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Recovery as a Multidimensional Remedy

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The recovery remedy as administered by the European Commission in case of incompatible but already granted state aid is currently understood and substantiated in a way that allows Member States to fulfill its recovery obligations by merely asking a refund of the state aid amount plus interest from the aid beneficiary. However, it is argued that "recovery" in this current one-dimensional interpretation and substantiation falls short in contributing to the achievement of the economic outcome pursued by EU state aid law. It is argued that "recovery" should be perceived as a multi-dimensional remedy, leaving room to tailor this remedy in view of the situation in order to achieve the economic outcome pursued by EU state aid law, which is efficiency and welfare.

I. INTRODUCTION

When the European Commission establishes that a state aid measure cannot be declared compatible with the internal market and such state aid has already been granted without being notified, it normally orders the Member State concerned to recover the state aid granted. Hence "recovery" has a prominent place in the EU state aid law enforcement regime. Nevertheless, the notion itself has not been defined. Indeed, the Procedural Regulation[1] mentions this notion but does not further define it. However, case law delivered by the European Court of Justice (hereinafter "ECJ") has contributed to the understanding of this notion by emphasizing the objective that is pursued through recovery: re-establishing the market situation as it was prior to the granting of the state aid. This objective is deemed to be achieved if the beneficiary repays the state aid amount plus interest.

Scholars have raised the point of criticism that recovery is not always able to neutralize all anti-competitive effects.[2] However, other scholars have argued that the benefits of calculating the actual competitive advantage may outweigh the difficulties involved in such a calculation, implying that a cost-benefit analysis pleads in favour of the current approach towards the recovery obligation. [3] It is not disputed in this paper that recovery of the financial advantage plus interest is not always able to undo all the distortive effects. However, the claim developed in this paper is of a different kind. This paper shall not deal with the way the recovery remedy is performed, but rather

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1 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 083, 27 March 1999, 1-9.

2 Lever, 'The EC State aid Regime: The Need for Reform', in Biondi, Eeckhout & J. Flynn (eds), *The Law of State aid in the European Union*, Oxford, Oxford University Press, 2004, 313-314.

3 Monti, 'Recovery Orders in State Aid Proceedings: Lessons from Antitrust?' (2011) *EStAL*, 416.

with the way the very notion of 'recovery' is interpreted and substantiated. It shall be argued in this paper that the current interpretation of 'recovery' is inadequate in light of the economic rationale underpinning EU state aid law (and thus also underpinning its remedies regime). By doing this, it is intended to contribute to the current debate referred and to contribute to a more effective administering of the recovery remedy.

It shall be argued that rethinking the interpretation and substantiation of 'recovery' is particularly welcome in view of the Commission's willingness to reform EU state aid law in view of developing an EU state aid policy that supports wider policy objectives (i.e. economic growth). This 'new role' for EU state aid law is argued to build upon the fundamental objectives of EU state aid law, i.e. maintaining the functioning of the internal market in order to achieve efficiency and welfare. It is indeed submitted that if EU state aid law and policy should be reformed to serve economic objectives by exploiting the potential embedded in this field of law to produce a particular economic outcome, the remedy to enforce such body of law should be aligned with this new direction in EU state aid law.

In view of the above, it shall be argued that 'recovery' should not be interpreted as a one-dimensional remedy, i.e. requiring the refund of the state aid amount plus interest, but as a multidimensional remedy that should be tailored to achieve, in each particular case, the economic outcome the underlying substantive law wishes to achieve. This however, does not mean that the way that notion is currently interpreted is flawed in every case. Nevertheless, it is intended for this paper to show that the theoretical considerations that will be developed in sections II and III can also have a practical impact to recovery practice and its effectiveness. In that respect, in section IV the example of state aid granted through a public purchase contract and its recovery shall be elaborated.

II. THE BACKGROUND: EU STATE AID LAW AND POLICY

1. The rationale underpinning EU state aid law

Article 107(1) TFEU, providing for the state aid prohibition, reads as follows:

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

It may seem relatively easy to determine the objective underpinning the state aid prohibition on the basis of this provision. Even though not explicitly articulated as such, it can be drawn from its wording that preserving undistorted competition and free trade are the goals pursued. The ECJ's and GC's case law indeed refers to the

objective of preserving free competition[4] and free trade[5] on the common/internal market as being the main objective of EU state aid law.

However, EU state aid law in itself serves more fundamental objectives. The Spaak Report is quite illuminating in this respect. The Spaak report mentions that merging national markets to a common market would result in a more efficient allocation of resources, an increased security of supply and more cost aware production.[6] Also, enlarging the market and eliminating monopolies would render it possible to develop modern techniques and efficient production processes because of economies of scale.[7] It also stimulates undertakings to invest in efficient production and in the quality of its products, this is because of an increase in competition.[8] In order to achieve this "common market", the Spaak Report suggests eliminating all barriers to trade and the achievement of economic integration. Thus the free movement provisions would serve as a legal framework to achieve such a common/internal market. However, such measures were not deemed to be sufficient as there are also barriers construed by undertakings in the form of anti-competitive behaviour and barriers arising from state intervention to the benefit of undertakings established in that state, which are liable to impede the establishing and well-functioning of such a 'common market'.[9] One of the fields of law dealing with this concern is EU state aid law. Hence, EU state aid law is an instrument of negative integration: Member States should refrain from granting measures falling within the ambit of Article 107(1) TFEU in order to preserve the well-functioning of the internal market and thus to achieve the output envisaged by integrating the markets of the European Member States.[10]

