

Chillin' State Aid Workshop Procedural and Institutional issues



Recovery and private enforcement: Tempus fugit...

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The role of national courts: a recap

State aid v compatibility

- > State aid: if in doubt, referral up/opinion
- > Compatibility: up, up, up!

Recovery: incompatible aid

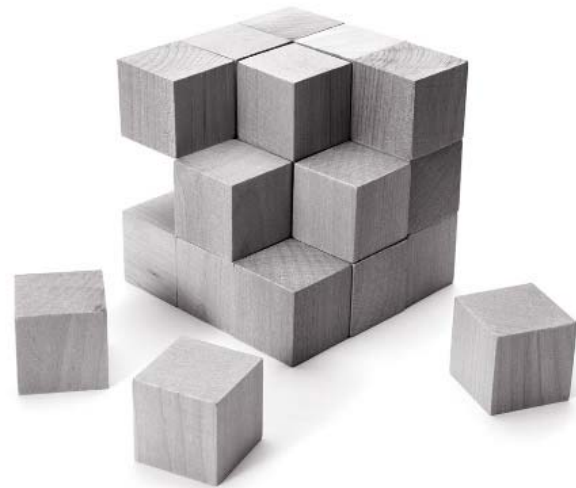
- > By third parties
- > By the Member State

Recovery: unlawful aid

- > Before approval
- > After approval: interest

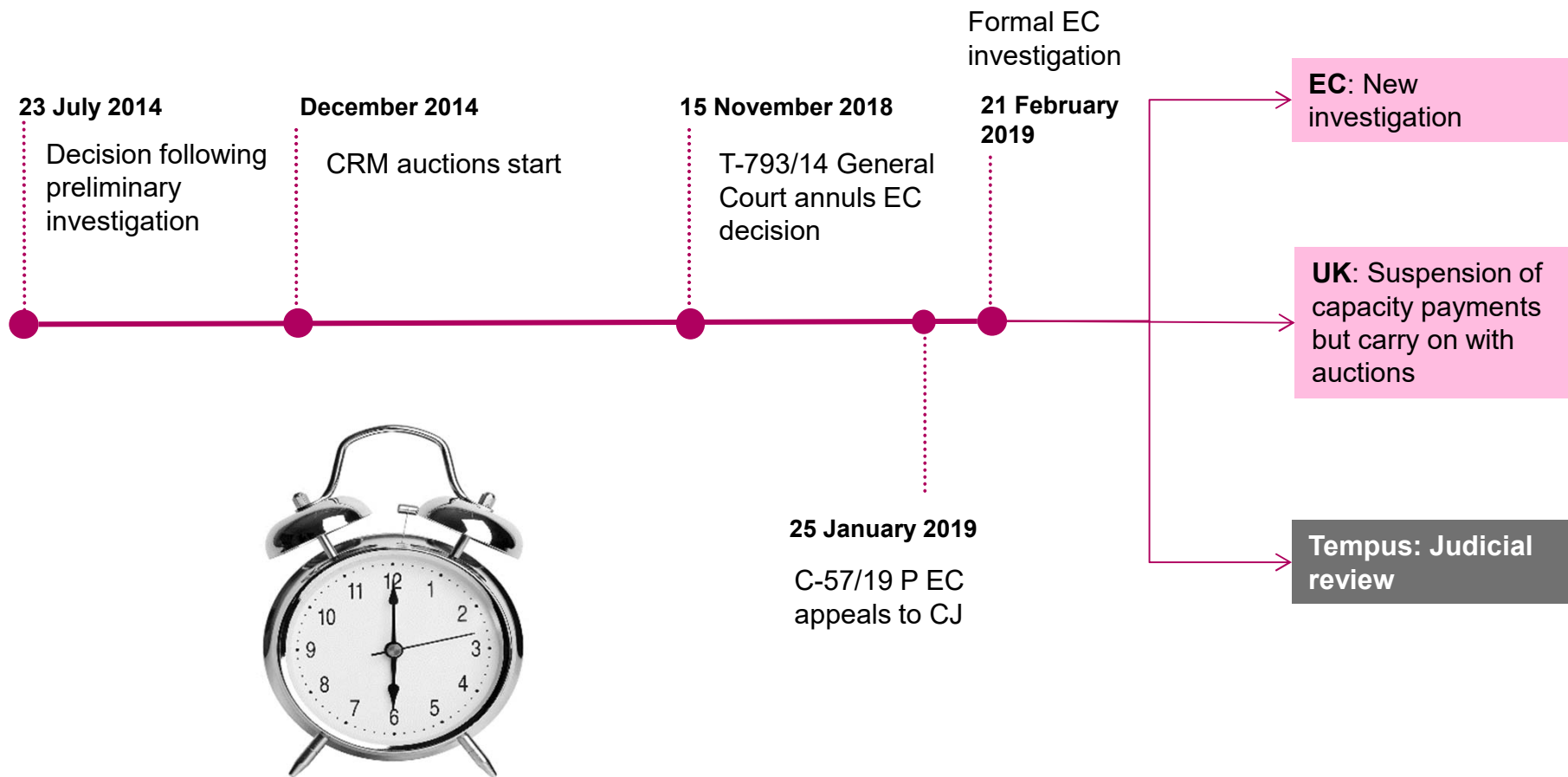
Damages

- > For lack of recovery
- > For aid itself: *Corsica Ferries*



Interim recovery by the national courts more effective and clear cut than by the EC

Case study: UK Capacity Market – Tempus Energy



Tempus' arguments before national court

Permission to JR and expedited procedure

Unlawful aid due to annulment of EC Decision, so UK government in breach of standstill obligation by:

- > T-1 capacity auction (summer) - conditional capacity contracts grant State aid (France Telecom/Bouygues)
- > Existing agreements with deferred payments
- > Collecting monies to fund the supplier charge
- > **not recovering payments that have already been made to Capacity Market agreement holders**



What can national court do? Tempus fugit...



The Commission is expected to complete its Phase II investigation and deliver its decision within a short period of time; any steps to recover past payments, or repay previously collected supplier charges, would be likely to give rise to issues of real legal complexity, involve new legislation and considerable time and resources – **UK**
***Grounds for Contesting the Claim*, 5 April 2019, para 56**



- > EC decision annulled – aid unlawful until new approval
- > Technically – national court “must” recover
- > But legitimate expectation due to old EC decision even if annulled?
- > **Question of timing...**
 - > new EC decision prior to UK judgment: interest?
 - > No EC decision by time of UK judgment: principal plus interest?
- > What about certainty, investability and (ultimately) security of supply?