



GCLC Lunch Talk  
24 June 2013

# Recovery and Insolvency – A case for greater flexibility?

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## Basic Recovery Principles

- ✓ The purpose of recovery is to **re-establish the situation that existed on the market** prior to the granting of the aid
- ✓ Recovery is **not a penalty**, but the logical consequence of finding aid illegal and incompatible
- ✓ Recovery must be **immediate and effective**:
  - **immediate**: the procedure must take place without delay
  - **effective**: the procedure must lead to actual recovery (*Olympic Airways C-415/03*)
- ✓ National rules preventing effective and immediate execution should be **left unapplied** (*Scott C-232/05*)



# Recovery and insolvency

- ✓ **Insolvency does not affect the recovery obligation:**
  - the **liquidation** of the beneficiary and the **termination of its economic activity** can be accepted as an alternative to full recovery (**end of the distortion of competition**)
  - national bankruptcy law applies, if it takes **EU interest** into account
- ✓ **Required action:**
  - **end of the economic activity** within a clear timetable, unless immediate and effective (= **full!**) recovery
  - **immediate registration of the recovery claim** in the correct rank,
  - **liquidation:** sale of assets **at market conditions** by an **insolvency administrator/court**; no sale of 'going concern'!



# Required Action

- ✓ Member State must **provoke insolvency** in case of outstanding recovery claim, and
- ✓ **Appeal** decisions of the insolvency administrators if they:
  - refuse to register recovery claims,
  - register claims in an incorrect rank,
  - **allow continuation of activity in the absence of full recovery,**
  - **authorise the transfer of assets below market terms,**
  - accept settlements between creditors which would reduce the recovery claim to the benefit of other, lower ranking claims (ex: *Commission v. Slovakia C-507/08*)



# EU Appeals

- ✓ **Two procedures exist before EU courts:**
  - Appeal against recovery decisions (Article 263 TFEU)
  - Application for interim relief (Article 278 TFEU)
- ✓ Appeals against recovery decisions **do not suspend the execution** of a recovery decision at national level
- ✓ Only a successful **request for interim relief** can halt the process!



# National Appeals

- ✓ **National courts** are only competent where the applicant could not challenge the decision before the EU Courts for lack of legal standing
- ✓ If a national judgment is adopted in breach of EU law, the **Member State must appeal it** (*COM v. Slovakia C-507/08*)
- ✓ In granting **interim relief**, national courts must respect the "**Atlanta/Zuckerfabrik**" criteria (*C-143/88, C-92/89, C-465/93*):
  - **serious doubts** about the validity of the COM decision (*fumus boni iuris*) and preliminary ruling request if no appeal pending
  - **Urgency – risk of serious and irreparable damage**
  - due account of **EU interest**, and **respect of EU case law**



# In need of greater flexibility? (I)

## ✓ **Arguably, not:**

- Insolvency/**market exit** is the only way to restore competition on the market in the absence of full recovery
- In practice, most aid beneficiaries facing insolvency because of a recovery order **should have exited the market long ago**
- Where justified, **interim relief can be obtained** both before EU Courts and national courts



## In need of greater flexibility? (II)

- ✓ **'Alternative ways of implementation' can be accepted in appropriate cases:**
  - **Itemized asset sale at market conditions** can be **'certified aid-free'** by COM after **notification** (cf. Alitalia, Olympic, Ryanair T-123/09)
  - **If economic continuity/circumvention excluded, recovery obligation does not pass to the buyer** (Sernam):  
**Criteria:** purpose of the transfer; transfer price; identity of shareholders/owners; moment of the transfer; economic logic (cf. *SIM 2 Multimedia (C-329/99, C-399/00)*):



***Thank you for your attention!***