



Introduction to State aid control: formal procedures

Overview

- Formal Procedure
- DG COMP decision-making process
- Commission decision-making process
- Recovery
- Monitoring
- Cooperation with national courts



Formal Procedures

Source of Information

- Manual of Procedures (ManProc):
 - details on rules
 - practical guidance
 - fiche pratiques with timetables, circulation lists etc.
- functional mailbox *COMP SA MANPROC SUPPORT*

Procedure – legal bases (i)

- **Article 108 TFEU**
- Jurisprudence of EU Courts
- **Procedural Regulation 2015/1589**
- Implementing Regulation 794/2004
 - as amended *inter alia* by Regulation 2015/2282

Procedure – legal bases (ii)

- Code of Best Practice
 - Revised code entered into force in 2018
- Communication on Professional Secrecy
- Notice on the enforcement of State aid law by National Courts

Procedural Regulation

Procedural Regulation

Chapter 1: Definitions

Chapter 2: Procedure **Notified Aid**

Chapter 3: Procedure **Unlawful Aid**

Chapter 4: Limitation Periods

Chapter 5: Procedure **Misuse Aid**

Chapter 6: Procedure **Existing Aid**

Chapter 7: Interested Parties

Chapter 8: Sector Inquiry

Chapter 9: Monitoring

Chapter 10: Cooperation with national courts

Chapter 11: Common Provisions

4 procedures

Core Concepts /Definitions

- new aid / existing aid
 - pre-accession/pre-Treaty
 - authorised by Commission [or Council]
 - "Lorenz procedure"
 - limitation period
 - has become aid due to evolution of common market

} existing aid

 - Everything which is not existing aid + alteration to existing aid

} new aid

- aid scheme / individual aid
- notified aid (or exempted aid) vs. unlawful aid (= illegal = aid not notified despite obligation to do so)

NB: Completely different from compatible vs. incompatible aid

- Misuse of aid

Procedure: Notified Aid

- Art. 108 (3)
 - notification obligation
 - standstill obligation
- exceptions:
 - *de minimis* aid
 - aid covered by an authorized aid scheme
 - aid covered by block-exemption
- Chapter II Procedural Regulation

Procedure: Notified Aid

- Pre-notification contacts
- Formal notification
- Phase 1: "preliminary examination" by Commission
 - time limit: 2 months after complete notification
 - if not complete, information request
 - if no answer after reminder, deemed withdrawn
 - Lorenz procedure:
 - MS gives prior notice that aid will be implemented (after expiry of 2-months period)
 - if no decision within 15 working days, aid is deemed authorised

Procedure: Notified Aid

- Phase 1: decision after preliminary examination (Art. 4)
 - no aid decision
 - no objection decision (compatible aid)
 - opening decision (doubts on compatibility = opening of formal investigation procedure)
- no negative decision
- no conditional decision (only commitment by MS)
- opening of procedure normally not subject to appeal