Hence, EU state aid law compliance is not so much an objective; it is rather a means. Literature mentions the instrumental nature of EU competition policy, including EU state aid policy, in order to establish a well-functioning internal market.[11] However, for the purpose of the claim developed in this paper, it is argued that the analysis should not stop there. The establishing of the internal market has an objective in itself. This was already argued above: by establishing the internal market and maintaining its well-functioning, a particular economic output was envisaged. This economic output

4 See e.g. Case C-225/91, *Matra*, [1993] I-3203, par. 42; Case T-358/94, *Air France*, [1996] II-2109, par. 56; Case T-16/96, *Cityflyer Express*, [1998] II-757, par. 50; Case C-209/00, *Commission v Germany*, [2002] I-11695, par. 29; Case C-404/00, *Commission v Spain*, [2003] I-6695, par. 19.

5 See e.g. Case 148/77, *Hansen and Balle*, [1978] 1787, 14; Case C-387/92, *Banco Exterior de España*, [1994] I-877, 12; Case T-46/97, *SIC*, [2000] II-2125, 77; Joined Cases C-393/04 and C-41/05, *Air Liquide*, [2006] I-5293, 27.

6 Comité Intergouvernemental créé par la conférence de Messine – Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères (the "Spaak Report"), Brussels 21 April 1956, p. 13.

7 *Ibid*., p. 13.

8 *Ibid*., p. 14.

9 *Ibid*., p. 16.

10 As will be discussed further on, the claim can however be made that EU state aid law is also becoming an instrument of positive integration.

11 Anestis, 'State Aid and Antitrust Remedies: Anything in Common?' (2012) EStAL 551. The author contents that competition policy is an instrument in the establishing of the internal market.

envisaged is extensively described in the Spaak Report, but it can be summarized as the intention to create efficiency and welfare.

This is also confirmed in literature regarding the economics underpinning EU state aid control. Three main reasons are put forward to explain why EU law provides for state aid control. First the need to avoid cross-border externalities, second to counter commitment problems, and also an internal market *rationale* – which is argued to be closely linked to the former two reasons – lies at the core of EU state aid control.[12] This internal market rationale underpinning EU state aid law is built upon the idea that integrated markets lead to economic growth.[13] Anti-competitive interventions, such as the granting of state aid, jeopardize this outcome as it distorts the normal functioning of the market.[14] Assigning the Commission with a duty to observe all Member States comply with the EU state aid rules is to be considered as a commitment device in order to protect the internal market idea.[15]

2. Directions in EU state aid policy

Even though being the very reason for introducing the state aid provisions, the economic rationale discussed above was only recently explicitly considered as a source to support wider policy objectives pursued by the Commission.

Indeed, EU state aid law went through a number of phases starting from the early days of European Economic integration. Notwithstanding this considerable history, authors note that only from 2005 did EU state aid law enter the "age of reason".[16] This new era for EU state aid law came as a response to the Lisbon Strategy that aimed for growth and employment, which offered a blueprint for a genuine state aid policy.[17] The State Aid Action Plan[18] (hereinafter "SAAP") was a direct consequence of this evolution. The SAAP indeed aimed at shaping the Commission's state aid policy in accordance with the Lisbon objectives. As the Commission stated in its communication:

> "To best contribute to the re-launched Lisbon Strategy for growth and jobs, the Commission will, when relevant, strengthen its economic approach to State aid analysis. An economic approach is an instrument to better focus and target certain state aid towards the objectives of the re-launched Lisbon Strategy".[19]

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12 Friederiszick, Röller & Verouden, 'European State aid control: an economic framework', in Buccirossi (ed), *Handbook of antitrust economics*, Cambridge, MIT Press, 2008, 638.

13 Midelfart-Knarvikand and Overman, 'Delocation and European integration: Is structural spending justified?' (2002) Economic Policy, 325; Friederiszick, Röller & Verouden, n 12, 641.

14 One of the clearest examples is probably supporting inefficient industries through subsidization while there being no economic rationale for doing so.

15 Friederiszick, Röller & Verouden, n 12, 641.

16 Kassim & Lyons, 'The New Political Economy of EU State Aid Policy' (2013) J Ind Compet Trade, 10.

17 *Ibid.*

18 State Aid Action Plan. Less and better targeted state aid: a roadmap for state aid reform 2005–2009, 7 June 2005.

19 SAAP, par. 21.

This new direction in EU state aid policy has recently been re-emphasized in the 2012 Communication on the modernization of EU state aid policy (hereinafter "SAM Communication"). [20] This communication too stresses the role of EU state aid law in the framework of larger Commission policy objectives. These policy objectives are articulated in the Europe 2020 Strategy objectives for economic growth, and they can be summarized as follows: (i) achieving "smart growth", i.e. developing an economy based on knowledge and innovation, (ii) achieving "sustainable growth", i.e. promoting a more resource efficient, greener and more competitive economy and (iii) achieving "inclusive growth", i.e. fostering a high-employment economy delivering economic, social and territorial cohesion.[21] According to the Commission, EU state aid law - and the policy developed when applying it - takes up an important role in achieving economic growth.

