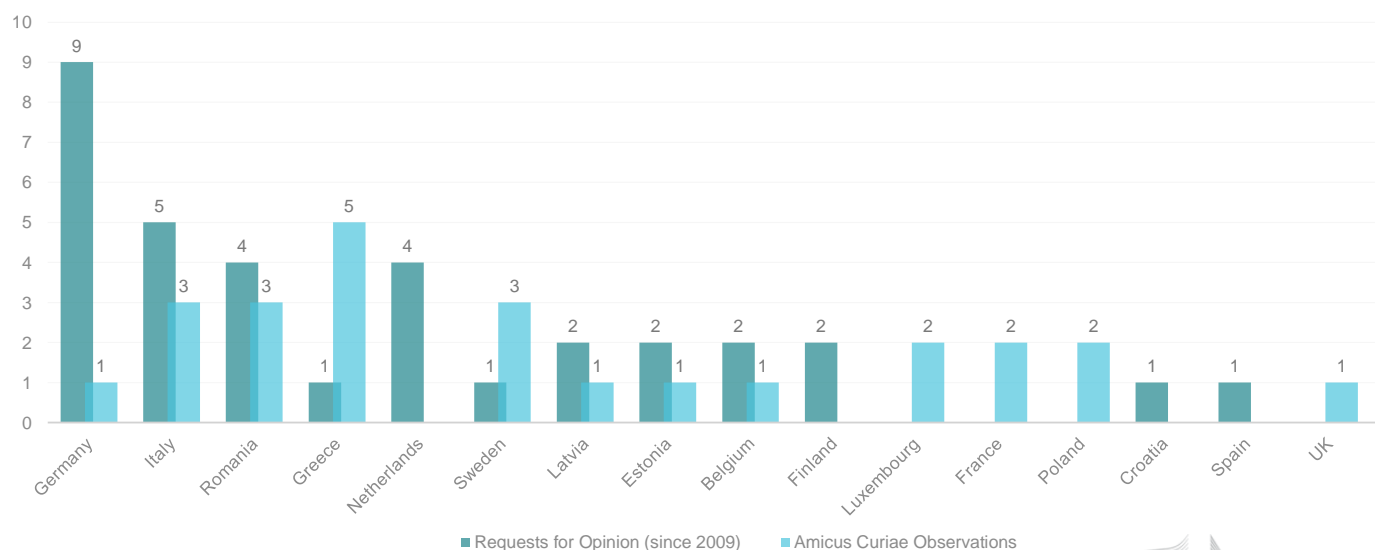


16



16

The use of cooperation tools by Member States



17

Illustration of a request for opinion initiated by the Raad van State

https://ec.europa.eu/competition-policy/state-aid/national-courts/application-state-aid-law/requests-opinions/opinions-issued_en

2014

Case	National Court	Commission opinion	National Court judgment	Summary & background
Overcompensation	Raad van State	27/10/2014 nl	nl	Does overcompensation due to a calculation error made under an approved scheme constitute State aid and is it covered by the principle of legal certainty?

18

18

Thank you

The *Enforcement Notice* Team:

Bernadette WILLEMOT-NIEUWENHUYS, Borja ALCARAZ,
Leonardo ARMATI, Diana CALCIU, Michela CASELLA,
Angeliki CHAROULI and Enrique COLMENERO

For more information, you can find the notice here: [EUR-Lex - 52021XC0730\(01\) - EN - EUR-Lex \(europa.eu\)](#)



© European Union 2020

Unless otherwise noted the reuse of this presentation is authorised under the [CC BY 4.0](#) license. For any use or reproduction of elements that are not owned by the EU, permission may need to be sought directly from the respective right holders.