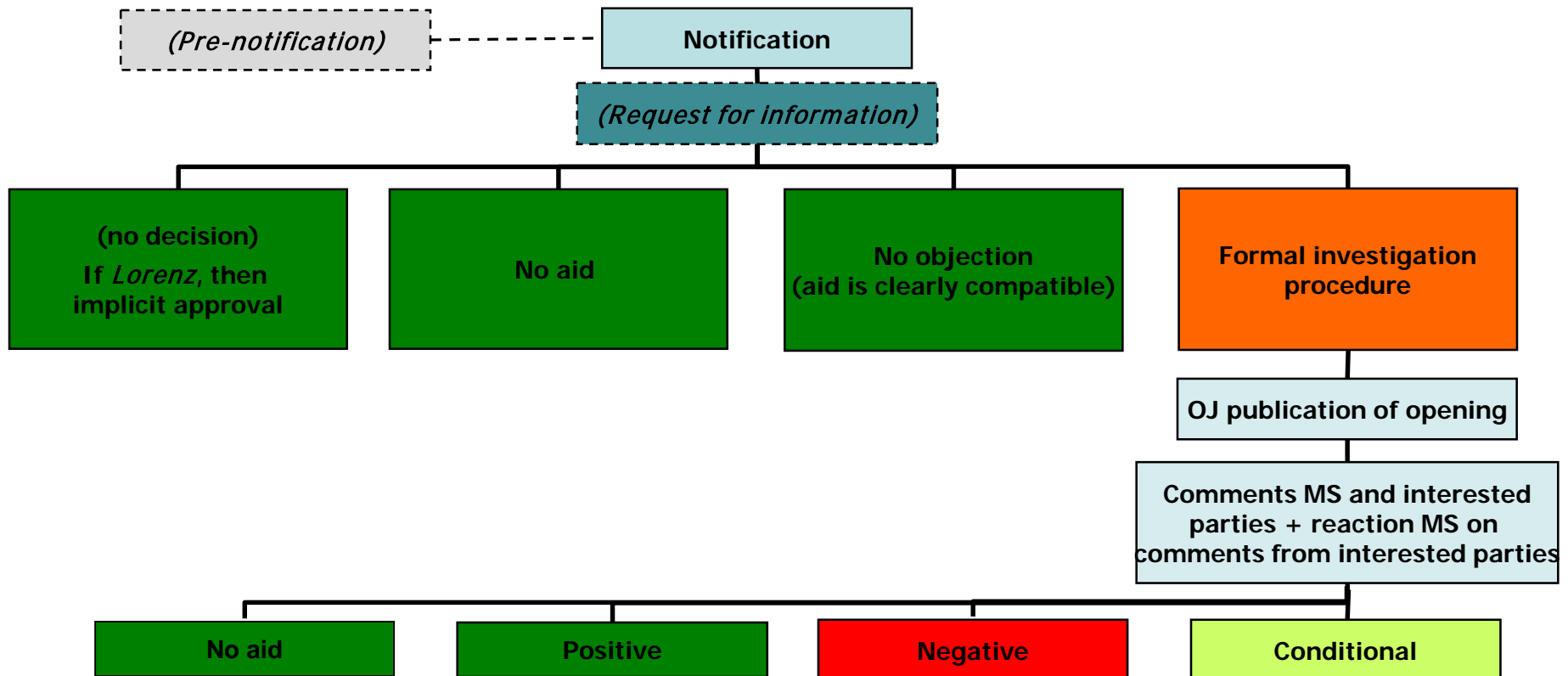
Procedure: Notified Aid

- Phase 2: formal investigation procedure
 - Formal Commission decision
 - publication of opening decision
 - MS and interested parties are invited to comment
 - MS can comment on the observations from interested parties

Procedure: Notified Aid

- Phase 2: closure of formal investigation (Art. 9)
 - no aid decision
 - positive decision
 - conditional decision
 - negative decision
- time limit: 18 months (non-binding)
 - "as soon as the doubts have been removed"

Procedure: Notified Aid



Procedure: Unlawful Aid

- similar procedure as for notified aid
- differences:
 - Art. 12(1): start of the procedure
 - complaint or *ex officio*
 - Art. 15(2): no time limits
 - use of injunctions
 - Art. 12(3): information injunction
 - Art. 13(1): suspension injunction
 - Art. 13(2): recovery injunction
 - negative Decision can lead to recovery (if aid was paid out prior the decision)

Complaint vs. market information

- **Complaint** (ISIS procedure code FC): only by persons with legal standing (most important: competitors) + compulsory form (Art. 24(2))
 - Certain procedural rights
 - Preliminary assessment letter
 - If complainant insists: formal decision
 - Important to keep complainant informed (Ombudsman)
- **Market information** (ISIS procedure code MI): e.g. from ordinary citizen, political party, ...
 - No procedural rights; "Market information letter"
 - COM can decide whether it wants to investigate on *ex officio* basis (ISIS procedure code EO)

Procedure: Existing Aid

- definition: Article 1(b) Procedural Regulation
- most common: aid granted before accession
- "new" Member States: existing aid lists
- procedure applies to existing aid schemes, not individual aid measures
 - basic principle: only changes for the future

Procedure: Existing Aid

- Articles 21-26

Steps

1. letter explaining preliminary view: Art. 21(2)

