

Repayment of State aid in case of insolvency

16. March 2021

Recent comments made by the European Commission in the *Alitalia* case (case SA.48171) show that even in the event of insolvency, State aid law can be enforced. In this case, the Italian government announced its decision to create a new national carrier to replace Alitalia, that, in 2017, had received financial support from the State. In the course of the ongoing investigation into the alleged State aid paid to Alitalia the Commission noted that if there was no “clean break” between Alitalia and its successor the new carrier might be considered liable for the repayment of that State aid.

As will be explained below, insolvency proceedings do not necessarily prevent the recovery of State aid that has been granted without approval. And while it is possible for a State to grant financial support to a company that is subject to or at risk of insolvency proceedings, this can only be done subject to strict conditions.



1. In what circumstances must State aid be paid back?

According to State aid law (Article 108(3)3 TFEU), State aid may only be granted if it has been previously approved by the Commission. Where aid is granted by the State but not duly notified and such aid is later investigated by the Commission, the Commission may

order the respective Member State to recover such unlawful State aid. The beneficiary may only retain any aid it has received if the Commission considers that the non-notified aid is compatible with the internal market.

2. Recovery of aid from a beneficiary facing insolvency

It is only in very specific and rather rare cases that unlawful and incompatible aid does not have to be recovered, e.g. if the recovery would be contrary to the general principles of EU law or where such recovery is impossible. It should be noted that there is no exception for companies that face bankruptcy as a direct result of the recovery of the aid. The Commission holds that an aid beneficiary that is not able to pay back the aid (plus any interest due) is in principle only able to remain in the market due to the aid it has received. Therefore, the beneficiary must leave the market in order to restore the competition which has been distorted by the aid.

In case of ongoing insolvency proceedings, the Member State should register a claim for the recovery of the incompatible aid and any interest due in the schedule of liabilities. Any plans for the continuation of the activities by the beneficiary of the aid can be supported by the Member State as a creditor only if they ensure a full recovery of the aid.

3. In which cases is the successor responsible for repaying State aid?

Member States should recover incompatible State aid from the original beneficiary of the aid. However, if that entity leaves the market, for example, due to insolvency, a legal and economic successor can be held liable for the repayment of the aid, provided that a part or all of the advantage of such aid has been transferred to that successor. The extension of the recovery to the legal successor is only possible if there has been a transfer of activities from the original beneficiary of the aid to the successor, resulting in the latter effectively enjoying the advantage of the State aid.

In the case of an asset deal, where the original beneficiary sells all or part of its assets to the successor, the successor may be required to pay back the aid. For example, in the *Alitalia* case, one of the issues discussed was whether its successor would be liable for repayment of the aid if it used Alitalia's valuable airport take-off and landing slots.

4. Are the requirements for the repayment of State aid affected by the particular circumstances of the ongoing Covid-19 pandemic?

As the ongoing Covid-19 pandemic continues to have a heavy impact on many sectors of the European economy, the Commission has prepared a special set of rules for

granting State aid to support representatives of these industries, for example in the transport sector. However, the rules for the recovery of incompatible State aid have not been relaxed and Member States are still obliged to recover funds swiftly. In 2020, the Commission issued several recovery decisions, clearly signalling that the recovery procedures are set to continue despite the difficult circumstances of the pandemic.

5. Can a Member State give up or defer a claim in order to avoid insolvency?

If a Member State relieves an undertaking of costs (e.g. by deferral or waiver of claims), this constitutes State aid if it is not in line with market conditions. In order to assess whether a public creditor acts in line with market conditions, its behaviour is compared to that of a hypothetical private creditor that finds itself in a similar situation (the so-called "private creditor test").


It follows that in assessing whether to give up a claim in order to avoid the insolvency of the beneficiary, the Member State should only take into account economic considerations. Political or public interest considerations should not play a role in this assessment. The Member State should assess whether the amount which can be recovered in the course of negotiations with the debtor is higher than the amount which can be received as a result of an insolvency procedure. In other words, State aid law allows debt to be deferred by Member States only if debt negotiations to avoid insolvency would allow for the recovery of a larger amount than an insolvency procedure. By contrast, if the measure constitutes State aid, it must be notified to the Commission and might be approved under the conditions of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty.


Our [► State aid law experts](#) are available to answer questions.


AUTHORS



Dr Christian Wagner

 Office Brussels

 +32 2 23411-60

 christian.wagner@kapellmann
.de