EUROPEAN COMMISSION
COMPETITION DG

State aid: General Scrutiny and Enforcement
Enforcement and Monitoring

SEMINAR FOR THE EU JUDICIARY

UTRECHT

20 – 21 JUNE 2022

CASE STUDY

Background

1. On 15 February 2015 the company Wood Corporation (**Wood**) and the Forest Management Board of Region A (**FMB**) concluded a timber supply contract. Under that contract, FMB committed to supply Wood specific quantities of wood for a fixed price for the period from 15 February 2015 to 31 December 2020. In addition, FMB made a commitment not to sell to other buyers for less than the price fixed in the contract.
2. In 2015 and 2016, FMB supplied Wood with timber, but did not deliver the agreed quantities of it. In 2016, Wood faced financial difficulties that lead to delayed payments to FMB. In August 2017, FMB terminated the supply contract of 15 February 2015, and from the second half of the year ceased to supply timber to Wood under the terms of the contract.
3. After FMB's alleged termination of the contract, the financial difficulties of Wood increased, and as a result, it was unable to satisfy its creditors. In September 2019, the company Wood was subject to a judicial decision in a resolution procedure to settle its debts.
4. Meanwhile, Wood had brought FMB before the competent civil court, seeking a declaratory decision ascertaining that, despite its termination by FMB, the contract of 15 February 2015 remained in force (**1st Case**). The court of first instance deemed well-founded Wood's claim and, by judgment of 24 April 2019, declared that the contract at issue was still in force.
5. On the other hand, following a complaint by a competitor of Wood that was damaged by FMB's commitment not to charge to other clients less than the price charged to Wood, by decision of 5 July 2019, the Commission expressed doubts as to the compatibility of the preferential tariff charged by FMB to Wood with State aid rules and opened a formal investigation into the contract of 15 February 2015.
6. The judgment at first instance that had found that the contract at issue had not been validly terminated by FMB was upheld also by the appellate court, by means of a final declaratory judgment of 3 December 2020.
7. Consequently, in January 2021, Wood brought a second action against FMB before the competent civil court, seeking, on the basis of the final declaratory judgment in the 1st Case, firstly, the award of damages amounting to approximately EUR 14

million due to FMB's failure to supply timber in 2012, and, secondly, the order for FMB to supply around 1,5 million cubic metres of wood in execution of the disputed contract between 2017 and December 2020 (2nd Case).

8. In the context of that second action, FMB defended itself by arguing that the execution of the contract in question was contrary to the law of the European Union. It argued that that contract constituted State aid within the meaning of Article 107(1) TFEU and that it had been carried out in breach of the third subparagraph of Article 108(3) TFEU.
9. In its reply, Wood argued that FMB allegation had not been raised in the proceedings concerning the 1st Case and, thus, the legality of the contract could not be called into question anymore, as *res judicata* had formed.
10. The trial in the 2nd Case has not been completed.

Topics for discussion:

- A. In principle, which elements of EU State aid law can be interpreted and applied by the national court?
- B. What does the fact that the Commission had opened a formal investigation entail for national courts?
- C. If the contract did entail illegal State aid, what consequences would the national court need to draw in relation to the 2nd Case?
- D. Does the assessment change if, in the meantime, the Commission had closed the formal investigation finding that the Member State A had unlawfully granted incompatible State aid to Wood through the contract with FMB of 15 February 2015?

The Commission's negative decision and the obligation to recover for Member State A

11. By decision of 20 December 2020 closing the investigation procedure, the Commission considered that the Member State A had unlawfully granted incompatible State aid amounting to EUR 8 million to Wood through the application of a preferential tariff for the period from 15 February 2015 to December 2017 and obliged A to recover it from the beneficiary within 4 months.
12. At the time of the Commission's decision, the company Wood entered into insolvency. The private creditors agreed to limit their claims at a rate of 60 %. Member State A did not agree and registered within the deadline, under national insolvency law, the full State Aid claim including recovery interest in the insolvency register.
13. In June 2021 the insolvency procedure of Wood was closed, with the payment of all creditors in respect of 60 % of their claims.
14. Member State A informed the European Commission that it believes it has complied with its obligation to implement the recovery decision.

Topics for discussion:

- E. Can the Member State A claim that the partial recovery of 60 % of the total amount to be recovered constitutes the full and effective implementation of the Commission's decision?
- F. Discussion by group of arguments in favour of and against the immediate and effective implementation by Member State A of the recovery obligation under EU law.

* * *



Knowledge Check on State aid

Diana CALCIU, Case Handler
DG COMP. Unit H4. Enforcement and Monitoring

The role of the national judge in the enforcement of state aid rules – Seminar for Dutch Judiciary, 21 June 2022



Funded by the European Union

Service Contract DG COMP/2017/015 - SI2.778715

This document has been prepared for the European Commission. However, it reflects the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein

The views expressed in this presentation are purely those of the speaker and may not in any circumstances be regarded as stating an official position of the European Commission

1

Ready?

2

2

Question 1

What is the purpose of recovery?

- A: To impose a penalty on the beneficiaries of incompatible aid
- B: To re-establish the situation that existed in the market prior to the granting of the aid
- C: To ensure additional revenues for Member States, thereby allowing a reduction in taxes or an increase in spending
- D: To liquidate the company which benefitted from incompatible aid

Vraag 1

Wat is het doel van terugvordering?