2. proposal for appropriate measures: Art. 22

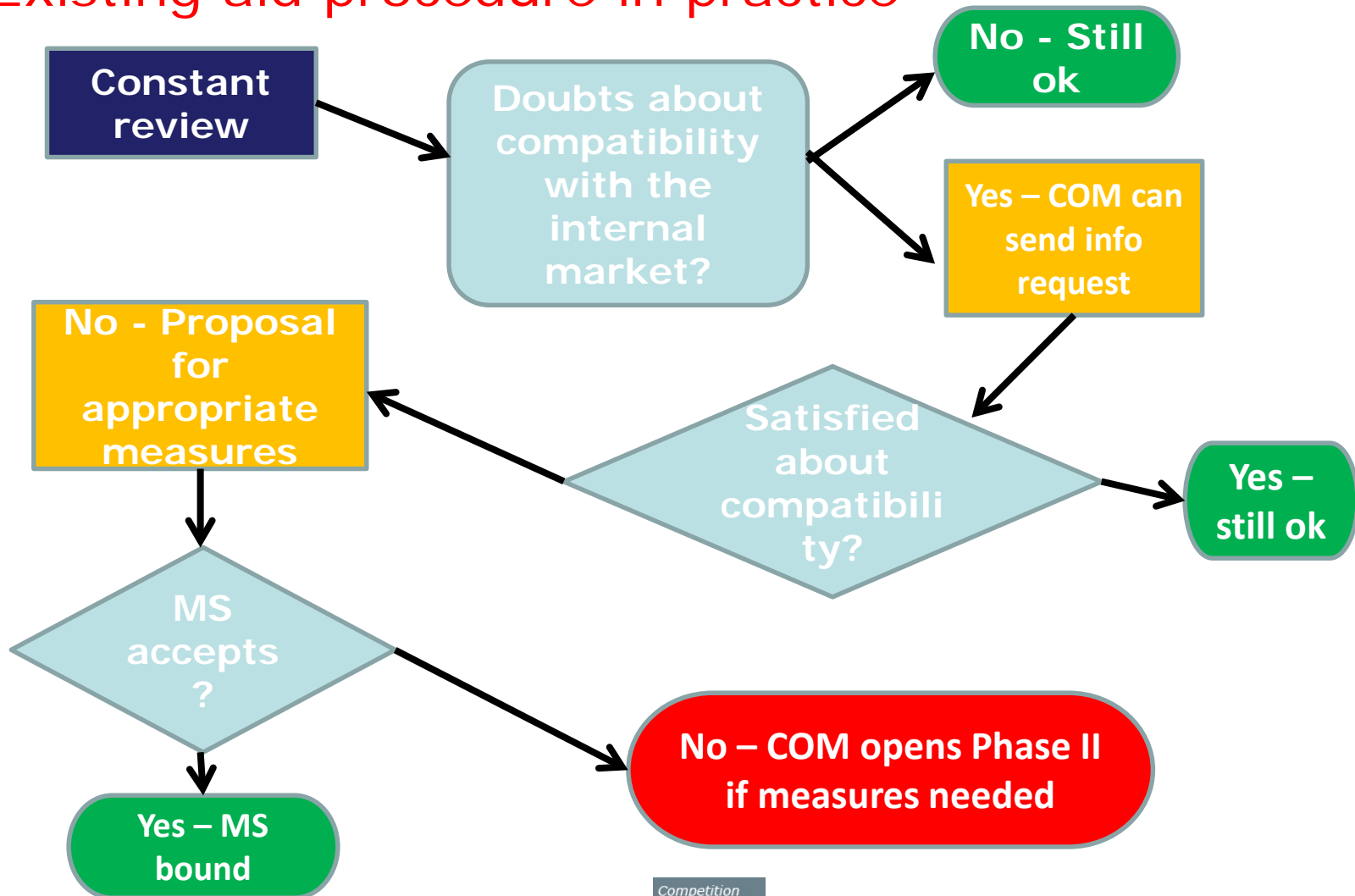
MS accepts or rejects proposal (Art.23)

➤ acceptance: proposed measure must be implemented

➤ refusal:

- Commission must open the formal investigation procedure (3.)
- after final decision (4.), appropriate measures become binding

Existing aid procedure in practice



Common Provisions

- Art. 30: professional secrecy (Art. 339 TFEU)
 - see also Commission Communication on professional secrecy in State aid decisions
- Art. 31: addressee of decisions = MS
- Art. 32: publication of decisions
 - summary notice in OJ
 - meaningful summary
 - full decision

Other procedural tools (i)

Requests for information to sources other than the Member State – market information tools / MIT (Art. 7):

- Only after the initiation of the formal investigation procedure
- Only if the information provided by the Member State during preliminary examination is not sufficient
- Mainly in technically complex cases
- Commission may request market information from any other Member States, undertaking or association of undertakings
- Factual company and market data, facts-based analysis of the functioning of the market
- From aid beneficiary only if the Member State agrees
- Simple request or decision
- Possibility of fines and periodic penalty payments!