The SAM Communication stresses in particular the role for EU state aid law in achieving sustainable growth. Such sustainable growth requires an effective internal market, involving the establishing of an integrated market as well as competition policy including state aid control, in order to safeguard the well-functioning of that integrated market. The idea underpinning this important role for state aid control in achieving sustainable growth is, that competition provides for incentives to undertakings to enter markets, to innovate and to improve productivity and competitiveness.[22]

Obviously, such EU state aid policy closely relates to the economic rationale underpinning EU state aid law. By emphasizing the role EU state aid law can play in realizing the Lisbon objectives and currently the Europe 2020 strategy objectives, the Commission uses the potential EU state aid law incorporates to achieve the desired economic outcome. This potential follows from the very reason why EU state aid law was introduced in the EEC Treaty (currently the TFEU) in the first place. Whereas EU state aid law used to be a body of law preserving trade between Member States and competition, the Commission explicitly promotes shaping the instrument of EU state aid control, "into a tool promoting a sound use of public resources for growth-oriented policies and limiting competition distortions that would undermine a level playing field in the internal market."[23] This new approach towards EU state aid control also seems to add a new dimension to its function. Whereas it was concluded, based on inter alia the Spaak Report, that the rationale for EU state aid law was preserving the well-functioning of the internal market in order to achieve and maintain an environment that produces the economic outcome envisaged, the SAM Communication seems to assign another mission to EU state aid law. After all, it is stated that, "[s]tate aid control plays a fundamental role in defending and strengthening the single market."[24] Hence,

[20] 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 (SAM) /* COM/2012/0209 final.

[21] Communication from the Commission. Europe 2020 - A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, 3 March 2010, 10.

[22] SAM Communication, par. 2. See also SAAP, par. 6-7.

[23] SAM Communication, par. 6.

[24] SAM Communication, par. 2.

EU state aid law should adopt not only the role of 'defender' but also the one of 'strengthener' in order to produce the economic outcome envisaged.

It follows that EU state aid law, influenced by the new directions in the policy underpinning its application, more than ever serves as a means to exploit the opportunities the internal market offers in terms of economic gains. This led *inter alia* to a 'more refined economic approach' and the 'balancing test' when assessing whether a measure could be declared compatible with the internal market based on Article 107(3) TFEU. However, apart from inciting Member States to take up their role in the recovery process, the way 'recovery' should be interpreted did not experience an influence from this evolution in EU state aid policy.

Favouring economic growth through a particular state aid policy – primarily through introducing efficiency and incentives, effects considerations in the assessment under Article 107(3) TFEU as to whether or not endorsing a state aid measure – goes together with an effective application and enforcement of the state aid prohibition laid down in Article 107(1) TFEU itself. As mentioned, the EU state aid prohibition serves the economic purpose of ensuring efficiency and welfare through maintaining the well-functioning of the internal market. Even though this prohibition relates to negative integration, enforcing this prohibition contributes to the same objectives as expressed in the SAM communication, of which it can be argued, to a certain extent, that it embodies a form of positive integration.[25] After all, recovery is – as a remedy – the means for the Commission to effectively enforce the underlying substantive law. As Wright observed, remedies become, "the means by which the abstraction of the substantive law is translated into concrete terms."[26] Hence, seeing EU state aid control as being currently assigned with an important role contributing to wider Commission policy objectives may provide for the momentum to rethink the way 'recovery' is interpreted. After all, even if it could be argued that recovery is outside the scope of the new approach to state aid control, at least it can be argued that such new approach produces 'spill-over effects' resulting in a more economic approach to the notion of 'recovery' given the shared fundamental objectives. The question to be raised in that respect is whether the current interpretation of 'recovery' complies with the economic outcome sought by EU state aid law and whether it duly serves the wider policy objectives set by the Commission.

III. A NEW FRAMEWORK FOR THE INTERPRETATION OF 'RECOVERY'?

1. Recovery and its *rationale* in the current stance of the law

Pursuant to Article 14(1) of the Procedural Regulation, the European Commission can require a Member State to recover state aid that was found incompatible to the internal

[25] This was argued by Blauberger in the context of the SAAP. M. Blauberger, 'Of 'Good' and 'Bad' Subsidies: European State Aid Control through Soft and Hard Law' (2009) West European Politics, 726 et. subs.

[26] C. A. Wright, 'The Law of Remedies as a Social Institution' (1955) U Det L J, 377.

market.[27] Even though this is the principal remedy the Commission has at its disposal, the notion is not clearly defined in the said Procedural Regulation, nor within other provisions of law.