- A: Het oplegging van een dwangsom aan de begunstigen van onverenigbare steun
- B: Herstel van de situatie zoals die bestond op de markt voor het verlenen van de steun
- C: Het verkrijgen van extra inkomsten voor lidstaten om belastingverlaging of verhoging van de uitgaven mogelijk te maken
- D: Vereffening van de onderneming die heeft geprofiteerd van onverenigbare steun

3

Question 1

What is the purpose of recovery?

- A: To impose a penalty on the beneficiaries of incompatible aid
- B: To re-establish the situation that existed in the market prior to the granting of the aid**
- C: To ensure additional revenues for Member States, thereby allowing a reduction in taxes or an increase in spending
- D: To liquidate the company which benefitted from incompatible aid

Vraag 1

Wat is het doel van terugvordering?

- A: Het oplegging van een dwangsom aan de begunstigen van onverenigbare steun
- B: Herstel van de situatie zoals die bestond op de markt voor het verlenen van de steun**
- C: Het verkrijgen van extra inkomsten voor lidstaten om belastingverlaging of verhoging van de uitgaven mogelijk te maken
- D: Vereffening van de onderneming die heeft geprofiteerd van onverenigbare steun

4

Question 2

Which procedures govern the recovery of State aid?

- A: EU procedures, namely the 2019 Regulation on recovery procedures
- B: National and EU procedures
- C: National procedures
- D: National procedures, provided they ensure immediate and effective recovery

Vraag 2

Welke procedures zijn van toepassing op terugvordering van staatssteun?

- A: EU-procedures, namelijk de Verordening van 2019 inzake terugvorderingsprocedures
- B: Nationale en EU-procedures
- C: Nationale procedures
- D: Nationale procedures, mits deze onmiddellijke en doelmatige terugvordering garanderen

5

Question 2

Which procedures govern the recovery of State aid?

- A: EU procedures, namely the 2019 Regulation on recovery procedures
- B: National and EU procedures
- C: National procedures
- D: National procedures, provided they ensure immediate and effective recovery**

Vraag 2

Welke procedures zijn van toepassing op terugvordering van staatssteun?

- A: EU-procedures, namelijk de Verordening van 2007 inzake terugvorderingsprocedures
- B: Nationale en EU-procedures
- C: Nationale procedures
- D: Nationale procedures, mits deze onmiddellijke en doelmatige terugvordering garanderen**

6

Question 3

When the Commission orders a Member State to recover, what should actually be recovered?

- A: The aid amount
- B: The aid amount and recovery interest
- C: The aid amount, recovery interest and a lump sum
- D: The recovery interest

Vraag 3

Wat moet er, als de Commissie een lidstaat verplicht tot terugvordering, daadwerkelijk worden teruggevorderd?

- A: Het bedrag van de steun
- B: Het bedrag van de steun en terugvorderingsrente
- C: Het bedrag van de steun, terugvorderingsrente en een bedrag ineens
- D: De terugvorderingsrente

7

Question 3

When the Commission orders a Member State to recover, what should actually be recovered?

- A: The aid amount
- B: The aid amount and recovery interest**
- C: The aid amount, recovery interest and a lump sum
- D: The recovery interest

Vraag 3

Wat moet er, als de Commissie een lidstaat verplicht tot terugvordering, daadwerkelijk worden teruggevorderd?

- A: Het bedrag van de steun
- B: Het bedrag van de steun en terugvorderingsrente**
- C: Het bedrag van de steun, terugvorderingsrente en een bedrag ineens
- D: De terugvorderingsrente

8

Question 4

What are the limits to recovery?

- A: There are no limits, recovery must take place in any case
- B: Those established by the applicable national law
- C: Limitation period
- D: Limitation period and general principles of EU law

Vraag 4

Wat zijn de grenzen aan terugvordering?

- A: Er zijn geen grenzen, terugvordering moet in elk geval plaatsvinden
- B: Die welke zijn vastgesteld naar toepasselijk nationaal recht
- C: De verjaringstermijn
- D: De verjaringstermijn en algemene beginselen EU-wetgeving

9

Question 4

What are the limits to recovery?

- A: There are no limits, recovery must take place in any case
- B: Those established by the applicable national law
- C: Limitation period
- D: Limitation period and general principles of EU law**

Vraag 4

Wat zijn de grenzen aan terugvordering?

