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A Diligent Businessman's Guide to Defence of State Aid Recovery

– Why it will not succeed and why not to worry

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Summary

Recovery of state aid is a pillar of the state aid control system. Aid in breach of Article 107 and 108(3) TFEU, incompatible aid, is retrieved in full, whereas aid which is only in breach of the standstill obligation, Article 108(3), is the subject to payment of interest. The Union acknowledges three exemptions to the recovery obligation: a recovery is in breach of Union principles, the aid was paid out over ten years ago and lastly, when a recovery is absolutely impossible. Recovery decisions are not common since the state aid control system systematically aims to solve the situations earlier in the process. Successful defence of recovery cases are a rarity, they represent a narrowly interpreted derogation from a small pool of cases.

The general purpose of the state aid control system is to protect the functioning of the Internal market. The specific aim of recovery is not as clear. Arguably, the specific measure of recovery serves three purposes: to remedy the anti-competitive effect, to retrieve the monetary benefit and to deter.

In a defence of recovery of state aid process, the only parties are the Member State and the Commission. The interest of the beneficiary is not a priority. This thesis analyses whether, while protecting the functioning of the Internal market and while remaining within the limits of the general state aid control system, the measure of state aid recovery can be adjusted to the benefit of the beneficiary. While the case law is to be approached with a certain caution, adjustments are achievable, albeit the scope of change is limited.

Through readjusting the focus of the recovery, from the retrieval of the pure monetary benefit, to remedy the anti-competitive effect and deterrence, the system can provide the beneficiary with a more favourable interpretation of the principles of proportionality, legal certainty and legitimate expectations.

Greater deterrence is achieved by adjusting the interpretation of the principle of legal certainty, by improving the procedural standing of the beneficiary and by letting the Member States face the consequences of their actions. Further, the social and financial stability of the Member States may, in certain cases, be more important to the protection of the Internal market than an immediate recovery, which is an advantage to the beneficiary.

To prevent abuse of the aid mechanism, state aid is under strict supranational control. The ongoing decentralisation of the control system is thus an indication that the system is efficient and stable. This development, in conjunction with analogies from EU funds law, indicates that the Internal market is sufficiently stable to allow for increasingly relaxed interpretations of the exemptions ´absolutely impossible´, legal certainty and legitimate expectations.

Sammanfattning

Återkrav av felaktigt utbetalt statsstöd är en grundbult i statstödssystemet. Statsstöd som är oförenligt med den inre marknaden, artikel 107 FEUF, och som strider mot genomförandeförbudet i artikel 108(3), ska återkrävas i sin helhet. Stöd som enbart strider mot genomförandeförbudet medför krav på att mottagaren ska betala ränta.

Kravet på återbetalning får dock inte strida mot en unionsprincip, den tioåriga preskriptionstiden får inte ha löpt ut och det får heller inte vara omöjligt att verkställa. Det är inte vanligt förekommande att återbetalningskrav bestrids framgångsrikt dels för att systemet är konstruerat för att förebygga att krav uppstår, dels för att undantagen tolkas restriktivt. Kontrollsystemets generella syfte är att skydda den inre marknaden. Det specifika syftet med återbetalning är dock inte helt klarlagt. Föreliggande uppsats identifierar tre syften med återbetalningen: att upphäva den ekonomiska fördelen, att upphäva stödets konkurrensbegränsande verkan och att förebygga felaktiga utbetalningar.

Statsstödssystemet tillmäter inte så stor vikt vid mottagarens intressen. Mottagaren har inte heller starka processuella rättigheter. Den här uppsatsen syftar till att undersöka om det är möjligt att, inom ramen för statsstödsystemet, bibehålla skyddet för den inre marknaden men samtidigt förbättra stödmottagarens ställning; främst möjlighet till ett framgångsrikt försvar. En viss försiktighet bör alltid iakttas men den här uppsatsen ger stöd för att det är möjligt att genomföra vissa begränsade justeringar.

Genom att betona vikten av att upphäva den konkurrensbegränsande effekten och vikten av att förebygga framtida felaktigheter, snarare än att upphäva den rent monetära effekten, blir det möjligt att ändra tolkningen av principen om proportionalitet, rättssäkerhet och berättigade förväntningar.

Systemet skulle i högre grad kunna förebygga utbetalningar av felaktigt stöd om tolkningen av principen om rättssäkerhet justeras. Ytterligare förbättringar skulle uppnås om stödmottagaren fick en förstärkt processuell ställning och om medlemslandet, och inte stödmottagaren, i ökad grad får ta konsekvenserna av felaktiga utbetalningar. En stödmottagare gynnas av att den inre marknaden, i vissa situationer, bättre skyddas av att medlemsstaterna är socialt och ekonomisk stabila än om återkravet verkställs omedelbart.

För att förebygga att staterna missbrukar systemet är statsstödskontrollen centraliserad. Den i viss mån pågående decentraliseringen av systemet tyder på att systemet är solitt. Stabiliteten gör att undantagen om absolut omöjlig verkställighet, att återbetalningen strider mot rättssäkerhetsprincipen eller principen om berättigade förväntningar kan tolkas till förmån för mottagaren, utan att den inre marknadens stabilitet hotas. Slutsatsen stöds av analogitolkning av praxis från strukturfondsområdet.

Preface

I would like to thank my supervisor Henrik Norinder - your advice, support, and time has been invaluable.

I would also like to thank Diana, Linda and Rebecka.

Finally, I would like to thank my parents, whose support so very often is left unacknowledged.

Abbreviations

AG	Advocate General
Art	Article
ECLR	European Competition Law Review
EStAL	European State Aid Law Quarterly
EU	European Union
EUCJ	European Court of Justice
EUR	Euro
GBER	General Block Exemption Regulation
GDP	Gross Domestic Product
OJ	Official Journal
SAAP	State Aid Action Plan
SAM	State Aid Modernisation
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Introduction to state aid recovery

The ugly sister of the competition law family, state aid has been characterised as ineffective, unclear and, to the beneficiary, incomprehensible. The situation is quite noteworthy, considering state aid control shall "above all"[1] prevent barriers impeding access to the market and ensure the competition on the Internal market.

The primary remedy of illicit aid is recovery. Any aid paid out in breach of the substantive law must be recovered in full. In the event of the aid being paid out in breach with the procedural law, the beneficiary must only pay interest. Since illegitimate aid is retrieved to the Member State and not to the Union, hence the system has been described as "draconian"[2]. In 2011, the Commission made six recovery decisions, a decline by five cases compared to the previous year.[3]

While the beneficiary or Member State may object to a recovery decision, the perspective of the beneficiary is not strongly emphasised in the state aid control system. A defence of recovery process requires "the patience of Job" and "deep pockets."[4]

Defence of recovery is an extreme measure; a last resort. A majority of the aid payments do follow proper procedure.[5] Modern state aid regulation has, and is, systematically aimed at reducing the number of cases which may be the subject of a recovery decision. This is achieved by reducing the number of cases which must comply with the regular notification procedure.[6]

A diligent businessman, who wants to understand the probability of him enjoying the benefit of state aid, will not be fully informed by reading this thesis. The scope of the thesis is restricted to an analysis of defence of recovery, which is only a limited piece of the system.

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[1] Hettne, Jörgen, *Public Services and State Aid – is a Decentralisation of State Aid Policy Necessary?* Last accessed 1 November 2013. http://sieps.se/sites/default/files/2011_14epa_0.pdf

[2] Lever, Sir Jeremy. "EU State Aid Law – Not A Pretty Sight" 1 [2013] EStAL, p. 7. Notably, the article is based on a speech.

[3] Buts, Caroline, Joris, Tony and Jegers. Marc. *"State Aid Policy in the EU Member States"*. 2 [2013] EStAL, p. 331.

[4] Hancher, Leigh, Ottervanger, Tom, Slot, Piet Jan. *EU State Aids*. 4th ed, London, 2012. The quotes, p. 12; remaining information p19.

[5] 80% of the aid is granted through schemes or through block-exempted measures. SPEECH/12/424 Alumnia, Joaquín "The State Aid Modernisation Initiative" 07/06/2012. (SPEECH/12/424)

[6] See chapter 2.4 *Evolution of enforcement* .

The aim of this thesis is to identify, describe and analyse the jurisprudence of defence of recovery in order to provide a *de lege ferenda* analysis of how the state aid system may be reformed. Ideally, any reform will increase the protection and standing of the beneficiary while the functioning of the internal market will remain intact.

1.2 Research question and purpose

Whereas the state aid control system in general, and the Commission in particular, take the Internal market and the perspective of the Member State into consideration, what often is ignored is the perspective of the beneficiary. The analysis is conducted with the perspective of the beneficiary, the hopefully diligent businessman, in mind. The purpose is to argue for the beneficiary and investigate to what extent the jurisprudence of defence of recovery may be changed, to the benefit of the beneficiary, without impairing the efficiency of the internal market.

The research question is:
While protecting the functioning of the Internal market and while acting within the limits of the general state aid control system, how may the defence of state aid recovery be adjusted to the benefit of the beneficiary?

The purpose is not to suggest to revolutionise the jurisprudence of recovery but to adhere to largely the same assessments currently embraced by the Court but with increased emphasis on the interest of the beneficiary. State aid control should indeed protect the Internal market but such protection can be achieved through employing a variety of measures. The protection of the Internal market may be achieved through other measures than by adhering to the current interpretation of defence of recovery.

In this thesis the current jurisprudence and development, including analogies with adjacent legal areas, is analysed in order to provide an answer to the research question. To identify which reforms may be made, to the benefit of the Internal market and the beneficiary alike, the aim of recovery as well as the strength of the current Internal market is identified in the analysis.

1.3 Delimitation

The focus of the thesis is state aid regulation at Union level, it does therefore not cover national law with any detail. The recovery of state aid is, however, a shared responsibility, thus it follows that the national law cannot be completely ignored.

Nor is the very definition of state aid the subject of this thesis. The question of a measure's status as state aid is dealt with in other parts of the state aid

system. Any defence of recovery of state aid requires that the measure has been defined as state aid.

Not all principles of Union law and not all aspects of the recovery process are covered. The right to be heard, a duty to motivate decisions and right to a fair trial are examples of issues which are not elaborated on in great detail since those issues must be discussed in a context of human and procedural rights law. While they are of course relevant to the beneficiary, the focus of this thesis is aspects and principles deriving from Internal market and competition law.

1.4 Method and litterature

The *de lege lata* analysis is based on the traditional legal dogmatic method, which consists of analysing the state of the legal area through studying recognised legal sources.

Considering that the focus of the thesis is Union law, the emphasis is to analyse relevant primary and secondary Union sources in addition to official documents on the interpretation and application of EU law, issued by the EU institutions. In addition to relevant court cases, decisions of the Commission are analysed. The Commission is the primary authority in competition law.

A variety of academic literature and articles have been useful when analysing the interpretation of different sources of law. In addition, a blog post by a prominent author is included in the material.

1.5 Terminology

Unlawful aid refers to aid issued in breach of the standstill obligation set out in Article 108(3) TFEU, whereas incompatible aid is aid that is paid out in breach of the material law, as defined by Article 107.

The notion of a *beneficiary* is the undertaking that receives the benefit of the aid. The *recipient* is the undertaking whom receives the aid initially. Normally, the two are the same.

In the Treaty, state aid law is a section of competition law. However, they are often treated as separate legal areas. For the purpose of this thesis Articles 101-109 TFEU, which include but is not limited to state aid law, are referred to as *general* competition law. Issues subject to Articles 101-102 are categorised as *classic* competition law.

The Lisbon Treaty, in force as of December 1, 2009, changed the numbering in the treaty, as well as the names of some key concepts. Throughout this thesis, the numbering will follow the Lisbon system consistently. The Common market is referred to as the modern Internal market, and the former Court of First Instance is renamed the General Court.

1.6 Outline

In accordance with convention, the first chapter introduces the thesis, its purpose and its methodology. The second chapter outlines the legal context. It includes primary and secondary law, policy documents and to some extent, the history of state aid recovery. Throughout the thesis, facts and statistics of state aid cases and recovery rate are included when appropriate.

The first part of the *de legel ferenda*, Chapter 3-5, presents the case law of and academic discussion of the three recognised exemptions to the obligation to recover. The sections which cover national procedural autonomy and proportionality do to some extent include analysis in order to provide context to the facts. Since interim measures are becoming increasingly important, its case law is presented in conjunction with the exemption of 'absolutely impossible' in Chapter 4.

In this thesis, the interests of the beneficiary and of the Member State are not automatically the same. In situations in which the beneficiary cannot be its own advocate, such as procedures of 'absolutely impossible', for the purpose of this thesis, the Member State is by necessity regarded as a representative of the beneficiary's interest.

To be able to learn from similar legal areas, Chapter 6 presents carefully selected analogies from EU funds law, classic competition law and Internal market law.

Recovery shall contribute to the overall goal of the state aid control system, the protection of the functioning of the Internal market, which is not a very specific, albeit vital, goal. To identify the specific aim of the recovery measure, Chapter 7 and 8 present and, to some extent, include an analysis of the jurisprudence of the recovery cases that fall outside of the three recognised exemptions. The types of procedures are transfer of assets, of shares or of the benefit; in addition to insolvency procedures and infringement procedures under Article 260(2) TFEU.

The *de lege lata* section is concluded with a summary.

The last chapter consists of an analysis of the jurisprudence and a *de lege ferenda* discussion.

2 Legal context

2.1 Introduction

State aid is not forbidden; it is accepted by the Union and is encouraged by its Member States. In the year 2011 the Member States spend Euro 64 billion, equal to 0,5% of the GDP, on state aid.[7] Any aid must, however, adhere to the substantive and procedural law. A state aid measure in breach of the procedural law, defined in Article 108 TFEU, is unlawful; aid which is in breach of the substantive law of Article 107 TFEU is incompatible.

The purpose of state aid control is to "ensure that the level-playing field in the Internal market is maintained"[8]. The control shall ensure that the state intervention is kept to a minimum and prevent distortion of the competition. Competition is measured by dual parameters: competition between undertakings[9] and competition among Member States[10].

Flawed competition between Member States damages the internal market. State aid is under strict supranational control, governed by a principle which can be described as a version of the principle of subsidiarity. The principle of subsidiarity is not applicable in competition law, since it is an area of exclusive Union competence. The image serves, however, as a useful frame of the academic discussion.

The actions of the Member State may result in a negative spill over on the Internal market, thus supranational rules are required. State aid policy is heavily supervised by the Commission out of fear of "beggar thy neighbour"[11] policies and a fear of that the special interests may influence the states' subsidy policy.[12] A detailed description of the applicable law follows.

2.2 Substantive law and procedural law

Article 107 TFEU defines the notion of state aid. The criteria are cumulative.[13] For the purpose of state aid control, the notion of "a Member state" refers to any public authority or body appointed by the state which is a part of state resources. The term "any aid" is given an extensive interpretation, broader than subsidy and it extends to a reduction of financial burden. Aid is

[7] Buts, Joris, and Jegers. 2013, p 331, fn 14.
[8] Commission Notice Towards an effective implementation of Commission decision ordering Member States to recover unlawful and incompatible State Aid, 2007/C 272/05, OJ C272 15.11.2007, para. 13. (Recovery Notice)
[9] Hancher, Ottervanger, Slot. 4th ed, 2012, p. 32.
[10] De Cecco, Francesco. *State Aid and the European economic* constitution. Oxford, 2013, p. 42.
[11] Hancher, Ottervanger, Slot. 4th ed, 2012, p.32.
[12] Hancher, Ottervanger, Slot. 4th ed, 2012, p.33.
[13] Case C-280/00 *Altmark* [2003] ECR I-7747, para. 74.

the granting of a selective advantage ”in any form whatsoever”[14] and must, by definition, distort competition and affect trade. Article 107(1) refers to the effect and not the intention of the measure.

State aid is not necessarily incompatible with the Internal market, the prohibition of aid is “neither absolute nor unconditional”[15]. Article 107(2) TFEU sets out categories of aid that are compatible with the Internal market. Article 107(3) identifies categories that may be considered compatible.