ECJ case law, codified by the European Commission[28], teaches that the objective of the recovery remedy is re-establishing the market in its original state, i.e. the state the market was in before the state aid was granted. This "re-establishing" reflects the idea that the benefit should be taken away from the beneficiary. Indeed, according to the ECJ's and GC's case law, this goal is attained when the beneficiary has repaid the state aid amount (plus interest) as such repayment implies that the beneficiary loses his advantage vis-à-vis his competitors.[29] After all:

> "As long as the aid is not recovered, the beneficiary of the aid is able to keep funds deriving from the aid declared incompatible and to benefit from the resulting unfair competitive advantage". [30]

Repayment of the state aid amount has such an effect. The ECJ stated in this respect:

> "The obligation on a State to abolish aid regarded by the Commission as being incompatible with the common market has as its purpose to re-establish the previously existing situation. That objective is attained once the aid in question, increased where appropriate by default interest, has been repaid by the recipient (…). By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored".[31]

In other words, in principle, there is no need for Member States to apply another measure other than sending an invoice to the beneficiary with the request to refund the amount mentioned.

The case law cited indicates that the notion of 'recovery' has been given substance in the light of Article 107(1) TFEU. This Article envisages keeping the internal market free from distortive financial interventions on the part of Member States; undertakings should be able to compete on a level playing field. The recovery remedy, being the most important remedy in EU state aid law, has to enforce this objective set by Article 107(1) TFEU. In that respect, requiring a refund in order to take the advantage enjoyed by the beneficiary seems to be a proper remedy.

However, in the next section it shall be argued that this frame of reference to substantiate 'recovery' is too limited. After all, EU state aid law indeed has as an initial

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[27] This provision provides that "where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary".

[28] Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15 November 2007, 4-17.

[29] Case C-303/88, *Italy / Commission*, [1991] I-1433, 57 and 60; Case C-350/93, *Commission / Italy*, [1995] I-699, par. 22; Case T-324/00, *CDA Datenträger Albrechts*, [2005] II-4309, par. 78.

[30] Case C-331/09, *Commission / Poland*, [2011] I-02933, par. 56.

[31] Case C-348/93, *Commission / Italy*, [1995] I-673, par. 26-27.

objective: keeping the internal markets free from anti-competitive and distortive state interventions. However, the analysis should not stop here; EU state aid law has a more fundamental objective, i.e. preserving the well-functioning of the internal market. This objective has, in turn, its own objective, i.e. creating a particular economic output (i.e. efficiency and welfare). This economic output is thus achieved also through substantive EU state aid law. But does procedural EU state aid law play its part in this respect given the current notion of 'recovery'? This question shall be considered in the next section.

2. The adjusted framework for the interpretation of 'recovery'

In the previous section, it was demonstrated that EU state aid law does not merely see to a state aid free internal market. By doing so, it has a more fundamental role to play: it has to preserve an environment in which efficiency and welfare can be created through free competition and free trade.

However, referring back to the rationale underpinning the recovery remedy, which was drawn from the ECJ case law and subsequent Commission codification, the recovery remedy does not seem to follow the same path. As to substantive EU state aid law, the analysis of the underpinning objectives is a multi-leveled one: EU state aid law intends to achieve a market free from distortive state aid (level 1,) in order to preserve the well-functioning of the internal market (level 2), in order to achieve welfare and efficiency (level 3). Yet, the analysis when examining the rationale underpinning 'recovery' – in its current interpretation – does not seem to bring us further than the first level objective of EU state aid law (i.e. a state aid free internal market). Hence, this implies that the recovery remedy as currently interpreted does not guarantee that the economic outcome envisaged by establishing and maintaining the internal market – whose well-functioning is to be preserved by EU state aid law – is actually produced. Moreover, this also implies that such interpretation does not match the wider policy objectives the Commission envisages to achieve through administering EU state aid law.

Based on the foregoing it is argued that the framework for interpreting the notion 'recovery' should not merely be defined by the need to 'remove the advantage'. In accordance with the rationale underpinning the substantive EU state aid prohibition, it is suggested that the following criterion should be used when interpreting the notion 'recovery': the advantage is removed out of the market in such a way that the outcome envisaged by the state aid rules is safeguarded, i.e. a genuine competitive environment on the internal market that produces efficiency and welfare. Hence, it is suggested that the notion 'recovery' should be substantiated in accordance with the economic rationale underpinning the establishing of the internal market, an outcome to which EU state aid law should contribute.

Hence, the basic point made in the foregoing paragraph was the following: the question should be raised whether recovery as currently understood is sufficient to enforce the state aid prohibition in order for it to play the role it was assigned in the broader framework of the internal market.

This however does not mean that recovery cannot take the form of a request for a refund of the state aid amount. Indeed, in many cases this will be the proper way to enforce the state aid provision to serve the fundamental objective. Nevertheless, it does

imply that it should not always be taken for granted that 'recovery' equals 'refund of the state aid amount plus interest'. The test should be whether such refund is suitable to achieve the economic output envisaged by EU state aid law. If it does not, 'recovery' should be interpreted in a different way, i.e. in a way that serves the underpinning rationale (a well-functioning internal market that produces efficiency and welfare) more adequately. Therefore, 'recovery' should be considered to be a multidimensional notion, to be substantiated in accordance with the harm it wishes to remedy and taking into account the economic outcome it should achieve. This may require a more profound analysis of the market and the effects of the state aid measure to that market.