Other procedural tools (ii)

Sector Inquiry – Art. 25

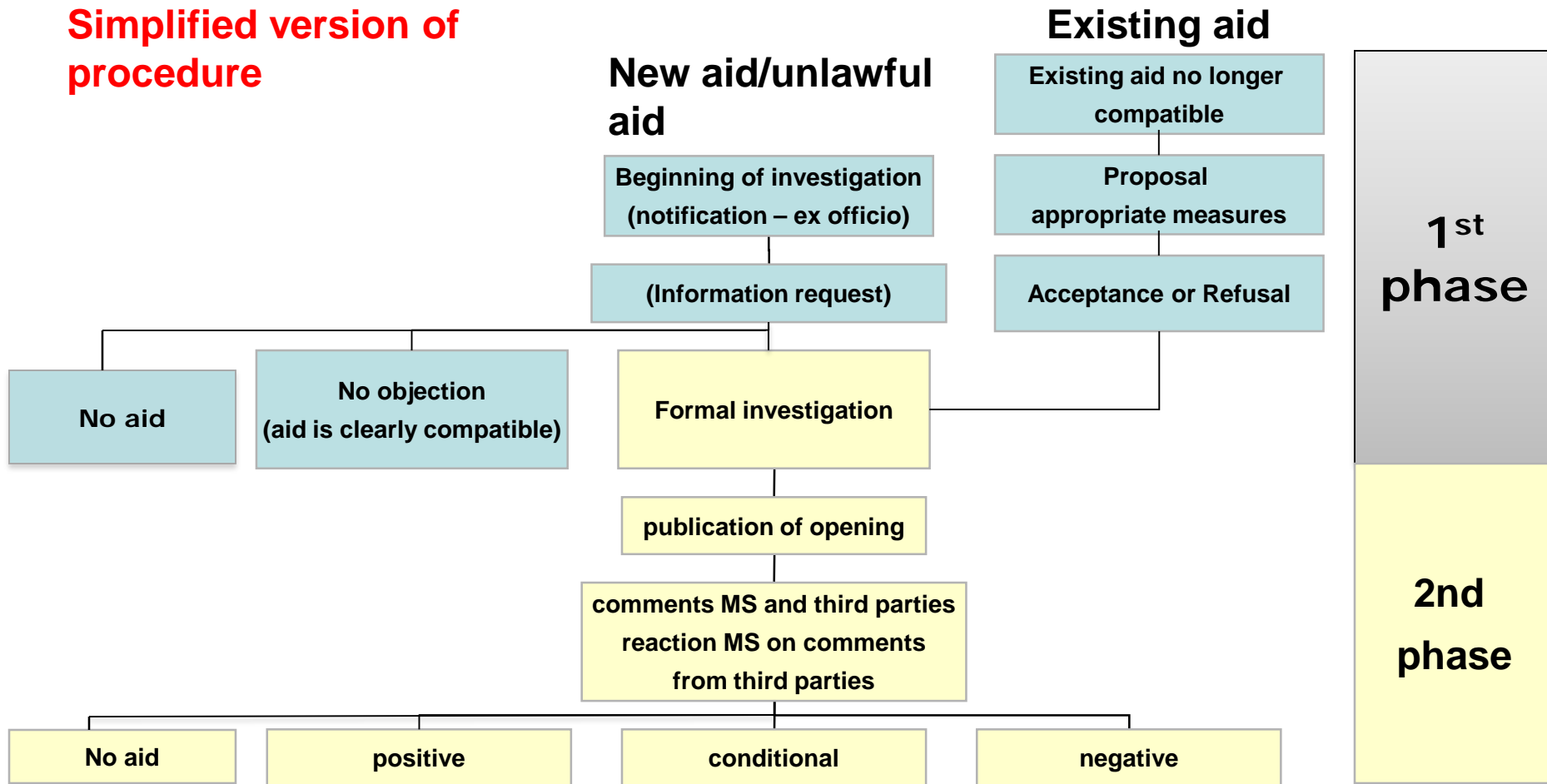
- Investigation of particular issue (aid instrument, sector) in several Member States
- Reasonable suspicion necessary
- Launched by decision
- Request for information as in the context of formal investigation procedure
- Interim and final reports – Member State and interested parties invited to comment
- Possibility of fines and periodic penalty payments!