The Treaty has given the Commission a great margin of discretion in the area of competition. It has the “exclusive authority” to rule on the “compatibility or incompatibility” [16] of state aid. The Commission, in a two-step procedure, carries out the compatibility assessment. The first step is a preliminary assessment: in case the Commission finds that the measure is not aid or that it is compatible, its final decision will be to that effect. If not, it will proceed with the formal investigation procedure, which is an extensive investigation. The Commission and the Member States are the parties of that process.[17]

Article 108 TFEU regulates the procedural law. New aid has to be notified to the Commission, which assesses its compatibility with the Internal market. Notably, the Member State, not the recipient, notifies the aid to the Commission.[18]

The standstill obligation, in Article 108(3) TFEU, sets out an obligation on the Member States not to implement any aid measures without prior authorisation from the Commission. The obligation in Article 108(3) does have direct effect. The purpose of the notification system is to allow the Commission to perform a compatibility assessment.[19]

There are exemptions to the notification requirement. In accordance with the Ferring-judgement, Services of General Economic Interest escape the aid criteria and hence the obligation to notify. [20] Additional notable examples are the block exemptions. Measures within the orbit of the General Block Exemption Regulation are considered not to disturb the Internal market. They do not fall under the standstill obligation, as defined by Article 108(3) TFEU. Thus, they do not have to be notified but the Member States are under an obligation to report them to the Commission.[21]

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[14] Heidenhain, Martin.. *European State Aid Law: Handbook*. München 2010, p. 14.
[15] Case C-39/94 *Syndicat francais de l’Express international(SFEI) v La Poste* [1996] ECR I-3547, para. 36.
[16] Heidenhain, 2010, p. 3.
[17]Art. 4 -6 Council Regulation (EC) 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty. (Procedural Regulation)
[18]Art. 2.1 Procedural Regulation.
[19] Köhler, Martin “Residex” 1[2013] EStAL p. 99.
[20] Case C-53/00 *Ferring* [2001] E.C.R. I-9067.
[21] Art. 3 Commission Regulation (EC) No.800/2008 of August 6, 2008 declaring certain categories of aid compatible with the common market in application of Arts. 87 and 88 of the Treaty. (General Block Exemption Regulation 800/2008).

2.3 The enforcement

2.3.1 Obligation to recover

Aid that is notified and compatible requires no further action. In the event of the aid not being notified nor compatible, the Commission must order the national authorities to retrieve the aid, illustrated in *Figure 1*.[22] In a situation where the aid is not notified but is later deemed compatible with the Internal market, the newly identified compatibility does not cancel the initial unlawfulness. The criteria are mutually exclusive.

The Commission will not order a full recovery of any state aid measure which is unlawful but compatible. In accordance with the *CELF v SIDE I* case, the Commission only requests that the beneficiary pay interest, which is illustrated in *Figure 1*. The national authorities may recover the full amount, if the course of action is in accordance with national law.[23]

Figure 1.

	Not notified	Notified
Incompatible	Full recovery	No further Union action
Compatible	Recovery of interest	Correct

The Commission reviews all existing aid and can reassess aid that is lawful and compatible. If the Commission, in its new assessment, finds the aid incompatible, the Commission cannot order a retrieval of the aid already paid out but the Member State cannot provide any additional aid, illustrated in upper right corner of *Figure 1*.[24]

2.3.2 Available defences and procedures

Member States and beneficiaries can object to a recovery order. The Recovery Notice acknowledges three exemptions to the obligation to retrieve aid: that a recovery is contradictory to the principles of Union law, ten years has passed

[22] Art. 14 Procedural Regulation.

[23] Case C-199/06 *Centre déxportion du Livre Francais (CELF) v Societe Internationale de Diffusion et d'Edition (SIDE)* [2008] ECR I- 469, para. 55.;
Commission Notice on the Enforcement of State Aid Law by National Courts OJ C85 p01 .9.4.2009, para. 34-35. (Enforcement Notice)

[24] Art. 17-19 Procedural Regulation.

since the aid was granted and a recovery is absolutely impossible.[25] The objector may choose to take advantage of any of the following procedures.

The objector may take action during the incompatibility assessment. The Commission may hear arguments from the beneficiary but only the Commission and the Member States can be parties. The recipient of the aid is merely an interested party, with a right to submit comments.[26] In the compatibility assessment, the Commission shall ex officio assess the risk of breaching a Union principle in the recovery decision.[27]

An action for annulment may be brought in front of the Community courts, in accordance with Article 263 TFEU.

A legal process in a national court may provide further judicial protection, particularly if it includes a preliminary ruling.[28] The national courts execute the recovery decision. It is for the national court to assess the circumstances in the individual case, although it may be necessary to seek guidance through a preliminary ruling as defined in Article 267 TFEU. The national court may ask for the opinion of the Commission.[29]

A regular infringement procedure, formally set out in Article 258 TFEU, is not initiated by the objector but it is an opportunity to present its arguments. If the Member State fails to comply with the judgment, it is open to the Commission to initiate action under Article 260, in which process the Member State may defend itself.

Not all aspects of a recovery decision can be challenged effectively. The Commission holds a broad scope of discretion when implementing and enforcing competition law policies.[30] Notably, any assessment of whether the size of the sum to be recovered is proportionate, would have to include a complex economic assessment. In matters of complex economic assessments, the Court cannot substitute its own economic assessments for those of the Commission's. The Court can only perform a limited judicial review. [31]

The main legal processes are outlined above. When relevant, this thesis may include cases subject to other articles, for instance action under Article 340 TFEU.

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[25] Recovery Notice, para. 18.
[26] Art. 6 Procedural Regulation.
[27] Art. 14.1 Procedural Regulation.
[28] Art. 267 TFEU.
[29] Enforcement Notice, section 3.
[30] Tridimas, Takis. *The General Principles of EU Law.* Oxford, 2nd ed, 2006, p. 174.
[31] Joined cases T-132/96 and T-143/96 *Freistaat Sachsen, Volkswagen AG and Volkswagen Sachsen GmbH v Commission* [1999] ECR II-3663, para. 6.

2.4 Evolution of enforcement

2.4.1 Introduction to the history of enforcement

Recovery is the primary remedy in state aid law, the Commission conducts the compatibility assessment and makes a decision. The Court confirmed the Commission's ability to order recovery in 1972 and yet, the efficiency of the system could be questioned.[32] The 1960s were characterised by a subsidy war. The financial crisis of the 1970s and 1980s left the Commission paralysed. During the 1980s, the Member States' unwillingness to adhere to the procedural rules caused "frustration"[33].

The first phase of modernisation took place during the 1990s. The Court expanded the definition of state aid, which widened the jurisdiction of the Commission. In late 1990s, the Council issued the Procedural Regulation giving the Member States and the Commission "a comprehensive corpus of rules"[34] allowing both parties to know what is expected of them in the recovery process.

To strengthen the state aid control further, the Commission launched two ambitious projects: the State Aid Action Plan 2005-2009 and the State Aid Modernisation, hereafter referred to as SAAP and SAM respectively. [35] As is explained in the subsequent sections, neither the SAAP or SAM are detailed pieces of regulation. Both are policy documents laying out the aims and the structure of the future reforms of state aid control.

The SAAP is a result of the Commission's frustration over lack of authority and it is framed as a consultation document. It is at once "a conscious attempt at reform and a wish list"[36] which lays out four major aims.

The SAM is a selective continuation and improvement of SAAP. Here follows a short summary of the aims of each plan and some of the most relevant results achieved during each project.

2.4.2 The State Aid Action Plan 2005-2009

The first aim is to achieve less and better targeted aid.[37] This is the paramount rationale of the plan: the Union shall simply spend less money on aid. Any

[32] Case 70/72 *Comisison v Germany* [1973] E.C.R 813, para. 13.
[33] Szyszczak, Erika. *Research Handbook on European State Aid Law*, Cheltenham 2011, p. 6.
[34] Szyszczak, 2011, p. 8.
[35] COM(2005)107 final Commission State Aid Action Plan – Less and better targeted state aid: a roadmap for state aid reform 2005-2009. 7.6. 2005. (SAAP).
COM(2012)209 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions EU State Aid Modernisation 8.5.2012. (SAM) .
[36] Szyszczak, 2011,p.10.
[37] SAAP, para. 18.

aid that is granted shall contribute to the goals set out by the Union. To allow well-targeted aid to escape the notification obligation, the Commission has set up the General Block Exemption Regulation, hereafter referred to as GBER.[38] The GBER collected and expanded the previously scattered multitudes of exemptions.[39] Notably, the Commission estimates that approximately 40% of all GBER cases are "potentially problematic" [40].

Actions taken under the SAAP resulted in alterations of the *de minimis* Regulation. Measures which fall under the *de minimis* threshold are not subject to the notification obligation. In 2006, the Commisison raised the threshold by EUR 100 000 to 200 000.[41] The new *de minimis* Regulation of 2013 does not include a further increase of the threshold.[42]

The second aim is to implement a refined economic approach.[43] The Commission assesses the compatibility of the measure, in accordance with the approach. Expressed in quite simple terms, the approach identifies whether the aid contributes to or disturbs the Internal market. It is an effects-based approach. Notably, the approach is applied in a compatibility assessment but it is not used to determine the sum to be recovered.[44]

The third and fourth aims are the creation of procedures that are more effective and in addition, a shared responsibility between Member States and the Commission.[45] To remedy some of the procedural inefficiency, the Commission has created a special recovery unit. Further, the Member States are to take a greater responsibility. To provide guidance to the Member States, the Commission has issued several notices such as the Enforcement Notice[46].

Another example of a notice is the Recovery Notice, which clarifies the principles regulating recovery. [47] With it, the states are given the right to ask the Commission for advice on state aid issues.[48] In addition, the Commission has published a notice on Simplified Procedure for Certain types of State Aid[49] laying out a simplified notification procedures for measures that are

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[38] General Block Exemption Regulation 800/2008.
[39] Szyszczak, 2011, p.13.
[40] SPEECH/12/424
[41] Art. 2.2 Commission Regulation (EC)No 1998/2006 of December,15 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid. OJ L379 p5, 28.12.2006. (De minimis Regulation 1998/2006)
Commission Regulation (EC) No 69/2001 of January 12, 2001 on the Application of Article 87 and 88 of the EC Treaty to de minimis aid, OJ L10, p. 30. 13.1.2001 (De minimis Regulation 69/2001)
[42] The ceiling remain intact in the new Commission Regulation (EC) No XXX/2013 of 18 Dec 2013 n.y.r (De minimis Regulation XXX/2013).
[43] SAAP, para. 18.
[44] Hancher, Ottervanger, Slot. 4th ed, 2012, pp. 40-41.
[45] SAAP, para. 18.
[46] Enforcement Notice.
[47] Recovery Notice.
[48] Recovery Notice, para. 80.
[49] Notice from the Commission on a simplified procedure for treatment of certain types of State Aid OJ C 136 p03 16.6.2009. (Simplified Notice)

most probably compatible. To a great extent, the notices are codifications of existing case law but since they do provide clarity, they are making the enforcement more efficient.

2.4.3 State Aid Modernisation 2012

The State Aid Modernisation set out to achieve three goals. [50] First, to foster sustainable, smart and inclusive growth in a competitive Internal market. The modernisation seeks to reconcile the role of targeted public spending and the task of generating growth, with the need to bring state budgets under control.

Second, to refocus the Commission's ex ante scrutiny on cases with the greatest impact on the Internal market, whilst strengthening the Member States cooperation in state aid enforcement. The result is few concrete actions but one suggestion has materialised. The Commission proposes that not all complaints must result in a formal decision. The Commission would like to be able to prioritise the significant cases, which would free up Commission resources.

The last aim is to streamline the rules and provide for faster decisions. A complex legal framework governs the state aid. With SAM, the Commission wishes to provide a better understanding of the notion of state aid. The exact format of such a clarification is not yet determined.

2.4.4 The financial crisis

It is important to look at the development and restructuring of EU state aid recovery policy over the last decade, which includes changes caused by the financial crisis. With the collapse of the bank Lehman Brothers in 2008, Europe fell into a financial crisis. The severity of the financial situation was grave enough to activate the application of Article 107(3)b TFEU.

In response to the crisis, the Commission issued the Banking Communication, a part of the provisional state aid regulation. the financial sector.[51] It stated the Commission shall execute a compatibility assessment within 24 hours, or over a weekend.[52] Despite the turbulence, the Commission managed to maintain the state aid discipline of the Treaty.[53] Significant portions of the provisional framework are no longer applicable.

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[50]SAM, para. 8 and 14.

[51] Commission Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270 p. 8. 2008. (Banking Communication)

[52] Banking Communication, para. 53.

[53] Hancher, Ottervanger, Slot. 4th ed, 2012, p. 26.

3 Defence 1: in breach of Union principles

3.1 Introduction to Union principles

One exemption from the obligation to order a recovery is a situation in which a recovery would contravene general principles of Union law. Which are the principles of Union law? Depending on the criterion used, it is possible to identify a plethora of principles. In this thesis only a selected few of the principles, all of which are discussed in state aid cases and decisions, are explored in detail.

This chapter primarily concentrates on principles that have an effect on the state aid case law and academic discussion. Certain principles are included since the principle has been used to argue at least one defence case successfully. Others are chosen because they are at the heart of an interesting academic debate. Both categories contribute to identify the current state of defence of recovery jurisprudence.

As a pedagogical note, the two concepts of *condictio indebiti* and good faith are useful to keep in mind throughout the thesis. Naturally, recovery of state aid is not based on the same principles and legal methods as *condictio indebiti* or good faith but the imagery may nevertheless facilitate a deeper understanding of the subject matter.

The norm is to recover incompatible aid. Beneficiaries of aid which is only unlawful but not incompatible are subjected to a payment of interest. To decide not to recover incompatible aid is a derogation and as any derogation, in accordance with Union principles, it must be interpreted narrowly.[54]

3.2 Meet the diligent businessman

Throughout the case law, the courts are referring to a diligent businessman. The diligent businessman is a theoretical person which serves as a benchmark as to what level of knowledge and understanding of Union law the EUCJ expects a businessman to have. A businessman not living up to the courts' standards may not, at least not successfully, claim the protection of the principles of good faith or legitimate expectations.

The courts do not provide any evidence that the diligent businessman is, by any standards, an accurate representation of those businessmen operating in

[54] Winckler, Antoine and Laprévote, Francois-Charles "Reconciling Legal Certainty, Legitimate Expectations, Equal Treatment and the Prohibition of State Aids" 2[2011] EStAL p. 324.

the Union, nor that the expectations the courts put upon him are realistic. The level of knowledge which the courts claim a diligent businessman should have is simply the level of knowledge the EUCJ wants any businessman to have.[55]

3.3 The principle of legal certainty

In affinity with the rule of law and as a fundamental principle of the Union law, legal certainty expresses that the "subject to the law must know what the law is so as to be able to plan their actions accordingly"[56]. The subjects of the law must be able to predict the content of the law and the subjects must be allowed to be able to foresee the nature of, and changes of, relationships governed by Union law.

The principle of legal certainty cannot be explained without referring to the principle of legitimate expectations. Within state aid law, the beneficiary may present arguments based on the principle of legal certainty and treat it as an independent principle but arguments are frequently based on a combination of the two principles legal certainty and legitimate expectations.

The principle of legal certainty does share similarities with legitimate expectations. As a result, the Court does not necessarily distinguish between the two principles. The Court often interprets legitimate expectation as a "specific expression"[57] of legal certainty. This section concentrates primarily on the latter category and its interpretation, as an isolated and independent principle, separate from the principle of legitimate expectations.

In the specific context of defence of recovery of state aid, legal certainty requires Union actions to be sufficiently clear, precise and predictable.[58] The Commission's decisions are not always clear and precise. A concerned party may present arguments in favour of an annulment of the recovery decision due to that the decision is lacking sufficient clarity, based on the principle of legal certainty.

The recovery process is governed by a system of bilateral character. The Commission assesses the compatibility of an aid measure and makes a decision on whether to recover or not. In its decision, the Commission must provide a method which could be used by the national authorities to identify whom to recover from and provide a method as to how to calculate the amount to be retrieved. The national court performs the final calculations and the identification of the actual beneficiary. It is not within the jurisdiction of the Commission to execute the recovery decision. Additionally the Member state often have more information. Thus, the Commission does not have to identify the exact amount to be retrieved or even define who the beneficiary is.

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[55] Petzold, Hans Arno "Judgment of the Court of European Union in C-210/09 Scott and Kimberly Clark", 1[2011] EStAL, p. 90.
[56] Tridimas, 2006, p. 241.
[57] Tridimas, 2006, p. 242.
[58] Dilley, James "Comments on the France Télécom Case",4[2012] EStAL, p. 916.

Union legislation and principles do not allow the Commission to issue decisions that are not sufficiently specific. An unclear decision is a breach of the principle of legal certainty. As stated above, in its decision the Commission does not have to deliver the exact number or the exact undertaking. The decision must only "delimit the range within which the final amount" is "to be established" [59]. The information is sufficiently clear and specific if it enables the national authority "without too much difficulty" [60] to determine the amount of aid to retrieve.

If a Member State fails to provide the Commission with the information required to form a well-founded and clear decision, the Court accepts that the Commission makes a decision that is less clear. Within certain limits, the Commission is allowed to formulate a decision of a clarity and quality that reflects the quality and clarity of the information. To sum up, non-exact information renders a non-exact method of calculation.[61]

As seen above, the level of uncertainty tolerated does have limits. So far, the case law has not provided a clear indication as to where these limits are drawn. The case *Commission v Salzgitter* clarifies the difficulty of identifying that line.[62] Its chronology is as follows. The Commission issued a recovery decision. The General Court annulled the decision, due to a breach of legal certainty. The Court set aside the judgement of the General Court and referred the case back to the General Court. In its final decision, the General Court denied the beneficiaries' application to annul the decision.