- A: Er zijn geen grenzen, terugvordering moet in elk geval plaatsvinden
- B: Die welke zijn vastgesteld naar toepasselijk nationaal recht
- C: De verjaringstermijn
- D: De verjaringstermijn en algemene beginselen EU-wetgeving**

10

Question 5

In justified cases, can a Commission recovery decision be implemented provisionally, while litigation is pending?

- A: Yes, through the payment of the amount to be recovered into an escrow account
- B: Yes, through the establishment of bank guarantees or payment in escrow accounts
- C: No, there can be no provisional implementation
- D: The matter is governed by the applicable national law

Vraag 5

Kan een terugvorderingsbesluit van de Commissie in gerechtvaardigde situaties voorlopig ten uitvoer worden gelegd hangende een procedure?

- A: Ja, door middel van betaling van het terug te vorderen bedrag op een escrowrekening
- B: Ja, door middel van afgifte van bankgaranties of betaling op escrowrekeningen
- C: Nee, voorlopige tenuitvoerlegging is niet mogelijk
- D: Op deze kwestie is het desbetreffende nationaal recht van toepassing

11

Question 5

In justified cases, can a Commission recovery decision be implemented provisionally, while litigation is pending?

- A: Yes, through the payment of the amount to be recovered into an escrow account**
- B: Yes, through the establishment of bank guarantees or payment in escrow accounts
- C: No, there can be no provisional implementation
- D: The matter is governed by the applicable national law

Vraag 5

Kan een terugvorderingsbesluit van de Commissie in gerechtvaardigde situaties voorlopig ten uitvoer worden gelegd hangende een procedure?

- A: Ja, door middel van betaling van het terug te vorderen bedrag op een escrowrekening**
- B: Ja, door middel van afgifte van bankgaranties of betaling op escrowrekeningen
- C: Nee, voorlopige tenuitvoerlegging is niet mogelijk
- D: Op deze kwestie is het desbetreffende nationaal recht van toepassing

12

Question 6

What happens to recovery when the aid recipient is insolvent?

- A: Recovery cannot be implemented
- B: Recovery cannot be implemented, if it can be proved that the aid recipient is insolvent due to an unforeseen market development
- C: Insolvency does not affect the recovery obligation. Liquidation can be an alternative means to achieve recovery
- D: The Commission and the Member State concerned negotiate on a case-by-case basis

Vraag 6

Wat gebeurt er met de terugvordering als de ontvanger van de steun insolvent is?

- A: Terugvordering kan niet ten uitvoer worden gelegd
- B: Terugvordering kan niet ten uitvoer worden gelegd als kan worden aangetoond dat de ontvanger van de steun insolvent is als gevolg van onvoorziene marktontwikkelingen
- C: De insolventie heeft geen gevolgen voor de terugvorderingsplicht. Vereffening kan een alternatief zijn om terugvordering te bewerkstelligen
- D: De Commissie en de betrokken lidstaat onderhandelen van geval tot geval

13

Question 6

What happens to recovery when the aid recipient is insolvent?

- A: Recovery cannot be implemented
- B: Recovery cannot be implemented, if it can be proved that the aid recipient is insolvent due to an unforeseen market development
- C: Insolvency does not affect the recovery obligation. Liquidation can be an alternative means to achieve recovery**
- D: The Commission and the Member State concerned negotiate on a case-by-case basis

Vraag 6

Wat gebeurt er met de terugvordering als de ontvanger van de steun insolvent is?

- A: Terugvordering kan niet ten uitvoer worden gelegd
- B: Terugvordering kan niet ten uitvoer worden gelegd als kan worden aangetoond dat de ontvanger van de steun insolvent is als gevolg van onvoorziene marktontwikkelingen
- C: De insolventie heeft geen gevolgen voor de terugvorderingsplicht. Vereffening kan een alternatief zijn om terugvordering te bewerkstelligen**
- D: De Commissie en de betrokken lidstaat onderhandelen van geval tot geval

14

Question 7

Deggendorf is:

- A: EU courts case law setting conditions to be met by national courts when granting interim relief
- B: A former German judge of the Court of Justice, who effectively set up the recovery doctrine
- C: A judgment establishing that new aid can be granted to the same beneficiary only after recovery of earlier incompatible aid (excluding recovery interest)
- D: A judgment establishing that new aid can be granted to the same beneficiary only after recovery of earlier incompatible aid

Vraag 7

Deggendorf is:

- A: Jurisprudentie van rechterlijke instanties in de EU waarin voorwaarden worden gesteld waaraan nationale rechters moeten voldoen bij het toewijzen van een voorlopige voorziening
- B: Een voormalige Duitse rechter bij het Hof van Justitie die in feite de terugvorderingsleer heeft opgesteld
- C: Een uitspraak waarin wordt gesteld dat nieuwe steun uitsluitend aan dezelfde begunstigde kan worden verleend na terugvordering van eerdere onverenigbare steun (exclusief terugvorderingsrente)
- D: Een uitspraak waarin wordt gesteld dat nieuwe steun uitsluitend aan dezelfde begunstigde kan worden verleend na terugvordering van eerdere onverenigbare steun

15

Question 7

Deggendorf is:

- A: EU courts case law setting conditions to be met by national courts when granting interim relief
- B: A former German judge of the Court of Justice, who effectively set up the recovery doctrine
- C: A judgment establishing that new aid can be granted to the same beneficiary only after recovery of earlier incompatible aid (excluding recovery interest)

D: A judgment establishing that new aid can be granted to the same beneficiary only after recovery of earlier incompatible aid

Vraag 7

Deggendorf is:

- A: Jurisprudentie van rechterlijke instanties in de EU waarin voorwaarden worden gesteld waaraan nationale rechters moeten voldoen bij het toewijzen van een voorlopige voorziening
- B: Een voormalige Duitse rechter bij het Hof van Justitie die in feite de terugvorderingsleer heeft opgesteld
- C: Een uitspraak waarin wordt gesteld dat nieuwe steun uitsluitend aan dezelfde begunstigde kan worden verleend na terugvordering van eerdere onverenigbare steun (exclusief terugvorderingsrente)

D: Een uitspraak waarin wordt gesteld dat nieuwe steun uitsluitend aan dezelfde begunstigde kan worden verleend na terugvordering van eerdere onverenigbare steun

16

Question 8

Following a request for information, the European Commission:

- A: Provides all the requested information or documents to the national court, except information covered by professional secrecy
- B: Provides all the requested information or documents to the national court, including information covered by professional secrecy
- C: Provides information or documents covered by professional secrecy, provided that the national court can guarantee the protection of this confidential information
- D: Provides all the requested information or documents to the national court, except information covered by professional secrecy and information whose transmission would interfere with the functioning of the Union

Vraag 8

Na een verzoek om informatie verstrekt de Europese Commissie:

- A: alle gevraagde informatie of documenten aan de nationale rechter, met uitzondering van informatie die onder het beroepsgeheim valt
- B: alle gevraagde informatie of documenten aan de nationale rechter, met inbegrip van informatie die onder het beroepsgeheim valt
- C: informatie of documenten die onder het beroepsgeheim vallen, mits de nationale rechter de bescherming van die vertrouwelijke informatie kan garanderen
- D: alle gevraagde informatie of documenten aan de nationale rechter, met uitzondering van informatie die onder het beroepsgeheim valt en informatie waarvan toezending in de weg zou staan aan de werking van de Unie

17

Question 8

Following a request for information, the European Commission:

- A: Provides all the requested information or documents to the national court, except information covered by professional secrecy
- B: Provides all the requested information or documents to the national court, including information covered by professional secrecy
- C: Provides information or documents covered by professional secrecy, provided that the national court can guarantee the protection of this confidential information**
- D: Provides all the requested information or documents to the national court, except information covered by professional secrecy and information whose transmission would interfere with the functioning of the Union

Vraag 8

Na een verzoek om informatie verstrekt de Europese Commissie:

- A: alle gevraagde informatie of documenten aan de nationale rechter, met uitzondering van informatie die onder het beroepsgeheim valt
- B: alle gevraagde informatie of documenten aan de nationale rechter, met inbegrip van informatie die onder het beroepsgeheim valt
- C: Informatie of documenten die onder het beroepsgeheim vallen, mits de nationale rechter de bescherming van die vertrouwelijke informatie kan garanderen**
- D: alle gevraagde informatie of documenten aan de nationale rechter, met uitzondering van informatie die onder het beroepsgeheim valt en informatie waarvan toezending in de weg zou staan aan de werking van de Unie

18

Question 9

What are the main differences between preliminary rulings to the CJEU and requests for opinion to the Commission?

- A: The request for opinion concerns economic, factual and legal matters while preliminary rulings concern the interpretation of the law of the European Union and the validity of acts of secondary legislation
- B: Commission opinions are not binding for national judges in contrast with the authoritative interpretation of EU law by the Court
- C: Requests for opinion are usually dealt with faster than preliminary rulings
- D: All of the above

Vraag 9

Wat zijn de belangrijkste verschillen tussen prejudiciële verzoeken aan het HvJ EU en verzoeken om advies aan de Commissie?