Such 'alternative approach' to the recovery remedy can be applied in a number of situations. One situation could be state aid granted through a loan at favorable terms. Pursuant to Commission practice, the state aid amount in such cases equals the difference between the interest that would be payable under normal market circumstances and the interest actually paid.[32] Hence, recovery in case of a state aid conferral through a loan at favorable terms, would imply a payment of that difference to the aid granting authority. However, based upon the theoretical considerations in the previous paragraphs, it could be argued that annulling *ex tunc* (in combination with an interest rate to be applied to the amounts to be restituted) the underlying loan agreement would be a more adequate way of neutralizing the advantage enjoyed by the beneficiary, especially if the maintaining of such loan (be it at a higher interest rate) does not fit within economically rational behavior. Another example might be the sale of real estate by a public authority below market value. Recovery of the state aid amount would imply requiring payment of the difference between the price actually paid and the market price.[33] Instead of requiring this payment, recovery in the form of annulling the contract *ex tunc* could be more appropriate, as other interested parties willing to pay the actual market price might be able to use such real estate more efficiently.[34]

These are just two short examples of situations in which 'recovery' could mean more than merely refunding the aid amount, taking into account the economic outcome envisaged by EU state aid law. In the next section, a more detailed example shall be elaborated. More in particular, the example of recovery of state aid granted through a public contract shall be developed.

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[32] See e.g. Commission Decision 2008/716/EC of 2 April 2008 on State aid C 38/07 (ex NN 45/07) implemented by France for Arbel Fauvet Rail SA, *OJ* L 238, 5 September 2008, 27-32, par. 36.

[33] See e.g.: Commission Decision 92/11/EEC of 31 July 1991 concerning aid provided by the Derbyshire County Council to Toyota Motor Corporation, an undertaking producing motor vehicles, *OJ* L 6 , 11 January 1992.

[34] These examples indicate that such alternative approach also seems justifiable if looked at it from the viewpoint of welfare. After all, inefficient allocation of resources and the welfare loss resulting from this seems hardly to be remediable through merely requiring repayment of the difference between the price of the interest paid and the market price or market interest rate. Even more, such welfare loss is hard to measure in monetary terms. Hence, requiring from the state aid beneficiary to compensate for this loss, e.g. by imposing payment of an additional lump sum compensating for the welfare loss, seems to be neither practical nor satisfactory. I am thankful to Albert Sanchez Graells for pointing me to this issue.

IV. THE EXAMPLE OF STATE AID THROUGH PUBLIC CONTRACTS

1. State aid through Public contracts

Entering into a public contract may constitute a state aid grant. As the ECJ held on numerous occasions, state aid conferrals can take a wide range of forms. The key question is: does a measure, "mitigate the charges which are normally included in the budget of an undertaking?"[35] Hence, the form of the measure is of no relevance. It follows that also public contracts can be used as a way to grant state aid to an undertaking. Also as to public contracts the EU state aid law prohibition applies.

In this respect, the notion of 'public contracts' is to be understood as defined in the currently applicable public procurement directive as to classical sectors (Directive 2004/18): contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services. It is important to see that this does not include public contracts for works, services or goods the purchasing authority does not really need as one could argue that from an economical point of view, such transaction could qualify as a subsidy instead of a genuine purchase.[36]

In order for the entering into a public contract to be in breach of the state aid prohibition, the conditions enshrined in Article 107(1) TFEU have to be fulfilled. As to public contracts, especially the first condition will give rise to discussion: does a public authority grant an advantage through the entering into a public contract? This question is to be answered by using the so-called 'private purchaser test'. The idea underpinning this test is the following; public entities have to enter the market in order to purchase goods, services or works in order to address their needs in fulfilling their tasks. When they do so, they should behave the same way a private purchaser would have behaved in similar circumstances.[37] Hence, Member States can grant state aid through public contracts, i.e. by overcompensating[38] the supplier of the goods, services or works. In other words: if the price paid by the Member State is higher than the market price, that Member State grants state aid to its counterparty. It is this 'overcompensation' that constitutes the state aid component and it is that which should be taken away from the benefitting undertaking, in order to restore the normal competition situation on the market.

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35 See e.g. case C-387/92, *Banco de Crédito Industrial*, [1994] I-877, par. 13.

36 This distinction shall also be briefly touched upon further in this part of the paper.

37 Joined cases T-116/01 and T-118/01, *P & O / Commission*, [2003] II-2957, par. 113-114.

38 A Member State can also grant state aid by purchasing goods, services or works it does not need. However, as Advocate-general Tizzano remarked, it is hard to establish whether or not a Member State needs a particular good, service or work (Opinion Advocate-General Tizzano, Joined Cases C-442/03 P and C-471/03 P, *P & O*, [2006] I-4845, par. 90). For the purpose of this paper, this situation shall not further be considered.

2. Recovery of state aid granted through public contracts

In a case in which the Commission establishes that the public contract entails a state aid grant which cannot be declared compatible to the internal market on the basis of Article 107(2) or (3) TFEU, Article 14(1) of the Procedural Regulation comes into play.

Then two questions emerge: (1) which is the state aid amount to be recovered in case of overcompensation in the framework of a public contract and; (2) what form should the recovery remedy adopt?