This paragraph seeks to examine in more detail the reasoning of the General Court's first decision, in which it annulled the Commission's decision.[63] According to the General Court, the Commission's decision lacked clarity. The Commission did not, despite having sufficient information to do so, object to a prolongation of the aid. The Commission did later decide to object but the objection was merely implied and the initial non-objection decision was only partly withdrawn. The General Court obligated the Commission to clarify the situation before ordering a recovery. [64]

To further continue the above case, this paragraph intends to examine the reasoning of the General Court's second decision, in which the court decides to not annul the Commission's decision. The reasons are as follows. Germany did not notify the aid to the Commission, despite being obliged to do so. Granted the Union is partly to blame, since it had allowed a certain amount of time to elapse before making a decision, but the length of the time the Commission took to make a decision is not alarming. The Commission can

[59] Case C-81/10 P *France Télécom v Commission* n.y.r, para. 101.
[60] Case C-81/10 P *France Télécom v Commission* n.y.r, para. 101.
[61] Case C-81/10 P *France Télécom v Commission* n.y.r, para. 101-102.
[62] Case C-408/04 P *Commission v Salzgitter* [2008] ECR. I-2767, para. 99.
[63] Case T-308/00 Salzgitter AG v Commisison [2004] ECR II-1933, para. 174-180.
[64] Tridimas, 2006, p. 295.

"not delay indefinitely the exercise of its powers"[65]. Thus the beneficiary failed to prove that the Union had breached the principle of legal certainty.[66]

As another example, the Commission applies the principle of legal certainty in a decision about a French tax scheme.[67] According to the Commission, some beneficiaries under the scheme were misled to believe the aid was lawful.[68] Additionally, the Commission has delayed exercising its powers to examine the scheme, rendering exceptional circumstances, which constitute a breach of the principle of legal certainty. [69]

3.4 Principle of legitimate expectations

3.4.1 The central principle

Legitimate expectation is often argued in tandem with other principles, often legal certainty, good administration and equal treatment. Where several principles are argued together with legitimate expectation, not all of the principles are presented separately, rather they will be presented in conjunction with the principle of legitimate expectations.

Notably, the principle of legitimate expectations has received far more space in this thesis than the other principles. Since it is the most often argued principle, the space allocation is proportionate. This section discusses the application of the principle, its definition and how it is argued.

Member States and private beneficiaries have different opportunities and ability to successfully argue legitimate expectations. A Member State may not invoke legitimate expectations on behalf of the recipient. This is to prevent the Member States from relying on their own unlawful actions.[70] The rules do not completely exclude a situation in which a Member state successfully argue legitimate expectations. It will only happen, however, if the Union institutions created an expectation with the Member State itself, and not the beneficiary.

Consequently, the burden of invoking legitimate expectations falls entirely upon the beneficiary undertaking. In contrast to a Member State, the beneficiary may plead legitimate expectations. As a rule, however, the argumentation is not successful, not for the beneficiary nor for the Member State.[71]

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[65] Case T-308/00 *RENV Salzgitter AG v Commisison* n.y.r,, para. 67.
[66] Case T-308/00 *RENV Salzgitter AG v Commisison* n.y.r,, para. 34 and 45-46.
[67] C(2006) 6629 Commission decision of 20 December 2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code - State aid C46/2004 (ex NN 64/2004)08, CP 244/07) OJ L 112 p41. 30.4.2007. (C(2006) 6629)).; Heidenhain, 2010, p. 646.
[68] C(2006) 6629The Swedish version reads: "avsiktligt vilseletts" para. 188.
[69] C(2006) 6629, para. 188 and 194.
[70] Case C-5/89 *Commission v Germany* [1990] ECR I-3437, para. 17.
[71] Tridimas, 2006, pp. 293-295.

In principle, the beneficiaries cannot enjoy the protection of the principle of legitimate expectations unless the aid is notified in accordance with proper procedure, which are laid down in Article 108(3) TFEU. Aid not notified to the Commission can later be deemed compatible or incompatible. In the event of the latter, the Member State must retrieve the aid from the recipient. A recovery is thus a foreseeable risk that the beneficiary, by accepting the not notified aid, has agreed to endure. [72]

A diligent businessman should, according to the Union, be able to determine whether the state has observed proper state aid notification procedures. [73] The formal system defined by Article 108(3) TFEU is more than merely a simple procedural rule. The standstill obligation does not serve the purpose of safeguarding the interest of private competitors but rather, it primarily serves the purpose of securing the Commission's competence to asses new aid.[74]

Normally, proper notification of the aid is a prerequisite of holding legitimate expectations. There are however, instances where the expectation may be recognised as legitimate, despite the lack of any notification. The proof is in the fact that EUCJ examines the possibility to apply legitimate expectations. Since lawful aid cannot be recovered; if unlawful aid could not be protected from recovery by legitimate expectation, contemplating to invoke the principle in a potential recovery situation would be redundant. Assuming the courts do not waste their time, it cannot be excluded that the principle can be used to protect unlawful aid from recovery. Its role must however be limited to exceptional circumstances.[75]

To explain in which situations a beneficiary may hold legitimate expectations, the concept of good faith is a useful allegory. Similar to the concept of good faith, legitimate expectations is not concerned with subjective faith. The law pays attention to what the buyer should have known, ignoring what the buyer did in fact know. In state aid recovery, legitimate expectations are not based on what the beneficiary de facto knows but what the theoretical diligent businessman is expected to, in other words should, know.[76]

As will be proven, Union measures must not violate the expectations which a reasonable person might hold, conditioned that the expectation is founded on the actions and behaviour of a relevant public authority. In situations where a change of a situation should have been foreseeable, the person may not hold a legitimate expectation. Further, an acknowledgement of the principle requires that there is no overriding matter of public interest preventing its application.[77]

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[72] Tridimas, 2006, p. 295.
[73] Heidenhain, 2010, p. 643.
[74] Köhler, 2013, p. 99.
[75] Heidenhain, 2010, p. 643.
[76] Case C-24/95 *Alcan Deutschland v Commission* [1997] E.C.R. I-1591, para. 25.
[77] Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, para. 147-148.

3.4.2 Legitimate Union sources

A beneficiary can hold legitimate expectation only if the expectations derive from a Union source. However, not all Union actions are valid sources. This section covers which sources of Union actions that may create legitimate expectations.

Certain Commission actions can be a valid source of expectations but not necessarily all Commission actions have the same legitimacy. Any suggestions from the Commission to a Member State during a state aid negotiation with the Commission are not a valid source of legitimate expectations. A decision by the Commission is, however, a legitimate source.[78]

The Commission has jurisdiction to create soft law. The soft law is self-binding for the Commission, when it makes decisions in individual cases. Such a piece of law may create legitimate expectations. If the Commission's piece of soft law covers an area outside of the jurisdiction of the Commission, the soft law does not give rise to a legitimate expectation[79]. Equally, a Council action can have two different results. If it is of political nature, it is not considered as a valid source of legitimate expectations.[80]

To be a valid source of legitimate expectation, the measure must be within the jurisdiction of the issuing body. The Commission and the national courts may interpret the notion of state aid in order to determine whether the standstill obligation is respected.[81] The final interpretation of state aid is within the power of the Court. In SAM, the Commission clarifies it is intent to clarify the notion of state aid. If the Commission issues a communication on the subject of the definition of state aid, it is on "thin ice" [82] and may only cause confusion.

The principle of legitimate expectation does not only protect a beneficiary. When applied together with the principle of equal treatment, it may serve to protect a third party from the combined actions of the beneficiary and the Union. In *CIRF* the Commission and the Member state agree upon a certain measure and in effect, upon a certain interpretation of the relevant rules.[83] The interpretation, which the decision is based upon, is not in accordance with established existing self-binding administrative regulations. Such an action is not compatible with the principle of legitimate expectations and equal treatment. A third party is entitled to receive an interpretation that is consistent and of a non-random manner. Hence, despite the fact that the two

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[78] Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, para. 153 and 155.

[79] Case 310/85 *Deufil v Commission* [1987] E.C.R. 901.

[80] Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, para. 150 and 152.

[81] Enforcement Notice, para. 10.

[82] Luja, Raymond "Does the Modernisation of State Aid Put Legal Certainty and Simplicity at Risk?" 4[2012] EStAL, p. 765.

[83] Case C-313/90 *CIRFS v Commission* [1993] E.C.R. I-1125, para. 32 and 45.

parties of the procedure agree, the decision is a breach of the principle of legitimate expectations. [84]

3.4.3 Ignorance: subjective good faith

Legitimate expectations must derive from the actions of the Union and the nature of the system. Several beneficiaries have argued that they simply had no knowledge of the structure of the state aid system. Specifically, they were unaware of that the Commission assess the compatibility of the aid. Insufficient knowledge of the control system and of the laws of state aid are not sources of legitimate expectations. Good faith is irrelevant. A difficulty to understand the situation does not result in legitimate expectations, nor does the fact that the company is small and has not received legal advice result in a kinder ruling.[85]

3.4.4 Good faith

The beneficiary can rely on the protection of the principle of legitimate expectations only if said businessman acts on the expectation. The Commission will not take merely theoretical scenarios into consideration when assessing if it is precluded from ordering a recovery. While that is arguably an unproblematic statement, particular assessment problems arise in the cases where the beneficiary is exposed to difficulties due to changes of the system or assessments of the nature of the state aid, changes that may be considered foreseeable. If the changes are, to a diligent businessman as the concept is defined by the Court, possible to predict, the argument to protect legitimate expectations has no bearing. This section seeks to investigate situations in which the beneficiary believes it acts in accordance with the rules applicable while, due to rapid changes of the control system, the opposite is true.

Aid which is granted within the framework of a Swedish aid scheme is initially identified as existing aid. Notably, Member states are under no obligation to notify existing aid to the Commission. As a result, the beneficiary does not have to make sure the aid has been properly notified. Due to Union actions, the aid was no longer identified as existing aid. The Union failed to follow standard protocol, including to properly publish the decision. Nevertheless, the changed status of the aid is legally binding. Normally, such a decision is only legally binding following a publication. Since the change was not published, the beneficiary could not know that the status of the aid was altered, from existing to new. Thus, the beneficiaries have legitimate expectations of having received aid which has been notified and assessed in every way required. [86]

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[84] Szyszczak, 2011, p. 374.

[85] Case T-55/99 *CETM v Commission* [2000] E.C.R. II-3207, para. 126.; Case T-109/01 *Fleuren Compost v Commission* [2004] ECR II-0127, para. 140.

[86] C(2004) 2210 Commission decision of 30 June 2004 on the aid scheme implemented by Sweden for an exemption from the tax on energy from 1 January 2002 to 30 June 2004, OJ. L165 p.21 25.06.2005,para. 63.

3.4.5 Change is not foreseeable

The very definition of state aid is not the topic of this thesis. The consequences of a changing definition of state aid, however, is. The Commission has consistently upheld the principle that "neither the lack of any precedent involving the application of the State aid rules in similar cases nor the alleged lack of clarity in Community policy on State aid"[87] results in a legitimate expectation. It is a principle not without exceptions.

An interpretation of a court case may render legitimate expectations, if it is formulated in a manner that leads the beneficiary "in good faith" to believe "that the national measures at issue before national court would cease to be selective, and therefore cease to constitute State aid"[88]. Since the beneficiary acts, or in this case does not act, in good faith, the Commission does not order a recovery of said measure.

In the situation at hand, the Commission abstains from a recovery because that particular type of aid measure is examined for the first time. Since the situation is entirely new, a diligent businessman cannot understand that the state does not act correctly. [89] It is a line of reasoning which is supported by AG Jacobs and an argument, or at least the overriding principle of that argument, which the Court accepts. AG Jacobs argues that in cases where a measure does not "self-evidently" constitute state aid, a recovery can be "inappropriate"[90].

3.4.6 Time as an exceptional circumstance

As previously stated, the existence of legitimate expectation normally requires proper notification but exemptions to that rule cannot be excluded. Extremely lengthy proceedings may result in such an exemption. If the aid is not notified in accordance with Article 108(3) TFEU, the Commission is not bound to deliver a decision within a set time frame. Despite the lack of formal time limits, the Commission is, however, not allowed to delay the exercise of its power indefinitely. This section presents the relevant case law.

Case *RSV* is a seminal state aid case. It is possibly the only successful case which concerns not notified aid. As could be expected, the circumstances of the case are special. In the *RSV* case, the Commission waited 26 month before submitting a decision regarding the compatibility of the unlawful aid. In the judgment, despite the fact that the Procedural Regulation is silent on the

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[87] Heidenhain, 2010, p. 646.

[88] C(2004)325 Commission decision of 9 March 2004 on an aid scheme implemented by Austria for a refund from the energy taxes on natural gas and electricity in 2002 and 2003, O.J. L190 p.13 22.07.2005, para. 66.

[89] C(2004)3060 Commission decision of 2 August 2004 on the State Aid implemented by France for France Télécom, OJ. L 257 p11 20.9.2006, para. 263-264. (C(2004)3060). An application for annulment of the decision is pending.

[90] Case C-39/94 *Syndicat francais de l'Express international(SFEI) v La Poste* [1996] ECR I-3547, para. 70-71.; Opinion of AG Jacobs in C-39/94 *Syndicat francais de l'Express international(SFEI) v La Poste,* para. 76.

subject as to which length of time may be considered inappropriate, the Court raises objections. The Commission defends itself by claiming that the complexity of the situation warrants a lengthy decision period. [91]

In its judgment, the Court fails to see the complexity of the case, stating that the contested aid is a supplement to previously authorised aid, which would make the decision process a fairly simple one.[92] The Court considers the action of the Commission to constitute exceptional circumstances and thus the beneficiary may rely on its legitimate expectations as of the aid's compatibility.

In contrast to the beneficiary of the *RSV* case, the undertaking in case *CELF v SIDE II* fails to prove it holds an expectation which is legitimate.[93] Notably, in CELF v SIDE II, the time to reach a final decision on the compatibility of the aid, 20 years, is considerably longer than that of the *RSV* case.

In *CELF v SIDE II* the parties utilise the judicial system of state aid control to its full potential. The process includes court annulments of three consecutive Commission decisions and in total, the case lasted over 20 years. In the case, the applicant argues that the repeatedly favourable decisions give rise to a legitimate expectation of the aid's compatibility. While the Court agrees that it is a "very unusual situation"[94] the complexity of the proceedings does not per se result in a legitimate expectation. If anything, the complicated nature of the case "should increase the recipient's doubts as to the compatibility of the aid."[95]

Additionally, in each individual step of the process, the Court finds, normal procedures are followed. As concluded by the Court, time passing due to the procedural tie of the Union judicial system is not an exceptional circumstance.

The level of cooperation on the part of the Member State is essential. If the Member State causes delays by not cooperating to satisfaction, the beneficiary may not hold legitimate expectations.[96] Logically, the prolonged delay in *RSV* is a result of Union action and hence the case is a success. The length of the unsuccessful *CELF v SIDE II* -case is due to the very time-consuming nature of the judicial system.

A lengthy process may result in legitimate expectations. Theoretically, they may in addition be a breach of the principle of good administration. The Court

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[91] Case 223/85 *Rijn-Schelde-Verolme (RSV) v Commission of the European Communities* [1987] ECR 4617.
[92] Case 223/85 *Rijn-Schelde-Verolme (RSV) v Commission of the European Communities* [1987] ECR 4617, para. 15-16.
[93] Case C-1/09 *Centre déxportion du Livre Francais (CELF) v Societe Internationale de Diffusion et d'Edition (SIDE) [2010] ECR I-2099.*
[94] Case C-1/09 *Centre déxportion du Livre Francais (CELF) v Societe Internationale de Diffusion et d'Edition (SIDE) [2010] ECR I-2099*, para. 52.
[95] Giraud, Adrien. "Judgment of the Court of the Eurpean Union in case C-1/09 CELF v SIDE" 3[2010] EStAL p. 675.
[96] Case T-55/99 *CETM v Commission* [2000] E.C.R. II-3207, para. 141-143.

acknowledges that there are cases where the procedure is not followed to perfection. It does not, however, acknowledge that such cases are a breach of the principle good administration or that it may lead to an annulment of the decisions.[97] In order to provide a context it may be noted that the General Court can take, on average, 48 months to issue a judgment in a fully contested case. Further appeal will usually take approximately another 18 months, a total of 66 months. In comparison, dumping cases take on average 18 months, competition cases may last up to 56 months.[98]

3.4.7 Expectations must be reasonable

To become legitimate, the expectation must be reasonable. The definition of the concept reasonable depends on the situation. A businessman cannot reasonably expect a piece of legislation never to change. As this section will show, expectations of transitional measures to ease the change may or may not be reasonable.