- A: Een verzoek om advies betreft economische, feitelijke en juridische kwesties, terwijl een prejudicieel verzoek betrekking heeft op de uitleg van het recht van de Europese Unie en de rechtsgeldigheid van lagere wetgeving
- B: Adviezen van de Commissie zijn niet verbindend voor nationale rechterlijke instanties in tegenstelling tot de gezaghebbende uitleg van EU-recht door het Hof
- C: Verzoeken om advies worden gewoonlijk sneller afgehandeld dan prejudiciële verzoeken
- D: Alle antwoorden zijn goed

19

Question 9

What are the main differences between preliminary rulings to the CJEU and requests for opinion to the Commission?

- A: The request for opinion concerns economic, factual and legal matters while preliminary rulings concern the interpretation of the law of the European Union and the validity of acts of secondary legislation
- B: Commission opinions are not binding for national judges in contrast with the authoritative interpretation of EU law by the Court
- C: Requests for opinion are usually dealt with faster than preliminary rulings

D: All of the above

Vraag 9

Wat zijn de belangrijkste verschillen tussen prejudiciële verzoeken aan het HvJ EU en verzoeken om advies aan de Commissie?

- A: Een verzoek om advies betreft economische, feitelijke en juridische kwesties, terwijl een prejudicieel verzoek betrekking heeft op de uitleg van het recht van de Europese Unie en de rechtsgeldigheid van lagere wetgeving
- B: Adviezen van de Commissie zijn niet verbindend voor nationale rechterlijke instanties in tegenstelling tot de gezaghebbende uitleg van EU-recht door het Hof
- C: Verzoeken om advies worden gewoonlijk sneller afgehandeld dan prejudiciële verzoeken

D: Alle antwoorden zijn goed

20

Question 10

When supporting national courts, the European Commission:

- A: Will not hear any of the parties involved in the national proceedings as part of its duty to remain neutral and defend public interest
- B: Will remain neutral and objective when hearing the parties involved in the national proceedings
- C: Will consider the merits of the case and hear the parties involved only when providing a national judge with an Amicus Curia observation
- D: Will consider the merits of the case and hear the parties involved only when providing an opinion following a request from a national court

Vraag 10

Bij de ondersteuning van de nationale rechterlijke instanties zal de Europese Commissie:

- A: geen van de bij de nationale procedure betrokken partijen horen met het oog op haar plicht om neutraal te blijven en het publiek belang te verdedigen
- B: neutraal en objectief blijven bij het horen van de bij de nationale procedure betrokken partijen
- C: de zaak inhoudelijk beoordelen en de betrokken partijen alleen horen als zij een nationale rechter voorziet van een opmerking als amicus curiae
- D: de zaak inhoudelijk beoordelen en de betrokken partijen alleen horen als zij advies uitbrengt naar aanleiding van een verzoek van een nationale rechter

21

Question 10

When supporting national courts, the European Commission:

- A: Will not hear any of the parties involved in the national proceedings as part of its duty to remain neutral and defend public interest**
- B: Will remain neutral and objective when hearing the parties involved in the national proceedings
- C: Will consider the merits of the case and hear the parties involved only when providing a national judge with an Amicus Curia observation
- D: Will consider the merits of the case and hear the parties involved only when providing an opinion following a request from a national court

Vraag 10

Bij de ondersteuning van de nationale rechterlijke instanties zal de Europese Commissie:

- A: Geen van de bij de nationale procedure betrokken partijen horen met het oog op haar plicht om neutraal te blijven en het publiek belang te verdedigen**
- B: neutraal en objectief blijven bij het horen van de bij de nationale procedure betrokken partijen
- C: de zaak inhoudelijk beoordelen en de betrokken partijen alleen horen als zij een nationale rechter voorziet van een opmerking als amicus curiae
- D: de zaak inhoudelijk beoordelen en de betrokken partijen alleen horen als zij advies uitbrengt naar aanleiding van een verzoek van een nationale rechter

22

*Thank you very much
for your attention*

comp-recovery-state-aid@ec.europa.eu



© European Union 2022

Unless otherwise noted the reuse of this presentation is authorised under the [CC BY 4.0](https://creativecommons.org/licenses/by/4.0/) license. For any use or reproduction of elements that are not owned by the EU, permission may need to be sought directly from the respective right holders.