

National Recovery Procedures: how to guarantee an effective and immediate enforcement of the Commission’s decisions. The role of national judges. Analysis of the case law of the EU courts. Belgian and Austrian Procedures (Part 3)

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Comparative analysis: recovery of fiscal state aid under Austrian and Belgian law

The scope of the fourth session of the seminar was to provide a comparison between the Belgian and Austrian fiscal state aid recovery procedures.

The main relevant difference between the two jurisdictions was identified in the available procedures for the recovery of fiscal state aid.

In Belgium, based on art. 108 TFEU, the national courts are competent to order for remedies even before the EC issues any negative decision. National courts can order for the recovery or (provisional) suspension of the measure at issue. As noted, after the Commission decision, in the absence of specific legislation, Belgian national courts may apply civil and administrative procedures depending on the nature of the aid in concern. Nevertheless, the Belgian legislator introduced two specific recovery procedure on the basis of the Maribel Scheme and the Excess Profit scheme.

In Austria, civil or administrative tax procedure should apply depending on the nature of the aid. However, with respect to fiscal aid, the assumption is that tax procedures are applicable.

Van de Vijver explained that in Belgium, the introduction of specific legislation was influenced by different factors, e.g., the numerous taxpayer involved in the Maribel and Excess Profit schemes, and to certain conflicts between Belgian general procedures and EU law, e.g., the limitation period.

According to Van de Vijver, national courts and National Authorities agreed that EU law overrules Belgian internal legislation. Specific legislation was introduced mainly to provide legal certainty and guidance on how the amount to be recovered needed to be calculated.

She continued explaining that problems may arise with respect to the qualification of the aid to be recovered as a tax, in particular, within the excess profit exemption case, the legislator qualified the amount at issue to be repaid as a “tax”, but only for certain purposes. Therefore, it is not clear to what extent tax judges are competent. Compared to the Austria situation, in the latter jurisdiction, it is assumed that the amount to be repaid qualifies as a tax and accordingly, only tax recovery procedures are applicable.

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From an Austrian perspective, Van de Vijver addressed the problem arising from the qualification of the aid to be recovered as a tax. She explained that in principle, the Austrian state aid recovery procedures were not meant for the recovery of fiscal state aid too. Nevertheless, in case of conflict between EU and domestic legislation, the former shall prevail on the domestic law even though there is no specific legislation to overcome these problems.

Finally, the effectiveness of the state aid recovery procedures was addressed. She explained that in Belgium, the recovery procedure within the Maribel case has proven long and difficult to be brought to a concrete conclusion. By contrast, the excess profit procedure provided for an effective and immediate recovery. Based on the information available, most of the aid has been recovered, though through provisional cantonments. Hence, to a large extent, the effectiveness of the recovery has been achieved. In Austria, as said, there have not been fiscal state aid recovery case to be used for an analysis of the effectiveness of the available recovery procedures.