In *Belgium and Forum 187 v Commission* the Court confirms that an expectation of transitional measures is reasonable. In the event the Commission changes its policy, the beneficiary shall enjoy some transitional measure[99]. In fact, the Commission has an obligation to provide transitional measures and they have to be adequate.[100] In the case mentioned, the Commission provides a very short transition period, which does not give the beneficiary sufficient time or opportunity to adapt, and hence it is not in accordance with the beneficiaries' reasonable expectations. [101]

Notably, the aid in *Belgium and Forum 187 v Commission* is initially considered not to be state aid. It is later deemed as state aid under Article 107 TFEU. The transition from being considered as non-aid to state aid is arguably essential to the assessment of which expectations are reasonable. It has been suggested that in cases "where the Commission has taken a non-objection, rather than a no-aid decision"[102] the undertakings are less likely to be able to rely on legitimate expectations in a defence of a recovery process. In the case of a non-objection, the derogation from the normal system is greater. The following case illustrates that not all expectations of transitional measures are reasonable.

In the subsequent case of *Nuova Agricast and Cofra v Comission* two companies complain about the transition from a 1997-1999 aid scheme to a 2000-2006 aid scheme. Following a failed application under the 1997-1999

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[97] Hancher, Ottervanger, Slot. 4th ed, 2012, p. 14.
[98] Hancher, Ottervanger, Slot. 4th ed, 2012, p. 13 fn 19.
[99] Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, para. 149.
[100] Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, para. 161-163.
[101] Joined cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, para. 161-163.
[102] Winckler and Laprévote, 2011, p. 325.

scheme, both undertakings withdrew their application, in order to be able to re-apply later.[103]

No new opportunity, however, presented itself, as the scheme of 1997-1999 provided no further call for applicants. In addition, the new scheme of 2000-2006 was the subject of slightly stricter rules imposed by the Union. In the court process, the undertakings argued the importance of protecting their legitimate expectation, in this case to benefit from suitable transitional measures.

The Court does not agree. No precise assurance has been given to them by any Union institution; there was no concrete promise that they would in fact be able to re-apply or that there would be a new call for applicants. A scheme is by definition limited in time and that limitation is public information. It is not reasonable to assume anything other than that a new scheme is guided by a new set of rules.[104]

3.4.8 The individual's interest must prevail

In a proportionality assessment, the principle of legitimate expectations has to be balanced against the interest of the public. The interest of the individual has to prevail over the interest of the public. The courts rarely perform this proportionality assessment explicitly; often it is an implied exercise. *P & O European Ferriesis* is one of few cases where the balancing of the interest is easily identifiable. [105]

The public interest is not static as it varies with the changing aim of the Union measure evoking the expectations. Starting with the interest of the public, the General Court identifies the interest of third parties as a general interest. In the assessment of which interests shall prevail, the General Court emphasises that the competitors has a right to challenge positive decisions; not necessarily out of concern for the competitors. The main purpose appears to be to uphold the system of the review conducted by the Community judicatures in order to prevent "the operation of the market from being distorted by State aid"[106].

3.5 National procedural autonomy

It is not within the Court's jurisdiction to assess national law. It is however, within its duty to assess the scope and the interpretation of Union law. In a system of shared responsibility, national law and Union law will inevitable collide. The following section assesses how the national procedural autonomy

[103] Case C-67/09 P *Nuova Agricast Srl and Cofra Srl v Commission* [2010] ECR I-9811.
[104] Case C-67/09 P *Nuova Agricast Srl and Cofra Srl v Commission* [2010] ECR I-9811, para. 71 and 80.
[105] Joined cases T-116/01 and T-118/01 *P & O European Ferries and Diputación Foral de Vizcaya* [2003] ECR II-2957.
[106] Joined cases T-116/01 and T-118/01 *P & O European Ferries and Diputación Foral de Vizcaya* [2003] ECR II-2957, para. 208.

and the effectiveness of the state aid control system are balanced. To provide context, some of the arguments relevant to the academic debate are presented.

Because of the direct effect of the standstill obligation and of the bilateral character of the recovery process, national courts find themselves under an obligation to apply national law and Union law simultaneously. A recovery shall be executed in accordance with the procedures under the national law of the Member State, provided said laws allow for an effective recovery.[107]

Union law does not preclude the application of national law or principles but requires that the interest of the Union is taken into full consideration. The Court applies "selective deference"[108]. In case *Alcan* full respect of the Union principle of effectiveness requires that the national principle of legitimate expectation is left unapplied.[109] Arguably, the Court is minimising the national autonomy, since such actions are beneficial to the interest of the Union.[110]

The relationship between national law and Union law may appear confusing. This is largely because the same principles, in name, exist at national and Union level alike. They are, however, the same in name only and are in effect two different principles. Since one derives from national law and the other from Union law, they have two independent meanings and effects.

Res judicata is an essential principle, acknowledged at Union level. The case *Lucchini* clarifies that *res judicata*, deriving from national law, does not allow Union rules to be left unapplied. Arguably, it could be concluded that the Court is prioritising the effectiveness of the system over the national procedural autonomy. [111]

Also, the case of *Lucchini* is arguably not about the conflict between national law and Union law but rather it is about the relationship of procedural law and substantive law. The Union law lacks procedural rules and hence, cannot interfere with national procedural autonomy. In the case, it is in fact jurisdiction and the principle of consistent interpretation which is discussed. Whereas a national court can execute a recovery, it cannot legitimate rule on the substantive law of the initial case, thus it lacks jurisdiction to create *res judicata*.[112]

3.6 Proportionality

Despite the lack of successful cases, the following section will discuss the possibility of increased nuance in the proportionality assessment.

[107] Art. 14.3 Procedural Regulation.
[108] Tridimas, 2006, p. 296.
[109] Case C-24/95 *Alcan Deutschland v Commission* [1997] E.C.R. I-1591.
[110] Tridimas, 2006, p. 296.
[111] Case C-119/05 *Lucchini* [2007] ECR I-6199.
[112] Galetta, Diana-Urania. *Procedural Autonomy of EU Member States: Paradise Lost?* Berlin, 2010, p. 64.

Proportionality is a reoccurring argument and since it is simply a centerpiece of the Union legal principles, it should always be addressed.

In regards to recovery of state aid, proportionality refers to whether the recovery causes more harm than the initial aid did. The means used to achieve the end must not be more invasive than what is necessary and appropriate. The proportionality of a measure is determined by the aim of the measure and of the significance of the aim. While a general aim of recovery is to ensure effectiveness and credibility of the system, a quite generic aim, the more precise purpose of a recovery remains "unclear"[113].

Unlawful and incompatible aid must be recovered in a flat recovery, which is when the sum to recover is the exact equivalent of the aid, with added interest.[114] Beneficiaries have argued that the flat recover is not proportionate, since the amount to be recovered does not equal the competitive-advantage the beneficiary received. While the amount of aid, in pure monetary terms, "normally"[115] corresponds to the competitive benefit of the recipient, that is however not always the case.

Proportionality in recovery is not to be confused with proportionality when establishing the size of the aid. The latter "require different measures to be adopted /…/ to restore the situation prevailing prior to the payment of the unlawful aid"[116]. While different sums must be retrieved from different types of state aid actions, the sum does not vary on account of the individual effect it has on the competitive situation.

The case law on proportionality, as it stands, is clear. The courts have consistently held that proportionality cannot stand in the way of recovery. The recovery of the aid "cannot in principle be regarded as disproportionate"[117]. Provided that the incompatibility of the aid is established, a recovery requires no further motivation. A recovery is simply "the logical consequence"[118] of the aid's illegality and incompatibility, and is not a penalty. [119] The state aid is not a reward nor a right, the aid is merely a benefit. [120]

It is established that the aid may have an effect beyond its pure monetary value. A Belgian study indicated that two years post the granting of the aid, the beneficiaries' market shares had increased.[121] Further, since the beneficiary must fulfill certain conditions in order to initially receive the aid the "face value"[122] might greatly exceed the benefit of the recipient. The

[113] Hancher, Ottervanger, Slot. 4th ed, 2012, p. 23.
[114] Art. 14 Procedural Regulation.
[115] Heidenhain, 2010, p. 650.
[116] Case T-55/99 *CETM v Commission* [2000] E.C.R. II-3207, para. 167.
[117] Heidenhain, 2010, p. 647.
[118] Case C-303/88 *Italy v Comisison* [1991] E.C.R. I-1433.
[119] Case C-75/97 *Belgium v Comission (Maribel)* [1999] ECR I-03671, para. 65.
[120] Tridimas, 2006, p. 174.
[121] Buts, Joris, and Jegers. 2013, p. 332.
[122] Lever, 2013, p. 7.

recovery of the original sum of aid is a “poor proxy for anticompetitive effects caused by the aid”[123].

The fact that the harm caused by the recovery may exceed the mere reversal of the aid is of no interest to the courts. The claims of the beneficiary, in case *CETM v Commission*, that the magnitude of the harm caused by the recovery would greatly exceed the magnitude of the initial benefit produced by the aid, is dismissed on both facts and arguments.[124] The General Court establishes that a recovery of the full amount of the initial aid is in accordance with the aim of case law of recovery. The Commission does not need to limit its decision to the amount that corresponds to the anti-competitive effect.

In addition to the flat recovery, the beneficiary must pay interest. The interest may only “offset the financial advantages actually arising from the allocation of the aid to the recipient”[125] and it is not an additional punishment. The definition of the financial advantage is clarified in *CELF v SIDE I*. The interest shall adjust for a difference in economic effect and the flat recovery. By not having to pay a commercial interest rate, the beneficiary receives an advantage and in addition, the aid leads to improvement of the competitive position relative the other competitors. The Member State must thus order the aid recipient to pay an interest in respect of the period of unlawfulness.[126]

[123] Monti, Giorgio “Recovery Orders in State Aid Proceedings: Lessons from Antitrust?” 3 [2011] EStAL, p. 416.
[124] Case T-55/99 *CETM v Commission* [2000] E.C.R. II-3207, para. 165.
[125] Case T-459/93 *Siemens SA v Commisison [*1995] ECR II-1675, para. 99.
[126] Case C-199/06 *Centre déxportion du Livre Francais (CELF) v Societe Internationale de Diffusion et d’Edition (SIDE)* [2008] ECR I- 469, para. 51-52.

4 Defence 2: absolutely impossible to recover

4.1 The state's defence

The recovery process is a shared responsibility between the Commission and the Member States. The Commission's task is to assess the compatibility and order the recovery. The national authorities are responsible for identifying the aid and the execution of the recovery. A recovery is not optional; the Member States are under obligation to carry out the recovery in an efficient manner.[127]

History shows that the Member States have been reluctant to execute recovery decisions to satisfaction. In June 2006, out of all recovery decisions adopted in 2000-2001, 45% had not been implemented properly.[128] The amount of not-refunded unlawful and incompatible aid had increased from 11,1% year 2010, to 14,4% in 2012.[129]

The state aid control system recognises three legitimate defences against recovery: a recovery is in breach of Union principles, the ten-year prescription period has expired and that a recovery is absolutely impossible to execute. The latter is the Member State's defence. In principle, a Member State cannot claim legitimate expectations; where the Member State fails to recover, the only legitimate excuse is that a recovery is absolutely impossible.[130]

In accordance with Union rules, no one can be obligated to do the impossible, *impossibilium nulla obligatio est.* A failed recovery is excused only if an execution of a recovery is impossible in objective and absolute terms. The subsequent sections identify the development of the jurisprudence of the exemption absolutely impossible.[131]

4.2 Some unsuccessful cases

The case law clarifies the distinct difference between impossible and absolutely impossible. Notably, the situation, which makes a recovery

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[127] Enforcement Notice, para. 10, 19-21.
[128] Recovery Notice, para 3.
[129] COM(2012) 778 final Report from the Commission State Aid Scoreboard Report on state aid granted by the EU Member States, Autumn 2012 Update. 21.12.2012, Brussels, p. 11. (Scoreboard 2012)
[130] Case 94/87 *Commission v Germany* [1989] ECR 175.
[131] C(2012)9461 Commission decision of 19 December 2012 on State aid SA. 20829 (C 26/2010, ex NN 43/20120) Scheme concerning the municipal real estate tax exemption granted to real estate used by non-commercial entities for specific purposes implemented by Italy OJ. L 166 p. 24, 18.6.2013, para. 192.

absolutely impossible, must exist at the time of the Commission's recovery decision, it cannot occur later. [132]

'Absolutely impossible' refers to whether it is, or is not, possible to recover. Significantly, it does not take into account which consequences a recovery will have to the undertaking. In *Commission v Greece*, the Court finds that the effect the recovery has on the financial status of the beneficiary is not relevant. A bankruptcy is an acceptable consequence of recovery. While the Union does not intend to encourage measures causing bankruptcy, in theory the recovery only restores the situation that would have occurred, had the aid not been initially granted. [133]

Nor is it of relevance whether a recovery will lead to a retrieval of any actual money. Most likely, a recovery in an insolvency case does not result in a return of the aid. An insolvent beneficiary is not reason enough to consider the recovery as an absolutely impossible mission. Preventing further distortion of the market is the key aim and thus the Member States are required to take action. In *Commission v Belgium* the Court concludes that a mere insolvency is not sufficient to remedy the situation. If an actual recovery is in fact impossible, the government has to insist on a full winding up of the undertaking. [134]

A recovery does not have to be financially wise to be considered possible; possible does not equal reasonable. The Commission does order a recovery, without any regard for the great financial costs and heavy workload such a decision will impose on the Member State. Challenges of technical or administrative nature may make a recovery difficult indeed; yet such a situation does not mean a recovery is absolutely impossible to complete.[135]

In *Italy v Commission* the Member State argues that a recovery is impossible due to the fact it is technically impossible to identify the recipient. The identification process involves executing a specific review of a large quantity of declarations, made by almost 150 000 transport undertakings. According to the Court, the situation "does present difficulties from an administrative point of view"[136] but a recovery of the aid is technically not impossible. Hence, despite great costs, the state must execute the recovery decision.[137]

In the decade to follow, the Court further clarified the interpretation of the recovery obligation, specifically in relation to it causing high administrative costs and heavy bureaucracy. The Court has consistently held that in a recovery producing, a heavy workload for the Member States is not a legitimate excuse to not execute the recovery. In *Commission v Belgium* the

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[132] Case C-75/97 *Belgium v Commission of the European Communities(Maribel)* [1999] ECR I-3687, para. 86.
[133] Case 63/87 *Commission of the European Communities v Hellenic Republic* [1988] ECR 2875.
[134] Case 52/84 *Commission v Belgium* [1986] ECR 89, para. 14.
[135] Hancher, Ottervanger, Slot. 4th ed, 2012, p. 1013.
[136] Case 280/95 *Commission v Italy* [1998] ECR I-259, para. 23.
[137] Case 280/95 *Commission v Italy* [1998] ECR I-259, para. 8 and 23.

Member State must calculate the exact number of workers actually employed during each quarter in order to identify the amount of aid to be recovered. Despite the heavy workload, the recovery is considered a task possible. [138]

Abstaining from a recovery is a derogation and shall thus receive a narrow interpretation. Hence, in order for a recovery to be absolutely impossible, a recovery must be de facto impossible. A generous interpretation would undermine the effectiveness of Union law in matters of state aid. A mere apprehension of such difficulty is not sufficient proof. The state must attempt to recover the aid, and the Member State's efforts must be sincere and serious. If it is possible to *indirectly* calculate the amount to be recovered, a recovery does not qualify as impossible to execute.[139]

The Member States are responsible for the execution of the recovery. In the event of unexpected difficulties, the general duty of sincere cooperation applies.[140] The national authorities and the Commission are required to "work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty provisions, and in particular the provisions on aid".[141]

Member States have argued that recovery would cause social unrest and disturbance of the society, therefore recovery would be impossible. In *Italy v Commission* the state acknowledges that the nation indeed has the technical ability to execute the recovery but argues that a recovery is nevertheless impossible; it would cause social upheaval. In the ruling, Italy receives no sympathy from the Court. Italy's reason to not recover the aid is unacceptable. According to the Court, a Member State is under an obligation to *try* to recover. Since Italy has not made an attempt to recover the aid, the nation cannot prove that a recovery is absolutely impossible to execute.[142]

4.3 A few successful cases

Successful lines of argumentation, based on a recovery being absolutely impossible, are rare. Therefore, even cases in which the exemption of absolutely impossible is not explicitly acknowledged but in which it is in effect indirectly applied, are of interest. Due to a Member State's insufficient records, the Commission has found that it is impossible to identify the amount to be recovered. In the decision, the Commission does not consider the recovery in itself to be impossible but since the identification process has failed, it is impossible to identify the correct amount of aid. To order a recovery in such a situation is a breach of the Member State's right of defence. That particular predicament constitutes an obstacle to a recovery.[143]

[138] Case 378/98 *Commission v Belgium* [2001] ECR I-5107, para. 18 and 23.
[139] Case 378/98 *Commission v Belgium* [2001] ECR I-5107, para. 41.
[140] Art. 4(3) TEU.
[141] Case 94/87 *Commission v Germany* [1989] ECR 175, para. 9.
[142] Case C-6/97 *Italy v Commission* [1999] ECR I-2981, para. 34.
[143] C(2004)3060, para. 261.