As to the first issue, it seems safe to argue that the state aid component in a public contract entered into under an excess price is the difference between the overcompensation and the real market value. Commission decision practice in the field of the sale of public real estate indeed seems to confirm this. In a number of decisions[39], the Commission established that the sale price for a real estate was below market value. Thus the difference between the market price and the actual price was considered to qualify as state aid. In those cases the Commission identified the amount of state aid granted and explicitly ordered the repayment of that amount. This also corresponds with the idea that when ordering the recovery of state aid, the re-establishing of the normal market situation is envisaged. Thus only the advantage received should be neutralized.[40] A similar example can be found in decisional practice regarding the granting of state aid through the provision of a guarantee by a Member State.[41]

As to the second question, the central notion to be examined is obviously 'recovery'. How should this notion be interpreted within the framework of state aid through public contracts? As mentioned before, neither the Procedural Regulation nor any other provision of EU law provides for a specific procedure to be followed or provides for a specific recovery measure to be adopted. In this respect, the principle of national procedural autonomy applies, subject to the requirements of effectiveness of EU law.[42] According to the current stance of EU state aid law, there is no reason to believe that Member States cannot duly perform their obligations by "asking for the money back" (with interest). [43] This is not only the point of view that is prevailing in the literature.[44] Also, a number of indications lead to the conclusion that Member States duly perform "negative decisions with recovery" by requiring repayment of the state aid amount plus interest. The following elements can be put forward.

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[39] Commission Decision 92/11/EEC of 31 July 1991 concerning aid provided by the Derbyshire County Council to Toyota Motor Corporation, an undertaking producing motor vehicles, OJ L 6 , 11 January 1992, *36-44;* Commission Decision 92/465/EEC of 14 April 1992 concerning aid granted by the Land of Berlin to Daimler- Benz AG Germany, OJ L 263, 9 September 1992, 15-25.

[40] Heidenhain, *European State Aid Law*, Munich, Beck, 2010, 650.

[41] See e.g. Commission Decision of 14 December 2010 on State aid granted by Germany to the Biria group (C 38/05 (ex NN 52/04)), OJ L 195, 27 July 2011, par. 70.

[42] Heidenhain, n 40, 661.

[43] Joined cases T-116/01 and T-118/01, *P & O / Commission*, [2003] II-2957, par. 137.

[44] Heidenhain, n 40, 809-810.

First, the objective of the recovery remedy is re-establishing the market in its original state, i.e. the state before the state aid was granted. This 're-establishing' represents actually the idea that the benefit should be taken away from the beneficiary. Indeed, according to the ECJ's and GC's case law, this goal is attained when the beneficiary has repaid the state aid amount (plus interest) as such repayment implies that the beneficiary loses his advantage vis-à-vis his competitors.[45] Repayment of the state aid amount has such an effect. In other words, in principle there is no need for Member States to apply other recovery measures other than sending an invoice to the beneficiary with the request to refund the amount mentioned plus interest.

Second, the Commission's decisions practice seems to support the interpretation that the recovery remedy is limited to requiring a refund of the state aid amount (plus interest). As an example, reference can be made to the decisions that were mentioned in the previous section and which were issued in the framework of the sale of real estate by public authorities. Admittedly, this concerns sale contracts, whereas our example mainly deals with public purchase contracts. Nevertheless, from a state aid law point of view the underpinning idea remains the same: the contract price should represent a fair market value, with as a benchmark the price a private party would have asked/paid. In a number of decisions[46], the Commission established that the sale price for a real estate was below market value. Thus the difference between the market price and the actual price was considered to qualify as state aid. In those cases the Commission identified the amount of state aid granted and explicitly ordered the repayment of that amount. It is true however that, at first sight, the *Ferries Golfo di Vizcaya* decision[47] may point to another conclusion. Public authorities entered into a contract for the purchase of ferry line vouchers. However, the Commission established that it did not concern a normal commercial transaction; it concluded that the purchasing authorities did not have an actual need for the vouchers and thus it qualified the purchase as a state aid measure. In its decision, the Commission concludes that the whole amount payable under the contract should be recovered, without taking into account the services already delivered by the state aid beneficiary. Even though the Commission uses in its decision the notion of 'repayment' and identifies an actual amount to be recovered, this decision may feed the presumption that implicitly it declares the purchase null and void. However, it should be remarked that this negative decision is not so much based upon the establishment of overcompensation. The main reason for the Commission to require recovery lies in the fact that the purchasing authorities did not have an actual need for the vouchers purchased. The purchase as a whole was therefore not a market

[45] Case C-303/88, *Italy / Commission*, [1991] I-1433, par. 57 and 60; Case C-350/93, *Commission / Italy*, [1995] I-699, par. 22; Case T-324/00, *CDA Datenträger Albrechts*, [2005] II-4309, par. 78.

[46] Commission Decision 92/11/EEC of 31 July 1991 concerning aid provided by the Derbyshire County Council to Toyota Motor Corporation, an undertaking producing motor vehicles, OJ L 6, 11 January 1992, par. 36-44; Commission Decision 92/465/EEC of 14 April 1992 concerning aid granted by the Land of Berlin to Daimler- Benz AG Germany, OJ L 263, 9 September 1992, par. 15-25.