Insufficient records is a frequently occurring issue. An additional example of how the lack of proper records affects the recovery process follows. The Commission acknowledges that aid granted during a certain period is impossible to recover. The Member State does not have the tax records required to identify the beneficiary. Since the records simply do not exist, it is impossible to produce a recovery order formulated with a sufficient degree of clarity. Hence, a recovery is not possible.[144]

In 2012, Italy managed to prove that a recovery was absolutely impossible.[145] It is one of few cases in which the exemption of absolutely impossible is acknowledged and applied explicitly. Italy exempted non-commercial entities devoted to certain activities, such as to social assistance, welfare, health, education, from a real estate tax. In the decision, the Commission finds that the Italian tax reduction does constitute state aid. Since the tax exemption is considered to be state aid, it is the subject of a recovery. The Italian tax records are, however, not adequately specific. It is not possible to separate commercial from the non-commercial entities. Thus, the Commission decides to completely refrain from ordering a recovery.

Italy's records are insufficient but the decision mentioned above is, nonetheless, arguably surprising. This is according to certain scholars. "Normally, the Commission should have instructed recovery on these grounds alone."[146] If the situation is assessed in accordance with the previous policy of the Commission, any aid, which cannot be proven to benefit non-commercial entities exclusively, should be retrieved.

4.4 Interim measures

The following section assesses the case law of interim reliefs. Despite interim decisions not being final, they are included in this thesis since they do affect the potency of the regular recovery order. While a beneficiary can appeal a recovery decision, the appeal process does not automatically suspend the effect of the recovery decision. Only by ordering an interim relief may the Court suspend the recovery. Such a request is rarely granted. [147]

Firstly, an interim relief under Article 278 TFEU must not prejudge the substance of the case. The second criteria is *fumus boni juris*; the case must *prima facie* lack a clear answer. Thirdly, an interim measure must be urgent. Awaiting the final decision in the regular defence process has to be damaging;

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[144] Case C-214/07 *Commission v France* [2008] ECR I-8357, para. 13.
[145] C(2012)9461, para. 200.
[146] Nicolaides, Phedon. The flexible boundary between economic and non-economic activities (part II), published 05 August 2013. Last accessed 4 January 2014. http://www.lexxion.eu/training/stateaidblog/2013/08/05/53-the-flexible-boundary-between-economic-and-non-economic-activities-part-ii
[147] Art. 278 TFEU; Hancher, Ottervanger, Slot. 4th ed, 2012, p.1052.

an immediate execution of the recovery would cause grave and irreparable damages. The later criterion is often the most difficult to prove. [148]

One of the reasons as to why interim reliefs are rarely successful is simply that the structure of the recovery system does not encourage interim reliefs. A beneficiary with a strong main case of annulment in the regular process will most likely be denied an interim measure. Thus, the beneficiary has a better chance at receiving an interim relief by arguing that the main case is slightly weak. Considering the pending annulment proceedings, that might, however, not be tactically wise.[149]

In *Greece v Commission* the General Court grants Greece an interim relief from its recovery obligation. The court states two reasons. First, the recovery is deferred due to the the extremely poor state of the "general financial situation" [150] in Greece. A recovery could lead to social unrest and diverge, possibly causing permanent damage. Thus, the situation calls for a temporary suspension of the recovery.

The second reason is of technical and administrative nature. The court believes the current case will not result in a successful recovery. In addition, an immediate recovery would draw resources from the public authorities' effort to recover tax debts. By offering the state an interim relief, the court provides the national authorities with an opportunity to concentrate on collecting tax income.[151] The case indicates a future two-speed Europe in matters of state aid recovery.[152]

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[148] Biondi, Andrea, Eeckhout, Piet and Flynn, James. *The Law of State Aid in the European Union*. Oxford 2004. p. 289.
[149] Lever, 2013 p. 9-10.
[150] Case T-52/12R *Greece v Commission* n.y.r. para. 47.
[151] Case T-52/12R *Greece v Commission* n.y.r. para. 48-54.
[152] Hancher, Leigh "State AidRecovery – A New Public Order?" 1 [2013] EStAL p. 4.

5 Defence 3: 10-year limit

Aid which has escaped the attention of the Commission for ten years since it was awarded, cannot, in accordance with the Procedural Regulation, be recovered.[153] Prior to the regulation, recovery of unlawful and incompatible aid had been at the Commission's discretion, albeit ordering recovery had developed into a "nearly hard and fast practice"[154].

In the 1980s, aid to the industry and service-sector constituted 2% of EU's GDP, in contrast to 0.5% in 2011.[155] The recovery rate in the 1980s was unimpressive. As a result, at the time of the introduction of the regulation, a considerable amount of aid was not yet retrieved. The ten-year exemption provided legal certainty to the beneficiaries of the unrecovered aid.[156]

Although the exemption is applied, beneficiaries should be careful not to exaggerate the practical value of the exemption.[157] Of primary concern is how easily the ten-year period can be interrupted, without any need to inform the beneficiary. No formal investigation by the Commission is required, the ten-year period is suspended if the Commission takes any action related to the unlawful aid. [158]

The ten-year period starts to run the day the aid is awarded. The starting date is easily identified for individual aid. If the aid is awarded under an aid scheme, the wording of the rule is not sufficiently clear. The moment when the aid scheme is put into effect does not necessarily coincide with the moment the aid is paid out. *France Télécom* provides "useful clarity"[159] to the issue. The relevant point in time is the day the aid is actually paid out. Consequently, the limitation period start to run "afresh each time an advantage is actually granted"[160].

A beneficiary might find it useful to know that a suspension is not conditioned upon the notification of the beneficiary. As is clarified in *Scott* the Member State and the Commission are the parties of a state aid recovery.[161] Despite the beneficiary having a "practical interest"[162] to find out about the suspension, that interest is not sufficient to create a procedural right on behalf of the beneficiary.

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[153] Art. 15 Procedural Regulation.
[154] Heidenhain, 2010, p.641.
[155] Scoreboard 2012, p. 8.
Aid related to the financial crisis, agriculture, fisheries and transport is excluded.
[156] Heindenhain, 2010, p. 648.
[157] Applied in C(2007) 1710 Commission decision of 10 May 2007 on the State aid C 1/06 (ex NN 103/05) implemented by Spain for Chupa Chups, OJ. OJ L 244 p20 19.9.2007, para. 37-39.
[158] Art. 15, Procedural Regulation.
[159] Dilley, 2012, p.116.
[160] Case C-81/10 P *France Télécom v Commission* n.y.r, para. 84.
[161] Case T-366/00 *Scott v Commission* [2007] ECR II-0797, para. 59-60.
[162] Hancher, Ottervanger, Slot. 4th ed, 2012, p. 1005.

6 Analogies

6.1 Purpose and delimitation

The Treaty is living law and its interpretation is ever evolving. State aid uniquely shares "more chromosomes with free movement than with antitrust rules" [163] while it simultaneously is a pillar of competition law. In order to assess how state aid develops, it is important to learn from areas of similar character: classic competition law, Internal market law and, due to its fundamental similarities with state aid, EU funds law. While being fully aware that this section cannot provide an exhaustive comparison, it may still offer useful analogies and indicate which changes are possible, while protect the fundamental function of state aid control system.

6.2 Reform of classic competition law

Regulation 1/2003 is the anno domino of modern classic competition law as with it, the system changed from ex-ante to ex-post control. [164] The old system was a two-step process consisting of prohibition and a possibility to grant exemptions. The latter was under the exclusive authority of the Commission.[165]

Regulation 1/2003 indicated a departure from a form-based to an economic-based approach and it introduced reforms in substantial and administrative matters.[166] Previously, any agreement covered by Article 101 TFEU had to be authorised by the Commission. With an exponentially increasing case burden, the Commission became understaffed and the control system ineffective.[167] The solution was a decentralization, giving responsibility to the national competition authorities.[168]

6.3 Evolution of public procurement law

Prior to 1992, limited preferential public procurement schemes were tolerated. However, impact assessments indicated that they only had a minimal impact and as a result of which, and as a result of the completion of the Single Market, they were abolished.[169]

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[163] De Cecco 2013, p. 38.
[164] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ L 1 p. 1, 4.1.2003. (Regulation 1/2003)
[165] De Cecco 2013, pp. 47-48.
[166] Szyszczak, 2011. p. 9.
[167] De Cecco 2013, p. 48.
[168] Szyszczak, 2011, p. 9.
[169] Bovis, Christopher H. *EU Public Procuremetn Law*. Cheltenham 2012 2nd ed, pp. 34-35.

6.4 EU funds law

EU funds, also referred to as structural funds, emanate from the EU budget and aim to strengthen structural and economic development, social cohesion and integration policy. It is administrated by the Commission, in cooperation with the Member States. Funds law and state aid law are, despite their similarities, two separate legal areas. [170]

In EU funds law, the Member State is the sole addressee of a Commission decision but despite the fact that the beneficiary is merely an interested party, the EUCJ safeguards the beneficiary's right to a fair hearing. The EUCJ considers the funds decision to be a "measure adversely affecting that person".[171]

The Commission does have the authority to cancel or recover funds but has become decreasingly involved in the process. The Member States take a greater role. Neither the recovery of funds nor of state aid is a punishment, merely the logical consequence of discovering a wrongful action. [172] A more in-depth description of the rules and case law of funds recovery follows.

In EU funds law, the Member States must retrieve any amount of funds misused whether it is a result of irregularity or of negligence of relevant instructions. In comparison with state aid law, the beneficiary may argue legitimate expectations, provided the beneficiary did not commit a manifest infringement of the rules or fail to fulfill its obligations.[173]

Legitimate expectations require a precise, unconditional and consistent assurance from Union authorities. Further, the assurance must be delivered in a manner which can create legitimate expectations and the assurance must comply with applicable rules.[174]

The legitimate expectations may derive from national or Union law. Within the area of funds law, the Court has been inclined to accept a greater scope of legitimate expectations created by national law, in contrast to the strict interpretation of the regulation of unduly paid state aid.[175]

The interpretation of legitimate expectations in EU funds law generally appears to be the subject of a less strict interpretation than in state aid law.[176] A businessman receiving EU funds does not have to be quite as diligent. This is due to the fact that the prevalence of legitimate expectations does not

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[170] Nehl, Hanns Peter "Legal Protection in the Field of EU Funds." 4 [2011] EStAL, pp. 631-633 and 646.
[171] Nehl, 2011, p. 634.
[172] Nehl, 2011, pp. 631-633 and 646.
[173] Nehl, 2011, p. 647.
[174] Nehl, 2011, p. 647.
[175] Tridimas, 2006, p. 296.
[176] Nehl, 2011, p. 647.

depend on whether the businessman “could have foreseen the adoption of a measure likely to affect its interests”[177].

In *Oelmüle Hamburg et. al* the principle of legitimate expectations takes priority over Union interests.[178] Notably, this principle only precludes recovery of the funds if the beneficiary acts in good faith. Further, legitimate expectations only apply if the money has been transferred.[179] EU funds law is subject of a more pragmatic interpretation; the more generous application of the principle “contrast sharply”[180] with that of state aid law. It is “markedly different” [181] from that of state aid law, where the Court acts in a more interventionist manner.

It could be argued that the difference in the interpretation of the two similar and yet different legal areas is due to the fact that in EU funds law, a Member State cannot gain a competitive advantage over another Member States. Arguably, the funds, in contrast to state aid, cannot affect competition between Member States. However, since it does affect competition between private undertakings, which in itself affects the market, it is difficult to find a valid reason as to why the principle of legitimate expectations should be given greater priority in funds law than in state aid law.[182]

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[177] Nehl, 2011, p. 647.
[178] Case C-298/96 *Oelmühle Hamburg AG and Jb. Schmidt Söhne* [1998] ECR I-4767, para. 37.
[179] Petzold, 2011, p. 91.
[180] Tridimas, 2006, p. 291.
[181] Tridimas, 2006, p. 290.
[182] Petzold, 2011, p. 91.

7 Transfer cases: the definition of the beneficiary

7.1 Purpose and delimitation

Three exemptions to recovery are recognised in the Recovery Notice: a recovery is in breach of Union principles, the ten-year limit and a recovery is absolutely impossible. These explicit exemptions do not alone determine whether an undertaking will be the subject of a recovery order.

As a rule, aid is retrieved from the original recipient, whom is most likely to have benefited from the aid. Significantly, if it is possible to establish that other undertakings have benefited from the aid, they may be subject to a recovery order.[183] In situations in which the original recipient's shares, assets or a combination of the two have been transferred, identifying which undertakings are beneficiaries of the aid is a quite complicated task. The following chapter assesses three situations in which the identification process is a challenge: transfer of assets, transfer of shares and transfers in multi-layer aid. This chapter includes both facts and analysis, allowing for a presentation of the facts and of the academic arguments in their proper context.

7.2 The aim of recovery

While the general aim of state aid law is clear, the specific aim of the act of recovery remains "unclear"[184]. In a situation where multiple undertakings are beneficiary candidates, being aware of the precise aim of recovery is of tremendous benefit in in the process of identifying the proper beneficiary. The following section presents two of the aims of recovery, notably they are not necessarily contradictory.

As this chapter will show, the case law and written law present two rationales of aims: to retrieve the monetary effect and to remedy the anti-competitive effect. The former is best explained by an analogy with *condictio indebiti* since the focus is to retrieve the "monetary benefit"[185] from the state aid and, in contrast to antitrust law, the aim is not to punish.[186] A recovery simply prevents the beneficiary from becoming unjustly enriched.

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[183] Case C-277/00 *Germany v Commission* [2004] E.C.R. I-3925, para. 80.
[184] Hancher, Ottervanger, Slot. 4th ed, 2012, p. 23.
[185] Monti, 2011, p. 421.
[186] Case C-75/97, *Belgium v Commission (Maribel)* [1999] ECR I-03671, para. 65.; Monti, 2011, p. 416.

Recovery emphasising the second aim, to target the anti-competitive effect, shall “re-establish”[187] the competitive situation existing prior to the aid. It is often possible to combine the two rationales but they are not necessarily compatible.

7.3 Transfer of assets

7.3.1 Introduction

It is primarily the Member States’ responsibility to identify the beneficiary. In order to protect equal treatment and prevent distortion of competition between Member States, the identification procedure is to be carried out in accordance with a common set of rules. The law is however “not yet fully established”[188]. The following sections presents situations in which the assets are transferred from the original recipient, including transfers caused by insolvency; the latter category is not covered in *Chapter 8.2 Insolvency*.

7.3.2 Monetary effect

The courts and the Commission consider both aims when making a decision: the retrieval of the monetary benefit and of the anti-competitive effect. In the *Alfa Romeo* case, the Commission chooses to focus on the monetary benefit. The background of the case is as follows: the assets of Alfa Romeo, the original recipient, was partly transferred to FIAT, the buyer, and partly to Fininmeccania, Alfa Romeo’s previous holding company. The new owners retained liabilities, in addition to new assets. [189] FIAT paid market price for the assets.

In its decision, the Commission finds the fact that FIAT paid market price significant. As a result, the benefit remains with Fininmeccania. Since the state aid inflated the price to a market price, Fininmeccania gained the advantage. By that, Fininmeccania is the subject of the recovery order. The Court agrees with the reasoning of the Commission.

In previous decisions the Commission has gone even further, deciding that the purchaser retained the benefit, even if it had paid the market price, a view largely dismissed by the Court.[190] The Court endorses the Commission’s decision in *Alfa Romeo*; an interpretation which is confirmed in *Banks* and codified in the Recovery Notice.[191]

If the seller of the assets receives market price, the seller remains liable. Conversely, if the transfer price is below that of the market, the liability

[187] Joined cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia SpA v Commission*, [2003] ECR I-4035, para. 66.
[188] Monti, 2011, p .415.
[189] Case C-305/89 *Italy v Commission (Alfa Romeo)* [1991] ECR I-1603, para. 39.
[190] Gyarfas, Juraj ”Looking for the Beneficiary: State Aid Recovery after a Share Deal” ECLR Vol. 33 No. 1[2012], p. 40.
[191] Case C-390/98 *Banks* [2001] ECR I-6117, para. 78.; Recovery Notice, para. 33.

transfers with the assets. The monetary value does indeed remain with the seller. The "anticompetitive effects" is, however, not visible in the relevant market, the one in which the aid is introduced.[192] Using the price to determine which undertaking shall be liable is using an approach that emphases the monetary effect and it does not restore the competitive situation. [193]

7.3.3 Anti-competitive effect

The Court, in addition to the approach in *Alfa Romeo,* does pursue the anti-competitive effect. The Commission and the Court use two parameters to identify the beneficiary: the price of the assets and the intention behind the transfer of the assets. If the assets are transferred for market price, the State's intention appears to be irrelevant.[194] The Commission and the Court examines the intention behind transfer of assets in two cases, *Seleco-Multimedia/SIM2* and *SMI.*[195]

In the first case, the Commission creates criteria to assess if the transfer is of "economic logic"[196] or if it is designed to escape recovery. Some of the criteria are the moment of transfer and the identity of the seller, as well as the acquirer. If a transfer is carried out in accordance with the procedural national law, for instance an insolvency law, the transaction is less likely to be seen as an effort to avoid recovery.[197]

An example of the application of the subjective criterion is the *Olympic Airways* case, an action taken under 108(2) TFEU, for failure to comply with the preceding recovery decision. [198] In the opinion, AG Geelhoed emphasises the subjective criteria, stating that the system employed by Greece frustrates the intention of the recovery.

This section provides a short summary of the history of the case. In 2002, the Commission ordered a recovery of the aid given to Olympic Airways. The subsequent year, in accordance with a new Greek law, the company undertook a restructuring. Several of the assets were transferred to the new company, Olympic Airlines, for no apparent reason. The liabilities remained with the old company. The new law granted the new company special protection from liabilities, such as a recovery order.

In the opinion, AG Geelhoed argues that the anti-competitive effect is the essential aspect of the case. Olympic Airlines should bear the cost since it "is actually responsible/…/for the economic activities promoted by the aid in

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[192] Monti, 2011, p. 421.
[193] Monti, 2011, p. 421.
[194] Monti, 2011, p. 423.
[195] Joined cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia SpA v Commission*, [2003] ECR I-4035.; Case C-277/00 *Germany v Commission* (SIM)[2004] E.C.R. I-3925.
[196] Joined cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia SpA v Commission*, [2003] ECR I-4035, para. 78.
[197] Case C-277/00 *Germany v Commission* (SIM)[2004] E.C.R. I-3925, para. 93 and 96.
[198] Case C-415/03 *Commission v Greece* [2005] ECR 3875, para. 34.

question”[199] A recovery order should identify the undertaking which would have the “competitive advantage resulting from the/…/ aid”[200] and in which there is “economic continuity”[201] The acquirer is the subject of a recovery order, provided it is able to enjoy the benefit of the aid. Market price is an indication of whether the competitive effect is transferred. If the competitive effect of the aid is exceeding the monetary aid, the competitive benefit is transferred, despite that the assets are bought at a market price.[202]

In its ruling, the Court did not focus on the price, despite it indicating whether the monetary benefit is transferred. The Court stresses the subjective criteria; that the restructuring is having a harmful effect on the recovery and thus the competition of the internal market. In order to avoid a situation in which the purpose of the recovery is “seriously compromised”[203] the new company is the subject of the recovery order.

7.4 Transfer of shares

7.4.1 Introduction

The second situation in which identifying the beneficiary is complicated is the transfer of the shares of the undertaking. The Commission may find that the previously owning holding company, the original recipient, or the acquirer of the shares is the beneficiary. The following sections clarify the assessment made by the Commission and the courts.

7.4.2 Monetary effect

In transfer of shares situations, the difference between the monetary and the competitive benefit does not present itself as clearly as it does when the assets are transferred. The primary addressee of a recovery decision is the original recipient, since “the sale of shares in a company which is the beneficiary of unlawful aid by a shareholder to a third party does not affect the requirement for recovery”.[204] Corporate law suggests that the transfer of shares does not have an impact on the obligations of the recipient undertaking.[205]

If no other aspects are taken into consideration, the recipient company is to be the subject of a recovery order, a rationale confirmed in *ENI-Lanerossi*[206]

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[199] Opinion of AG Geelhoed in Case C-415/03 *Commission v Greece* [2005] ECR 3875. para. 29.
[200] Opinion of AG Geelhoed in Case C-415/03 *Commission v Greece* [2005] ECR 3875. para. 31.
[201] Opinion of AG Geelhoed in Case C-415/03 *Commission v Greece* [2005] ECR 3875, para. 33.
[202] Monti, 2011, p. 422.
[203] Case C-415/03 *Commission v Greece* [2005] ECR 3875 para. 34.
[204] Case C-328/99 *Italy and SIM2 Multimedia v Commission* [2003] ECR I-4035, para. 38.
[205] Gyarfas, 2012, p. 41. With possible variations in national law.
[206] Case C-303/88 *Italy v Commission* [1991] E.C.R. I-1433, para 57.

and the Recovery Notice. [207] Such a recovery would retrieve the monetary benefit but not necessarily redeem the anti-competitive effect.

7.4.3 The anti-competitive effect

If the recipient retains its status as an independent legal person and continues the activities that made it qualify for aid, the purchaser is not responsible for the repayment of the aid. In *SMI*, the EUCJ stated that since the recipient retains its legal personality and the competitive advantage of the aid, the aid should normally be recovered from that undertaking.[208] It is an approach that may contribute to remedy the competitive advantage while simultaneously reducing the seller's opportunities to engage in speculation.[209]

The assumption that the benefit remains with the recipient can be reversed; the transfer price is an important component. Notably, in *CDA* the General Court favours an approach in which the recipient remains responsible, regardless of the level of the transfer price. [210]

In *SMI* the Court finds that if the state aid element is reflected in the price, that is if it is at market price, the buyer cannot be held accountable in a recovery decision.[211] The acquirer has not enjoyed the benefit of the aid. The "situation is to be restored primarily" [212] by making the seller responsible for the recovery.

The line of reasoning is confirmed in *Spanish Shipyards*[213], a Commission decision in which the shares have been transferred in a closed and selective procedure. The buyer bought the shares from a company belonging to the same group as the buyer. The Commission finds that under such circumstances the benefit does not stay with the original recipient but transfers with the shares. The successor of the previously independent company gains the benefit, thus the buyer should be responsible for the aid repayment. [214]

7.5 Multi-layer aid

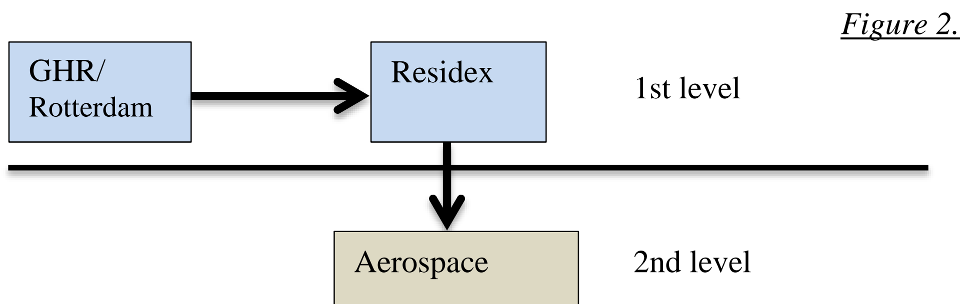
In a multi-layer transfer of aid, neither the shares nor the assets are relocated, nevertheless, the benefit is transmitted from the original recipient. If the setup

[207] Recovery Notice para, 34.
[208] Case C-277/00 *Germany v Commission* [2004] E.C.R. I-3925, para. 81.
[209] Opinion of AG Tizzano of Case C-277/00 *Germany v Commission* [2004] E.C.R. I-3925, para. 84.
[210] Case T-324/00 *CDA Datenträger Albrechts v Commission* [2005] ECR II-4309.
[211] Case C-277/00 *Germany v Commission* [2004] E.C.R. I-3925, para. 80.
[212] Case C-390/98 *Banks* [2001] ECR I-6117, para. 78.
[213] C(2004)1620 Commission decision of 12 May 2004 on the State aid implemented by Spain for further restructuring aid to the public Spanish shipyards State aid case C40/00 (ex NN 61/00) OJ L58 p 29 4.3.2005, para. 120.
[214] Hancher, Ottervanger, Slot. 4th ed, 2012, p. 1015.

is made with the intention to circumvent the state aid control, the recovery obligation may not move with the transferred benefit.

The repayment obligation cannot continue to be transferred perpetually. Searching for the beneficiary among consumers or in “upstream markets”[215] is not realistic, or to the benefit of the principle of legal certainty. The following section assesses how far down in the transfer chain the aid can be recovered.

Figure 2.



The parties of the case *Residex* are the Municipality of Rotterdam and Residex. [216] The Port authority Gemeentelijk Havenbedrijf Rotterdam (GHR) is not a separate legal entity from the Municipality. Thus, the port authority and the municipality are treated as one.

In *Residex* the public port authority GHR provides the financial institution Residex with a guarantee to cover a loan by a third party; enabling Residex to issue a loan to Aerospace with beneficial conditions, illustrated in *Figure 2*. GHR subsequently refuses to honour the guarantee, arguing it has the right to do so since the aid is not notified in accordance with Article 108(3) TFEU. The legal question is: which undertaking is the beneficiary?

The guarantee granted, at the first level transfer, is considered as state aid. The Court identifies, however, the borrower, Aerospace, as the primary beneficiary. The Court focuses on the advantage, reasoning it is the borrower that “normally obtains a financial advantage and thus benefits from the aid”[217].

According to the Court, both the lender and the borrower in the situation can be “beneficiaries of that guarantee”[218]. The creditor, Residex, can be considered a beneficiary if the guarantee is granted to cover the needs of an existing claim, from the lender on the borrower, when the borrower is reconstructed. Thus, the guarantee is increasing the security of a claim which is financially beneficial. The final identification of the beneficiary, however, is the responsibility of the national court. [219]

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[215] Gyarfas, 2012, p. 42.
[216] Case C-275/10 *Residex Capital IV* n.y.r.
[217] Case C-275/10 *Residex Capital IV* n.y.r. para. 39.
[218] Case C-275/10 *Residex Capital IV* n.y.r. para. 43.
[219] Köhler, 2013, pp.100-101.

In order to remedy the disturbance on the internal market, the Court expects a recovery from the second level transfer, as a minimum measure. A cancelation of the first level obligation contract is not necessarily required. The national court is allowed to cancel the guarantee, if such a measure restores the competitive situation existing prior to the aid. Only if the national system does not provide alternative means to restore the competition, the national court is obliged to cancel the first level guarantee. [220]

[220] Köhler, 2013, pp. 101-103.

8 The definition of recovery - insolvency and Article 260(2)

8.1 Purpose and delimitation

Effective recovery is essential to the efficiency of the state aid control system. Given the multitude of situations, methods of calculation and types of state aids in the state aid system, the definition of 'effective' is not quite as easily identified as could be expected. This chapter investigates how the Union defines effective. It is achieved by studying the jurisprudence of insolvency cases and actions under Article 260(2) TFEU for examples of sufficient and insufficient effectiveness.

8.2 Insolvency

In insolvency cases, the state aid regulation is frequently in conflict with national insolvency laws. The aim of the national insolvency laws is often to allow the business to continue its operation, thereby improving the creditors' chances of collecting their debt.[221] The beneficiary may find the conflicting national and Union laws confusing but the courts do not. National procedures and laws preventing an effective recovery of the aid are to be left unapplied.[222]

Aid that proves difficult to retrieve, must be registered by the state as a claim in the insolvency proceeding. A mere registration of the debt is not enough, since it could potentially allow the indebted beneficiary to continue to distort the market. It is the duty of the state, second to a full recovery, to ensure that the undertaking is not only insolvent but that it is completely winded up.[223]

As a creditor in an insolvency proceeding, the state is under no obligation to file for preferential treatment. True, the aid must be registered as a "liability relating to the repayment of the aid in question in the schedule of liabilities" [224] but no further effort is required. A registration in combination with the beneficiary being winded up is enough to prevent further distortion of the internal market.

While the Commission's obligation to order a recovery of the aid is not conditioned on any money being retrieved, the Commission does not have an obligation unless the recovery will have an effect on the internal market. If at the time of the Commission's decision, the beneficiary has ceased its economic activity, and the insolvency proceedings is terminated, the

[221] Hancher, Ottervanger, Slot. 4th ed, 2012, p. 1013.
[222] Case C-323/05 *Commission v France* [2006] ECR I-10071, para. 53.
[223] Case C-610/10 *Commission v Spain* n.y.r. para. 103-106.
[224] Case C-277/00 *Germny v Comission* [2004] E.C.R. I-3925, para. 85.

Commission can forgo a recovery decision.[225] In contrast, in a situation in which the insolvency proceeding is still ongoing, at the time of the Commission decision, or the insolvency proceeding is not initiated until after the Commission's decision, the Commission is under an obligation to order a recovery.

8.3 Infringement: Article 260(2) TFEU

Further food for thought is found in Article 260(2) TFEU case law. Arguably, *Commission v Greece*[226] provides the most explicit account of an effectiveness assessment. The case is the very first state aid case submitted by the Court under Article 260(2). Subsequently other cases followed. [227] They provide valuable insight as to which measures effectively reverse the effects of the aid and which situations are considered harmful to the Internal market.

Commission v Greece establishes that a successful recovery does not require a transfer of money. The Member States are allowed to choose the method of reversal, provided the recovery is effective, immediate and transparent to the Commission. The Court found that a set-off operation is a valid form of recovery.[228]

Previously the Court has avoided situations in which a new aid could in effect compensate for an existing recovery obligation. The Deggendorf-principle stipulates that the granting of new aid may be conditioned upon the successful recovery of previously granted and not yet recovered incompatible aid.[229]

The Court holds the infringement, conducted by Greece, as serious, bearing in mind "the rules on State aid are vital to the establishment of a system which is designed to ensure that there is no distortion of competition in the Internal market"[230]. In addition, time is an important parameter used to determine the severity of the infringement.[231]

Further, the graveness of the infringement is determined by the "the legal and factual context of the infringement"[232] and the need for deterring measures. The Member State has infringed the Article 108(2) TFEU on several occasions, making the new infringement more severe.

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[225] C(2004) 1621 Commission decision of 7 May 2004 on the aid granted by Germany to Dornier GmbH (Dornier) OJ L357 p36 7.5.2004, par a10.
[226] Case C-369/07 *Commission v Greece* [2009] ECR I-5703.
[227] Hancher, Ottervanger, Slot. 4th ed, 2012, p. 1027.
[228] Case C-369/07 *Commission v Greece* [2009] ECR I-5703, para. 84.
[229] Case C-355/95 P *Textilwerke Deggendorf GmbH (TWD) v Commision and Germany* [1997] ECR I- 2549, para. 25 f.
[230] Opinion AG Mengozzi of Case C-369/07 *Commission v Greece* [2009] ECR I-5703, para. 72.
[231] Case C-610/10 *Commission v Spain* n.y.r. para. 122.
[232] Case C-496/09 *Commission v Italy* [2011] ECR I-11483, para. 89.

9 Summary: de lege lata

A majority of the state aid measures are properly notified. Thanks to relatively recent reforms, yet fewer measures will have to be notified. Aid in breach of Article 107 TFEU is retrieved in full; aid in breach of Article 108(3) is the subject of interest payments. A recovery is compulsory save the three recognised exemptions: a recovery is in breach of Union legal principles, the ten-year limit has expired or a recovery is absolutely impossible.

In accordance with Union principles, exemptions are interpreted restrictively. The Commission rarely considers a recovery to be in breach of a Union principle. A flat recovery is always acceptable. The national procedural autonomy is deprioritised in favour of Union interest. A recovery order cannot be postponed in eternity, or be too unclear, but the Commission enjoys a wide margin of interpretation.

Legitimate expectations can only derive from legitimate community sources and normally a notification is required, the *RSV*-case being a notable exception. The expectation must be reasonable and any foreseeable changes cannot give rise to legitimate expectations. A beneficiary may hold legitimate expectations of certain transitional measures and of that certain state measures will cease to be state aid.

A recovery may be considered impossible if the records required to identify the beneficiary, or the amount, are deemed insufficient. Problems of an administrative or technical nature are not legitimate excuses. The Member State must make a serious and real attempt to recover the aid. Fear of social upheaval and reduced tax income may grant interim relief. Lastly, the ten year limit can easily be aborted, without the knowledge of the beneficiary.

Internal market law has a history of protectionism. Classic competition law has undergone a greater decentralisation than that of state aid law, despite the state aid reforms under SAAP and SAM. The Court interprets the principle of legitimate expectations slightly less strict in funds law than in state aid law.

There are relevant state aid cases that are not subject to any of the three exemptions. A transfer of assets, shares or of the benefit may result in a situation in which the original recipient is no longer the beneficiary. A recovery may remedy the competitive effect or the monetary benefit.