[47] Commission Decision 2001/247/EC of 29 November 2000 on the aid scheme implemented by Spain in favour of the shipping company Ferries Golfo de Vizcaya, OJ L 89, 29 March 2001, 28-36.

transaction. This was also confirmed by the GC (at that time the Court of First Instance).[48]

It follows that when an undertaking receives state aid through a public contract, such state aid can be recovered through refunding the state aid amount received plus interest. This is congruent with the frame we identified earlier in this paper that applies when the recovery remedy is given substance in the current stand of the law: the recovery remedy sees to the fulfillment of the objective of Article 107 (1) TFEU. But does it also fulfill the more fundamental objectives related to EU state aid policy?

3. Another approach to "recovery"?

As mentioned before, EU state aid policy indeed envisages keeping the markets free from distortive state aid, but it does so with a wider objective: ensuring the well-functioning of the internal market in order to achieve efficiency and welfare. Is this more fundamental objective achieved when interpreting 'recovery' the way it is currently understood, i.e. by merely requiring a refund of the overcompensation plus interest? Even more, is the said approach still adequate, given the role of 'strengthener' of the internal market, in addition to the role of 'defender'?

It was argued above that the recovery remedy should allow, apart from releasing the market from an advantage that distorts competition and trade, to actively restore competition and trade between Member States in order to produce the economic outcome envisaged. It seems to be assumed that once the advantage is neutralized through a refund plus interest, the market is re-established in the state it was in before the state aid's granting. As to public contracts, this would imply that a refund of the overcompensation is claimed, leaving the contract itself untouched. However, does this restore competition and trade between Member States the way it should, given the economic rationale underpinning EU state aid law?

As to public contracts, it must be noted that procedures for the award of such contracts are regulated to some extent by European directives, currently directives 2004/17 (as to utilities sectors) and 2004/18 (as to the classical sectors). These directives apply to contracts exceeding a certain value. The objective of these directives is to create an internal market for public contracts in order to create effective competition amongst tenderers.[49] [50] The economic output sought by these directives matches the one envisaged by the establishing of the internal market[51] – which is logical as EU public procurement law is actually a further specification of the free movement provisions.

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[48] Joined cases T-116/01 and T-118/01, *P & O / Commission*, [2003] II-2957, par. 137.

[49] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *OJ* L 134, 30 April 2004, 114-240, par. 2 and 36. See also e.g.: Case C-220/05, *Jean Auroux*, [2007] I-385, 52; Joined Cases C-285/99 en C-286/99, *Lombardini and Mantovani*, [2001] I-9233, par. 34.

[50] Also public purchase contracts outside the scope of the public procurement directives are subject to EU law, i.e. EU primary law and more in particular the free movement provisions as well as general principles of EU law. However, for the purpose of this paper, we will only consider public contracts falling within the scope of the EU public procurement directives.

[51] Arrowsmith, *The Law of Public and Utilities Procurement*, London, Sweet & Maxwell, 2005, 121-125.

One of the basic requirements of these directives is, in order to open up markets for public contracts, to publish a contract notice if the contract value exceeds a certain threshold. The idea underpinning such publication requirement is that such contracts might be of interest to firms in other Member States as well, so they should have an opportunity to win the contract. Apart from this publication requirement, the directives also provide for requirements as to disclosure of selection and award criteria, the use of technical specifications, etc.

Suppose, even though an obligation to publish a contract notice exists, a Member State enters into a public contract without such publication (i.e. a *de facto* award). The reasons for doing this can be manifold: protectionism, favoring national champions, unawareness of such obligation. Now, the contract turns out to be entered into for a price exceeding the market price. The firm that received the contract thus benefits from an advantage. Next, the Commission opens an investigation procedure, establishes that it concerns unlawful state aid and orders the recovery. Assuming the Member State complies with the recovery order and claims a refund plus interest, the case is closed.[52] However, the firm that won the contract might not be the best firm within the EU to perform such contract. Hence, such situation does not favor efficient firms. In other words, the chosen firm might not be the firm deserving such a contract as it was not exposed to actual competition with other tenderers, implying a disincentive for this firm but also for other firms to invest in efficiency and innovation. Moreover, 'recovery' as currently understood does not seem to be tailored to achieve the policy objectives recently set by the Commission.[53] Falling short in complying with the publication requirement is only one example as the same reasoning applies to situations in which a contract notice was published but in which an award procedure is conducted

[52] The point can be made that the Commission should address this issue with reference to the public procurement directives or to primary free movement law. After all, the Commission can initiate an action for non-compliance pursuant to Article 258 TFEU. However, recourse to EU state aid law might still be preferable for various reasons. For instance, compliance with EU public procurement law does not always rule out the existence of state aid. When a contract is awarded following a negotiation procedure of a competitive dialogue procedure, it is not guaranteed that the contract is awarded to the tenderer offering the lowest price possible. The same goes for restricted award procedures, i.e. award procedures which are not open to all potential tenderers in the market, but only to a limited number of tenderers (see: Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11 January 2012, 4-14, par. 66). Another reason is of a more practical nature. As the Commission relies to a large extent on information on infringements submitted by interested parties, it is more likely to obtain such information in a state aid context. Competitors to the state aid beneficiary might not have standing before national courts to challenge the award decision or challenging the award decision before the national court might be burdensome, so recourse to the complaints procedure with the Commission is a rational way to proceed. In that respect, the position of a complainant in a state aid context seems to be more favourable, in view of the commitments undertaken by the Commission in the State Aid Manual of Procedures (see section 7). In case of a complaint based upon the infringement of EU public procurement law or the free movement provisions, the complainant's position is less favourable as no similar commitments apply in this respect.