To complete the summary, any recovery claim on an insolvent beneficiary must be properly registered. Unless the aid is recovered, the undertaking must be winded-up. The number of cases under Article 260(2) TFEU is increasing. A Member State may, within reason, choose the preferred method of recovery; a set-off is an acceptable measure.

10 Analysis

10.1 General problems of recovery

A *prima facie* reading of primary law indicates no duty to protect the interest of the businessman. The following analysis is founded upon the assumption that Union law intends to, and should, offer the businessman some protection; the scope of which is discussed in this analysis. Consequently, the analysis is written from the perspective of the businessman and the word problem is used to indicate the struggles of the beneficiary.

The Internal market and competition is at the heart of the European Union and no one is advocating that the Union should adopt a laissez faire attitude in all matters of state aid. Recovery must remain the primary remedy in state aid law since without which, the system would most likely be rendered completely inefficient. Rather, the intention is to investigate whether the recovery measure could be reformed to the simultaneous benefit of the beneficiaries and of the Internal market.

While recovery is standard procedure, some exemptions apply. The exemptions are: a recovery is in breach of Union principles, a recovery is absolutely impossible or the aid was granted over ten years ago. These exemptions are more than merely theoretical. For each of the recognised exemptions, the courts and the Commission have recognised at least one successful defence case.

State aid control has been, is and will be reformed. An effect of the relatively recent reforms is the decentralization of the control system. The Union is encouraging the national authorities to take greater responsibility for the supervision through the Recovery Notice and the Enforcement Notice. The Commission exercises less direct control, following the expanded scope of the *de minimis* Notice and of the GBER. The Commission's direct involvement is further limited by the fast track procedure and, if the proposal is put into effect, a mandate to prioritise among the incoming complaints.

A majority of the aid recipients will not go through a defence of recovery process. The system is structured to reduce the need for recoveries. The combined effect of the standstill obligation, the incompatibility assessment, the GBER and the *de minimis* notice is a system where recovery generally is not needed. The defence process is a last resort, a final attempt to win where all else has failed.

Given that defence procedures are a last resort, the pool of cases to analyse is limited; successful cases even fewer. Not recovering is an exemption and since exemptions are interpreted strictly, no other outcome should be expected.

The analysis is focusing on cases which provide legitimate arguments in favour of a changed interpretation, albeit they are not necessarily successful cases. The majority of the cases presented in the *de lege lata*-section are not commented upon in great detail but the cases are not redundant. The purpose is to indirectly highlight the line of reasoning.

While most defences of recovery cases are not successful, they remain legally and politically relevant since they contribute to identifying the perceived problems of the current system. There is a discrepancy in the undertakings', the Member States' and the Union's understanding and interpretation of the system. The most efficient remedy is prevention. In a less-then-clear system, prevention proves a challenge.

To provide the parameters of the analysis the specific aim of recovery must be identified; the aim does define the need for change. Further, the level of the state aid system's stability and the internal market's level of stability must be assessed, since they determine the scope of future reforms.

10.2 Context: general scope of change

10.2.1 The aim of recovery

Admittedly, a significant portion of the following analysis has been touched upon in Chapter 7 *Transfer cases*. Clarity takes priority over originality and therefore several of the arguments are once again discussed in this chapter. The general aim of the greater state aid control system is to ensure the functioning of the Internal market, and to protect the competition between undertakings and between Member States. Member States have been prone to engage in protectionist behavior not only in the state aid area but also in matters controlled by Internal market law, emphasising the need for supranational control.

The general aim of state aid control is clearly defined, the same cannot however be stated for the specific measure to recover incompatible and unlawful state aid. The functioning of the Internal market is protected by a plethora of measures, each with its own sub-aim. An analysis of the case law and academic debate leads to the identification of three sub-aims: removing the anti-competitive effect, canceling the monetary effect and creating deterrence. Arguably, this analysis will show that it is clear from facts presented in the *de lege lata*-part that the system should be designed to prioritise the removal of the anti-competitive effect.

The case law of various types of procedures contribute to the analysis but in very different ways. The transfer cases, and to a limited extent cases of insolvency and those Article 260(2) TFEU, contribute to identify two of the aims, which are to remedy the anti-competitive effect and the retrieval of

monetary benefit. An analysis of these two aims contribute to identify the third aim, which is to deter.

To elaborate, the aims are detected through analysing the case law and academic debate of transfer cases, insolvency cases and Article 260(2) TFEU cases. Analysing those cases is more rewarding and illuminating than to analyses cases of the three acknowledge exemptions, since the Commission and the courts are under an obligation to interpret the exemptions restrictively. In some types of cases belonging to the former category, the beneficiary is not easily identified. The courts and the Commission's chosen means to identify the beneficiary shed light on which aim is prioritised; a different priority might have resulted in a different beneficiary.

Any recovery measure must effectively achieve the aim or aims of recovery. The measures which the courts acknowledge as effective means provide guidance as to the nature of the aim or aims of recovery. The Commission and the courts, restricted only by the duty to protect the Internal market and issues of a practical nature, enjoy a greater degree of freedom in transfer cases than in the classic recovery exemption-cases. Hence, an analysis of the transfer cases shows the true intention, purpose and priorities of the Commission and the courts.

Firstly, the transfer case law contributes to identify the aims to reverse the anti-competitive effect and the purpose to retrieve the monetary benefit. The writing of the rulings stress the importance to reverse the anti-competitive effect; in reality, that is not necessarily achieved. In *Alfa Romeo*, the Union focuses on reversing the monetary effect, not the anti-competitive effect. The price point is allowed to determine the assessment of to where the benefit has transferred.

The price point alone cannot tell where the anti-competitive effect is or whether it has been transferred to other markets. Since the monetary benefit is visible in the market where the aid was introduced, the undertaking that retains the monetary benefit is the subject of the recovery decision. Since the aim is not to punish, the only reasonable conclusion is that a reversal of the pure monetary effect is satisfactory to the Union.

In many situations, the monetary and the anti-competitive affects are the same. However, that is not always the case. The case law indicates that in transfer of shares cases, the difference between the two aims is not quite as large as in transfer of assets cases. Arguably, the protection of the competitive effect takes priority, although the effort to protect has limits; beyond those limits, a retrieval of the monetary effect is perfectly acceptable.

The multi-layer case law provides further evidence of the anti-competitive effect being prioritised. The Court states that the Member States are only obliged to act to prevent or reverse any anti-competitive effects. *Residex* is an example since Residex, despite receiving a guarantee and despite the fact that a guarantee can result in an improvement of an undertaking's financial

situation, is not, by the Court, automatically identified as the aid beneficiary. Only if the claim, which the guarantee covers, existed prior to the guarantee should Residex be considered the beneficiary; else the guarantee does not improve the undertaking's competitive situation.

It is shown in the case law that in regards to transfer of assets-cases, the price points take center stage, which could be problematic since it could result in a reversal of only the monetary effect. It is important to remember to design a system that prevents anti-competitive effects in addition to achieving deterrence. The case *Olympic Airlines* serves as an example that such a system may in fact be realistic. The Court attempts to indirectly identify the anti-competitive effect, by analysing whether the aid is sound business; a test which shares similarities with the private investor test. Through assessing the Greek measure's harmful effect on the control *system*, the Court can indirectly identify the harmful effect on the competitive situation.

At variance with the court, AG Geelhoed focuses directly on the anti-competitive effect, applying the concept of economic continuation in order to identify how and to where the anti-competitive benefit has been transferred. In summary, with the newly created company receiving all of the advantages but none of the disadvantages, the competitive benefit is in fact transferred to the newly minted company. Interestingly, AG Geelhoed and the Court reach similar conclusions, but on different grounds. The Court does not explicitly endorse the argumentation presented by AG Geelhoed.

The final argument, in support of the notion that remedying the anti-competitive effect is the main aim of state aid recovery, is the combined result of analysing transfer cases, insolvency cases and Article 260(2) TFEU procedures. A Member State's budget does in fact benefit from a recovery, since the state, not the Union, receives the retrieved aid. It is shown in multiple cases that the aim of recovery is never to provide income to the state but to prevent further distortion of the Internal market. Consequently, preferential treatment of the state, the creditor, is not required; it is not acceptable to reconstruct the company and later retrieve the aid; and a complete winding up of the beneficiary is required. The logical conclusion is thus that the aim of recovery is to prevent further anti-competitive effect on the market; not to remedy the purely monetary benefit.

Secondly, state aid recovery has three aims two of which, i.e. to remedy the anti-competitive effect and to remedy the monetary benefit, are described in previous sections of this chapter. The *Olympic Airlines*-case illustrates the third aim, which is to deter. The Court introduces a subjective criterion. Member States taking measures to circumvent the state aid control are more likely to face a recovery decision. Hence, the Court contemplates the decision's effect on the Member State's behaviour and not only its effect on the Internal market.

Deterrence can be interpreted differently: a synonym of punishment or a synonym of prevention. Certain scholars argue that recovery shall neither

punish nor deter, since recovery is not fault-based. For the purpose of this thesis, deterrence is interpreted as prevention or discouragement, as opposed to a reprimand or punishment. The purpose of the recovery is to challenge and encourage legal persons to take responsibility. While it is true that the courts repeatedly have clarified that recovery is not a punishment, arguably, it does serve the purpose of deterrence.

An infringement is considered particularly alarming if committed by a serial infringing Member State, as is evident from Article 260(2) TFEU case law. Thus, the Court does not only considers the state's action in that particular situation but its general pattern in state aid recovery. Since a multi infringing state is more likely to become the subject of an Article 260(2), it is evident that the Court emphasises the preventative effect of the procedure, and not whether it will remove an anti-competitive effect in the individual case.

A set-off as a means of recovery and the Deggendorf principle are both situations in which the Member State cancels the recovery claim. Only the former method is accepted by the Union. In the latter, the Member State grants the beneficiary the aid by a post recovery decision, which if allowed, could potentially lead to a subsidy war. It would be considered as a waste of tax-payers' money. Considering an aim of SAM is to bring the Member States' budgets under control, to not allow measures which would possibly hinder achieving that aim is arguably prevention.

It is evident from the nature of state aid reform that one aim of state aid recovery is deterrence. Both SAAP and SAM aim to affect the behavior of the Member State and the beneficiaries; they offer an indirect method of prevention. Proper notification is not only a matter of purely procedural law. It is crucial to the Union's ability to contentiously conduct compatibility assessments. Since the reforms facilitate proper notification, the reforms thus aim to encourage the Member States' benevolent participation in the state aid control, thus protecting the control system.

Recovery has three identified aims. The case law of transfer of assets and of shares does not with certainty prove which aim takes priority. Arguably, however, the question of greatest significance is not which aim takes priority but which aim contributes, to the greatest extent, to the protection of the Internal market. The answer is found by analysing the legal context in which state aid law operates. Since state aid control is a part of competition law, it is reasonable to assume that recovery should primarily concern itself with remedying the anti-competitive effect. Retrieving only the monetary effect may not improve the competitive situation, hence, such actions might indirectly contribute to the distortion of the Internal market.

10.2.2 The state of the state aid system

Any reform of the state aid recovery mechanism must protect the interest of the beneficiary as well as the functioning of the Internal market to satisfaction. Logically, increased protection of the beneficiary must only be allowed if the

state aid control system is efficient and stable. The history of state aid law indicates that without a functioning control system, the Member States do not show the required state aid discipline. The earlier years were characterised by subsidy wars, poor notification rate and wide-spread miscommunication with the Commission.

The theory is simple: a strong Internal market can afford a relaxation of the state aid control, without any risk of harming the protection of the functioning of the Internal market. For the purpose of this thesis, the strength and the resilience of the entire Internal market does not need to be assessed, an assessment of the strength of the state aid control system is sufficient. The modernisation of the state aid control system has increased the efficiency and stability of the system. The statistics indicate that the recovery rates have improved; hence the system has become stronger. Arguably, the system is stable. It can hence afford a relaxation of the application of the recovery obligation.

The reforms under SAAP and SAM lead to a de facto decentralization. With the increased *de minimis* threshold and an enlarged GBER, the Commission has in effect limited its own authority in performing detailed supervision. Thus, the Commission considers the system sufficiently viable and healthy to allow a relaxation of the supranational control. The stability of the system is illustrated by the fact that despite that 40% of the GBER cases being potentially problematic, the Commission will not abolish the less strict control.

Notably, classic competition law has undergone an even greater decentralization and yet the state of the Internal market does not demand for the decentralisation to be reversed. Classic competition law belongs to the same legal family as state aid law and since both legal areas shall protect the same Internal market, the system is arguably able to accept the same level of relaxation of control in both areas.

To present a counterargument, the effects of relaxed control in classic competition law is not comparable to the effects of relaxed state aid control. This is due to the fact that the classic competition law is concerned with actions between private parties. A relaxation of the state aid law interpretation will result in Member States supervising themselves which, historically, is not a successful approach.

The state aid system has, however, proven itself capable of surviving a temporary but intense relaxation, a result of the financial crisis. Despite the lower quality of ex-ante control, which is an inevitable consequence of the 24 hour time frame under Article 107(3)b TFEU, the aid control system remains intact.

10.3 Specific issues

10.3.1 The role of legitimate expectations

The principle of legitimate expectation deserves attention. A discussion about legitimate expectations is a discussion about jurisdiction. As a rule, expectations are considered legitimate exclusively when founded upon formal jurisdiction; which in this thesis is referred to as absolute jurisdiction. Consequently, a Commission decision but not a Commission suggestion, can cause legitimate expectations. The courts expect the businessman to be aware of every aspect of the state aid system while the Union institutions have no obligation to clarify its jurisdiction.

In contrast, the beneficiary often rely on perceived jurisdiction in its argumentation. The beneficiary may believe a measure is not state aid and thus does not understand that the Commission has jurisdiction to assess the measure's compatibility. It is an argument with limited effect on the courts. Normally, the beneficiary has to face the consequences of misunderstanding the jurisdiction or the system.

The Union is not entirely uncompromising. A few success cases prove there is a narrow corridor in which the Union accepts legitimate expectations caused by perceived jurisdiction. If the beneficiary believes the issuing body has absolute jurisdiction or if the beneficiary is unaware that the jurisdiction has been used to change the situation, and it has limited opportunity to learn about the facts, the beneficiary may hold legitimate expectations. Thus the Union has accepted that relative jurisdiction is a valid argument. The scope of its acceptance is, however, open to discussion.

Overlapping jurisdiction is a key concern in the sibling legal area of national procedural autonomy. Whereas in cases concerning legitimate expectations the issue is the balancing of absolute and perceived jurisdiction which both are within Union jurisdiction, in national procedural autonomy cases, the courts must balance the jurisdiction of the Member State and the jurisdiction of the Union.

Cases of national procedural autonomy are divided into two categories: national cases based on legitimate expectation and cases of *res judicata*. The two categories fall within two different jurisdictions, *res judicata* cases having an especially uphill battle. Most likely there is no scope, within state aid, to increase the importance of *res judicata*. Such an interpretation would indirectly result in a decentralisation of the legislative jurisdiction. Certainly, the State aid control system has undergone a decentralisation but of the executive and, to some extent, judicial power. A decentralisation of the legislative power would be detrimental to the Internal market, as it would challenge the current supranational gravity of the system.

In contrast, legitimate expectations deriving from national law do not cause the same concerns. The Union has no specific procedural law hence the national procedural laws cannot intrude on the Union's legislative jurisdiction. The Member States are enjoying, rightly so, a certain liberty when executing the recovery decisions. In conclusion, cases of this nature should be treated in the same way as the other legitimate expectation cases.

As previously stated, the Union has accepted that, to a certain degree, perceived jurisdiction may render legitimate expectations. This is significant. The current systems do invite confusion. With the current system largely being regulated by soft law, the difficulty of identifying the scope of jurisdiction and the Commission's, possibly, ill-advised attempt at clarifying the definition of state aid, a businessman may easily hold expectations of relative jurisdiction.

Arguably, the Internal market does not benefit from confused and surprised beneficiaries having to return aid. Such a system does not contribute to achieving deterrence. Harsh remedies are efficient only if the undertakings understand why their actions are illicit. In an unclear system, the beneficiaries are simply too confused to be able to act in a proper manner. This paragraph speaks only of the aim to deter, achieving one aim might decrease the probability to achieve the other aims.

Some aids must be retrieved to prevent anti-competitive effects, else the system will be left completely inefficient, but preventing anti-competitive effects is not the only aim. Notably, the Court acknowledges that in situations in which the beneficiary is confused as to the definition of state aid and said confusion is due to the changing status of the measure as aid or not aid, the interest of the beneficiary should be taken into great consideration. This is evident in the cases of reasonable expectations of transitional measures. I agree with AG Jacobs; if a measure is not obvious state aid, it is not justifiable to recover. Considering that the definition of state aid is evolving, any other interpretation would ask the businessman to be more diligent than the courts.

An analogy with EU funds law indicates that a relaxed interpretation of the exemption legitimate expectations does not automatically lead to failure in regards to achieving the aims of recovery. In contrast to state aid law, in EU funds law the exception of legitimate expectation is interpreted with more generosity. EU funds law shares great similarities with state aid law. The exemption should receive equal interpretation in both of the legal areas.

To present a counterargument: the analogy lacks relevance. Since the funds law decisions are made by the Union and not the Member State, the supranational structure of the system remains intact. Consequently, EU funds do not affect competition between Member States.

The weakness of the counterargument is that EU funds do affect competition between Member States, albeit the Union, unlike Member States, does not have any incentive to act with bias. Further, the EU funds may have a negative

effect on competition between undertakings, which harms the Internal market. Since state aid and EU funds have similar effects on the Internal market, drawing inspiration from EU funds law, the market can afford a relaxation of the interpretation of the principle of legitimate expectations in the area of state aid.

To conclude, despite a strict interpretation of the principle of legitimate expectations, due to a certain level of confusion regarding the rules and case law, recovery does not deter. The system has accepted that the interest of the beneficiary receives some priority in situations in which it is difficult to assess whether a measure constitutes state aid. Lastly, the principle of legitimate expectations should be interpreted slightly more relaxed, equal to the interpretation of the exemption in EU funds law.

10.3.2 Time as an argument

Justice delayed could be justice denied, hence time has always been of the essence in the Union system. This section is an analysis of the significance of time as an argument in cases based on legitimate expectations and good administration. Legitimate expectations arguments can be divided into two categories: arguments related to jurisdiction, analysed in the above section, and arguments associated with the Union institutions' duty to exercise power. Lengthy procedures are in effect a delayed exercise of power.

As is evident in the case law, whether the time elapsed is considered acceptable depends on the assessment of two parameters: the behavior or actions of the Member State involved and, as seen in the *RSV* case, the length of the time period. It is important to keep in mind that despite lengthy procedures not being abnormal, successful defences of recovery are rare.

The meaning of the first parameter could be summed up as follows: as *RSV* and *CELF v SIDE II* shows; whereas good faith grants no advantages, bad faith may cause disadvantages. Case *CELF v SIDE II* and *CETM* clarifies that if the delay is caused by the Member State's actions or by the structure of the system, the beneficiary may not hold a legitimate expectation. Interestingly, the courts appear to emphasise the importance of deterrence. They ask a question of almost ideological character: does the beneficiary deserve a successful defence of recovery?

Recovery has three aims. While the above reasoning protects the aim of deterrence, it does not cater to the aim of reversing the anti-competitive effect. The question the Union should ask is: does the recovery contribute to remedy the anti-competitive effect? When a considerable amount of time has passed since the aid was paid out, the answer may very well be negative; a considerable amount of the anti-competitive effect has transferred upstream to consumers or to other markets. Retrieving the monetary effect is still a realistic option but reversing the anti-competitive effect is a challenge, and an ever increasing one as time elapses. A retrieval of the anti-competitive effect requires early action.

Time is of the essence, as resources. The principle of the above argument is not an original idea, the Union adhere to a ten-year limit on recovery decisions. The limit was introduced to protect the beneficiary's legal certainty. It is highly unlikely that a beneficiary escapes a recovery decision due to it being a breach of the principle of legal certainty. Arguably, the Union assess that with the passing of the ten years, the effect a recovery has on the Internal market is diminished to the point where that otherwise deprioritised protection of legal certainty takes priority.

According to the Court, recovery is not a punishment, merely the logical consequence of incompatibility. The logic is arguably slightly flawed. Considering the beneficiary cannot notify state aid and lacks the right to be informed when the ten-year period is aborted, the beneficiary's position is weak. Thus, actions that are out of the beneficiary's control can cause the beneficiary harm. A recovery should serve a purpose beyond providing income to the state. Recovery which fails to remedy the anti-competitive effect are surprisingly similar to a recovery whose sole purpose is to provide income to the state.

In summary, the courts and the Commission should not ask whether a beneficiary deserves to be exempted from recovery but whether a recovery will remedy the anti-competitive effect.

10.3.3 Legal certainty - absolutely impossible

The case law identifies two criteria of legal certainty: clarity of the recovery decision itself and the Commission's obligation to exercise its power within a reasonable time frame. The former criterion is related to legitimate expectations, hardly surprising, considering the Court often apply the two as one. The latter is analysed in the previous section.

The first criterion, clarity of the recovery orders, is intriguing, its application mirrors that of the exemption of absolutely impossible. Whereas the latter exemption refers to the Commissions ability to collect sufficient information to form a well-founded decision, the former is concerned with the Member States' ability to understand the Commission's decision.

The exemption of 'absolutely impossible' is not a principle, thus it does not have to be balanced against other principles, rather it is a digital question. A recovery either is or is not possible. Hence, the duty to cooperate is heavily emphasised since the Union institutions must be absolutely certain that there is no possibility to retrieve.

Repeatedly, the Court has clarified that a proportionality assessment is not a part of the assessment of whether a recovery is possible. The effect a recovery has on the beneficiary is irrelevant, as is the administrative and monetary cost of carrying out the recovery. Further, it is irrelevant whether a recovery results in the recovery of actual money. To conclude, the key to a successful defence

is insufficient records; it must be literally impossible for the Commission to retrieve the information needed to formulate a well-informed decision.

Legal certainty is in contrast to the exemption ‘absolutely impossible’ a principle but it is applied in a manner resembling the non-principle ‘absolutely impossible’. Granted, the courts do not ask whether it is *absolutely* impossible for the state to understand the recovery order but rather if it is feasible *without too much difficulty*. Based on the case law, a significant lack of clarity is accepted. Despite the significant lack of clarity in some recovery decisions, the court does not acknowledge a breach of legal certainty. In effect, the courts treat it as a question of binary nature: it is or it is not possible to understand the recovery decision.

Since the state aid control system is stable, the system can tolerate a relaxed interpretation of the exemption absolutely impossible. However, caution is required. An interpretation too generous leads to the states left to determine whether they can execute a decision, a power which can be abused to engage in subsidy wars. Thus, no drastic changes are expected but the development is visible in a recent decision addressed to Italy. Granted, insufficient records have been a successful argument in the past but nevertheless the decision indicates a more generous interpretation, since the aid is not retrieved despite the fact that the aid would *normally* have been recovered.

Considering the latest development of the interpretation of the excemption absolutely impossible and the stability of the state aid system, the interpretation of the principle of legal certainty and the exemption absolutely impossible can be relaxed slightly; with maintained functioning of the Internal market.

10.3.4 The role of social upheaval

The effect of an interim relief is temporary, making the case law at once less but also more relevant. They are less relevant since as a consequence of their temporary nature, the Union’s prerequisites are not quite as demanding. They are more relevant since the stakes are lower; the non-permanence allows the Union to experiment a little bit, the operative word being *little*. They indicate the trend; new possible directions of state aid recovery. It bears repeating that the successful interim cases are nonetheless scarce.

Possibly finding inspiration in primary law, which recognise with which severity the financial crisis affects Europe, with the case *Greece v Commission* the court recognise the increased significance of social upheaval which is caused by the financial crisis, as an argument in state aid law.

The case must be read in light of the state aid reforms. Changes initiated under SAM and SAAP aim to allow the Commission to concentrate on cases with the greatest impact on the Internal market. Arguably, in its ruling, the court finds that an immediate recovery from the Greek farmers is not of great importance to the Internal market. Surprisingly, the probability of success is

a relevant aspect. If the Member State is in great financial difficulty, an interim relief is more likely to succeed. Due to the financial constraints, in a regular recovery process the aid would most likely not be retrieved; it is better to allow the state to improve its financial situation before proceeding.

A Member State's general financial situation thus affects the speed by which the recovery is executed. The Union is creating a fast-track and a slow-track recovery system. Since the Union is more likely to pursue an Article 260(2) TFEU process where the Member state shows reluctance to execute recovery decisions, the nationality of the beneficiary is becoming increasingly important. The nationality is not affecting the decision itself but it affects the degree of enforcement. Considering not all decisions are executed, beneficiaries from financially stable states have in effect a slight disadvantage.

An aim of SAM is to bring the Member State's budget under balance. The court arguable contemplates the decision's effect on the state aid control system in addition to its effect on the overall Internal market. The Internal market appears to be better helped by the Member States collecting taxes rather than collecting state aid. The more generous approach to interim reliefs is simultaneously contributing to the protection of the Internal market and the protection of the beneficiary.

The new development in interim cases could possibly foreshadow an evolution of the interpretation of the exemption 'absolutely impossible'. They have a comparable criterion. The interim relief's irreversible damage, shares similarities with the criterion absolutely impossible. Further, the courts have not excluded social upheaval as a legitimate argument, they merely require extensive evidence, which was finally provided to the Court's satisfaction in the interim case. Were the financial situation to decline further, a recovery could become absolutely impossible. Neither the functioning of the Internal market nor the ability to balance budgets benefit from a severely financially damaged Member State.

To conclude, in certain situations, the financial stability of the Member States, as opposed to certain aspects of the state aid control system, is of greater importance to the protection of the Internal market. A Member State's general financial situation affects the speed and level of enforcement of a recovery. The recent development in interim relief case law may foreshadow a reformed interpretation of the exception absolutely impossible.

10.3.5 Proportionality

The Court leaves no room for doubt that the size of the sum to be retrieved is not the object of an in-depth proportionality assessment. A flat recovery is by definition not objectionable. This section is not a misguided effort to analyse the development of the interpretation of the principle of proportionality. Rather, it is a *de lege ferenda* discussion of how the courts, within the orbit

of the aim of recovery, can construct a proportionality assessment of the sum to be recovered.

A proportionality assessment is a part of the economic assessment, within which the Court may only perform a limited judicial review. Since the Court only conducts a limited judicial review, the case law does not prove that the Court finds a flat recovery proportionate; it only proves a flat recovery is not disproportionate. By ordering the payment of interest, which serves the purpose to render the aid's real effect on the market, the Court acknowledge that a more nuances proportionality assessment can be carried out within the orbit of the state aid control system.

The nature of proportionality is such that the more important the aim, the more intrusive measures are allowed. State aid control shall protect the Internal market. It is an important task. Recovery is, in addition, technically not intrusive; it is merely a withdrawal of a benefit and not an invasive punishment. Hence, in theory, a flat recovery is not objectionable.

Notably, the above paragraph is concerned with the general aim of state aid control, not the specific aim of reversing the anti-competitive effect. Nor does it analyse whether a flat recovery is effective. A flat recovery is in effect a recovery of the monetary benefit only. Without a more nuanced proportionality assessment, the recovery might not render the actual effect on the Internal market. Hence, a more nuanced proportionality assessment is benefitting the Internal market and the beneficiary alike.

A more thorough assessment would cause increased administrative costs. Whereas the Court accepts increased administrative costs for the Member States, possibly because the Member State is the sinner, huge costs may not, without great justification, tax the Commission. Thus, considering the specific aim of recovery, the state aid system allows a more refined proportionality assessment of the sum but practical concerns prevent this development.

As a summary, the current proportionality assessment contributes to retrieve the monetary benefit but not necessarily the anti-competitive effect.

10.3.6 How diligent must the businessman be?

In an implied proportionality assessment of a different kind, the Court asks what could reasonably be expected of a beneficiary; how diligent must a businessman be? The case law indicates that the short answer is: very.

The state aid control system places a tall order on the beneficiary. The current case law illustrates that the question of what can be expected from a diligent businessman is often nearly rhetorical. The diligent businessman is expected to have a law degree. The system does consider the interest of the beneficiary a priority, as seen in legitimate expectation cases. However, the very fact that the Court asks what can be expected of a diligent businessman is interesting.

It indicates that the state aid control system shall pay some attention to the interest of the beneficiary, in addition to the protection of the Internal market.

A purpose of this thesis is to present arguments in favour of the beneficiary. Notably, not all aspects of the current system are unreasonable. Asking the beneficiary to oversee the legality of all the aid from the last decade is a heavy burden but not an unreasonable request. Ten-year limits exist elsewhere.

A fundamental flaw of the system is, however, that the businessman has all of the responsibility but only limited authority. While the Member States do have the option to notify the aid to the Commission, an action which makes a defence of recovery redundant, the beneficiary does not have the same opportunity. The beneficiary may inform the Commission once the aid is paid out but the beneficiary itself cannot notify, the aid to the Commission. If the Member State chooses not to notify, the beneficiary is left either to abstain from the aid or to take a risk.

Further, the time frame of a notification procedure is, as acknowledge by SAM, simply not business relevant. Lengthy procedures are not a carte blanche to ignore the rules but it is an aspect to take under consideration.

As a result of the recent reforms, fewer situations ends with a defence of recovery process. As a result of the reforms, and even more so if the Commission would start to cherry pick cases, fewer defence cases will be successful. The most efficient defence of recovery is to never enter a defence of recovery process. To protect the interest of the weaker party, the beneficiaries should have access to the early procedures. They should be allowed to notify, be informed if the ten-year period is aborted and receive an improved standing.

In contrast to the beneficiary, a Member State can notify and it does have standing, it is a formal party in the in-depth procedure. Whereas recovery is not a punishment, it does cause financial hardship on the businessman but not on the Member State. The current order does not greatly contribute to the aim of deterrence, since it does not make the polluter, the Member State, pay.

Actions under Article 260(2) TFEU are the exception. The recent development to increasingly utilise such procedures will not remedy the flaws of the current interpretation of the recovery obligation but it will prevent the need to ever recover. Granted, the monetary effect on the Member States, which an Article 260(2) procedure had, is not explicitly linked to the granting of the illicit aid; the purpose of the procedure is to cure the Member State's recovery apathy. As a result of the process, the Member State's actions will have consequences and not only for the beneficiary but also for the Member State. Further, in order to prevent unjust enrichment, the Union and not the Member State should be the recipient of the retrieved aid.

To summarise, due to fundamental flaws of the system, the interest of the beneficiary should be taken into greater consideration. In addition to an

adjusted interpretation of the state aid rules, the procedural standing of the beneficiary should be improved. They are important to the beneficiary's ability to defend itself, as is the increased use of procedures under Article 260(2) TFEU, albeit they serve slightly different aims.

10.4 In conclusion: de lege ferenda

Bringing the interest of the beneficiary and the interest to protect the Internal market together is not easy; to do it to both interests' complete satisfaction is impossible. It is not the aim of this thesis and nor does it have to be, rather the aim is to improve the beneficiary's standing and position – the protection of the Internal market is not neglected but it has already has a strong position which will not become weaker – by finding and discussing aspects of the state aid control system which would work in the beneficiary's favour but are currently underutilised.

The scope of potential change is determined by two parameters. First, the stability of the Internal market and state aid control system, as it determines to what extent the Internal market needs protection. Historically, the actions of the Member States have been cause for concern but overprotection of the Internal market is nothing less than a waste of Union and Member State's resources. An anlalysis of the case law, academic discussion, the structure of the state aid system and of certain aspects of similar legal areas leads to the conclusion that the system is stable. It is not a far distant goal; it is established and implemented.

The second parameter is the aim of state aid recovery, since it determines the method to be used to provide the necessary level of protection. This parameter potentially provides common ground for the interest of the beneficiary and of the protection of the Internal market. The general aim of state aid recovery is to protect the Internal market but that goal can be dissected into sub-aims. The analysis identifies three sub-aims: recovering the monetary effect, reversing the anti-competitive effect and the deterrence effect. The aim to retrieve the monetary effect is currently unnecessary heavily prioritised. By increasingly prioritise the other two aims, most importantly the aim to reverse the anti-competitive effect, the Internal market would receive a more effective protection and possibly also improve the beneficiary's situation.

Within the orbit of the greater frame of scope of change, several adjustments of specific parts of the state aid system and case law are feasible. The system can provide the beneficiary with a more favourable interpretation of the principles of proportionality, legal certainty and legitimate expectations. The interpretation of the exemption not to retrieve if a recovery is absolutely impossible may be less narrow.

Greater deterrence is achieved by adjusting the interpretation of the principle of legal certainty. Further, the social and financial stability of the Member States may, in certain cases, be more important to the protection of the

Internal market than an immediate recovery. This is an advantage for the beneficiary.

The case law as it stands offers very little relief to the beneficiary; even when using the underutilised aspects of the state aid control system, the beneficiary will be at the mercy of exemptions, thus, even after certain adjustments of the system, a defence in a recovery case will most likely not be successful. Yet, the beneficiary have no reason to worry greatly. The reality is such that in the future a beneficiary is even less likely to have to participate in a defence of a recovery process; and when it does, it should have received an improved standing. The new system should and to some extent will, provide more opportunities not to not have to be exposed to a recovery decision.

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