[53] It is noteworthy that the Commission marked also public procurement as one of the drivers to achieve the policy objectives which were also mentioned in the SAM Communication. See: Green Paper on the modernisation of EU public procurement policy - Towards a more efficient European Procurement Market, 27 January 2011, COM(2011) 15 final, p. 3.

in breach of the public procurement directives (e.g. inadequate disclosure of award criteria, use of technical specifications in breach of the provisions in this respect).

It follows from the foregoing that in case of a state aid grant through a public contract, the remedying effect of a mere refund of the state aid amount plus interest does not adequately serve the aim lying at the heart of EU state aid law. After all, the non-deserving firm still has the contract, whereas under normal market circumstances the contract would not have been awarded to this firm. Thus the market is still distorted: an undertaking which would not have received the contract under normal market circumstances is now chosen to perform the public contract after all. Even though the state aid amount is supposedly taken out of the market, still the economic outcome sought is not realized. Hence, it is argued that 'recovery' should be modeled in accordance with the aim lying at the heart of the substantive law it is supposed to protect and enforce. In the example of a public contract, it could be argued that 'recovery' should be interpreted as a measure to intervene in the contract as such and – if such is practically and legally[54] possible – leading to a removal of the contract out of the market (e.g. by having it declared it null and void).

Admittedly, approach to "recovery" seems at first sight far reaching. Nevertheless, suppose a public contract was entered into with an undertaking based on protectionist motives. In such case, merely recovering the excess amount does not entirely neutralize such protectionism. Protectionism was in the SAM Communication indeed identified as one of the issues EU state aid law should tackle.[55] In a case where a Member State grants state aid through a contract entered into with a clear view to erect obstacles in favor of a national undertaking, the recovery is not able to achieve the underlying economic objectives of EU state aid law.

V. CONCLUSION

In this paper, it has been argued that the way the recovery remedy is currently interpreted and substantiated does not guarantee that the economic outcome pursued by substantive EU state aid law is achieved.

Apart from being a general remark causing concerns, the foregoing statement also has policy relevance. Recently, the Commission seems to have rediscovered the economics underpinning EU state aid law, including its potential to contribute to the achievement of the Commission's current economic policy objectives. To that end, the way the substantive rules are administered was already the subject of reforms and will continue

[54] One could think of a problem of proportionality in some cases. Also, as a source of inspiration, reference could be made to the provision in the "Remedies Directive" dealing with the grounds that mitigate the consequence of the ineffectiveness sanction in public procurement law (art. 2 quinquies, par. 3 Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 31-46). However, an exhaustive discussion as well as an appraisal of this article falls outside the scope of this paper.

[55] The SAM Communication reads as follows in this respect: *State aid modernisation can improve the functioning of the internal market through a more effective policy aimed at limiting distortions of competition, preserving a level playing field and combating protectionism.* SAM Communication, par. 15.

to be so. However, the recovery remedy as currently understood and substantiated does not seem apt to enforce the economic outcome sought by substantive EU state aid law and thus neither to fully support the Commission's policy objectives to be achieved, amongst others, by its EU state aid policy. Hence, the current directions in EU state aid law and policy call for a reconsideration of the way 'recovery' is substantiated.

Against this background, it was argued that 'recovery' should not be understood as a one-dimensional remedy, merely envisaging the refund of the state aid amount plus interest by the beneficiary. After all, such refund is not always appropriate to serve the economic rationale underpinning substantive EU state aid law, i.e. efficiency and welfare. Therefore, it was suggested that 'recovery' should be substantiated in view of the underlying economic rationale. Hence, when substantiating the notion of 'recovery' one should ask the question how that outcome can be achieved. 'Recovery' should therefore be perceived as a multidimensional remedy: the way it is substantiated should depend on the question how an advantage falling within the scope of application of Article 107 (1) TFEU can be taken out of the market so that competition and trade are restored in a way that allows for a genuine competitive environment on the internal market that produces efficiency and welfare. Therefore, it was argued that 'recovery' in this current one-dimensional substantiation falls short in contributing to the achievement of the economic outcome pursued. It was argued that 'recovery' should be perceived as a multi-dimensional remedy, leaving room to tailor this remedy in view of the situation in order to achieve the economic outcome pursued.

The aforementioned theoretical considerations were illustrated through the example of the recovery of state aid granted through public contracts. It was argued that merely requiring a payment by the state aid beneficiary of an amount equal to the difference between the price paid and the actual market price (plus interest) may remove the advantage out of the market, but it may not achieve the economic outcome pursued by EU state aid law, i.e. welfare and efficiency. It was argued that such recovery does not guarantee that the contract is performed by the "deserving firm" (i.e. an efficient firm). Hence, having the contract performed by an undeserving firm (albeit at an adjusted price) de-incentivises investment in efficiency and, related thereto, innovation as well as market entrance by new firms. This goes against the economic rationale underpinning EU state aid law and the new directions in the Commission's EU state aid policy. In such case an alternative substantiation of 'recovery' may be desirable, such as annulling the public contract *ex nunc* or *ex tunc*.