Types of procedures in State aid case registered in ISIS

- PN: pre-notification
- N: notified aid
- CP: cas présumé
 - FC: formal complaint
 - MI: market info
 - EO: ex officio
- NN: non-notified
- C: contradictoire
- E: existing aid
- CR: recovery
- CC: court case
- MX: monitoring (yearly exercise)
- MC: monitoring (conditional decision)
- NC: national court)

Procedure

Simplified version of procedure





Implementing Regulation 2004 (as amended 2015)

Implementing Regulation

- notification forms:
 - standard part
 - supplementary information sheets per aid type
- notification in practice:
 - notification through electronic validation – shall be considered to be sent by PermRep
 - Commission writes to PermRep
 - MS to identify confidential information

Implementing Regulation

- Simplified notification procedure for certain alterations of approved schemes (Art.4):
 - Increase of budget of more than 20%
 - Prolongation of scheme for max. 6 years
 - Tightening of criteria, reduction of aid intensity, reduction of eligible expenses
- decision within one month (best effort)
- only if annual reports have been submitted



Recovery Policy

Principles and Procedure

DG COMP, Unit H4 – Enforcement and monitoring

Purpose of Recovery

- 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 **unlawful** and incompatible.
- The aid must be recovered together with recovery interest (Article 16 of Procedural Regulation 2015/1589).
- Recovery is governed by national law (procedural autonomy), provided this allows for immediate and effective recovery.
- Have a look to the [Recovery Notice](#) (new recovery notice adopted in 2019)

Early Involvement of H4

- State Unit to contact H4 early in the investigation in order to establish the key elements needed for a complete recovery decision:
 - Exact identification of the beneficiary, the aid, its form and date of granting.
 - Identification of the calculation method and other elements necessary that clearly describe the way to establish the aid amount: not in the operative part, but in the conclusions of the main part of the decision.
 - Discussions on possible “obstacles” to recovery – as the case may be subject to court actions.

“...early ...” means

- Before NCOM proposing opening formal investigation in case there are indications that a negative decision with recovery is likely.
- At the latest: after comments from Member State in reply to the opening decision (negative decision with recovery likely).

Example of a Standard Recovery Decision

(Consult COMP WIKI for latest und up-to-date version!)

Article 1

The State aid amounting to EUR <amount> unlawfully granted by <Member State>, in breach of Article 108(3) of the TFEU, in favour of <identity of the beneficiary> is incompatible with the internal market.

Article 2

1. <Member State> shall recover the aid referred to in Article 1 from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
4. <Member State> shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of notification of this decision.

Article 3

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.
2. <Member State> shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, <Member State> shall submit the following information to the Commission:
 - (a) the total amount (principal and recovery interests) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. <Member State> shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to <Member State>.

Failure to Implement/Deggendorf

- Application of “Deggendorf” case-law (T-244/93 and T-486/93):
 - obligation of Member States to suspend payment of new aid where earlier **unlawful** and incompatible aid has not yet been repaid;
 - possibility of conditional approval by the Commission (granting of new aid suspended until previous aid reimbursed);
 - List of pending recovery cases published on DG COMP's website.

Role of EU/National Courts

- EU courts:
 - Application for annulment of recovery decisions (Article 263 TFEU)
 - Application for interim relief (Article 278 TFEU)
- National courts:
 - In case appl. for annulment before GC is not possible for the applicant (e.g.: beneficiaries of schemes normally do not have legal standing);
 - Competent for actions against national acts implementing the recovery decision.

Provisional recovery is possible in case of pending (court) proceedings.

Failure to Implement/Infringement

- The decision is binding on all organs of the State, including its national courts.
- Infringement action against the Member State pursuant to Article 108(2) TFEU:
 - non-implementation by the Member State of the decision.
- Infringement action against the Member State pursuant to Article 260 TFEU:
 - non-implementation of the Court's judgment;
 - preceded by letter of formal notice to the Member State;
 - lump sum and/or daily penalty.

Monitoring

Monitoring ⁽¹⁾

- *ex post* check of existing aid schemes implemented by MS: Legal compliance
- 2 types:
 - conditional decisions (MC procedure)
 - annual monitoring cycle (MX procedure)

Monitoring (2)

- Annual cycle:
 - Aid granted through existing schemes (approved or block-exempted)
 - Control in the form of a sample
 - approved and block-exempted aid schemes
 - sample across all MS and different types of aid
 - check for compliance with SA rules / decision

Monitoring ⁽³⁾

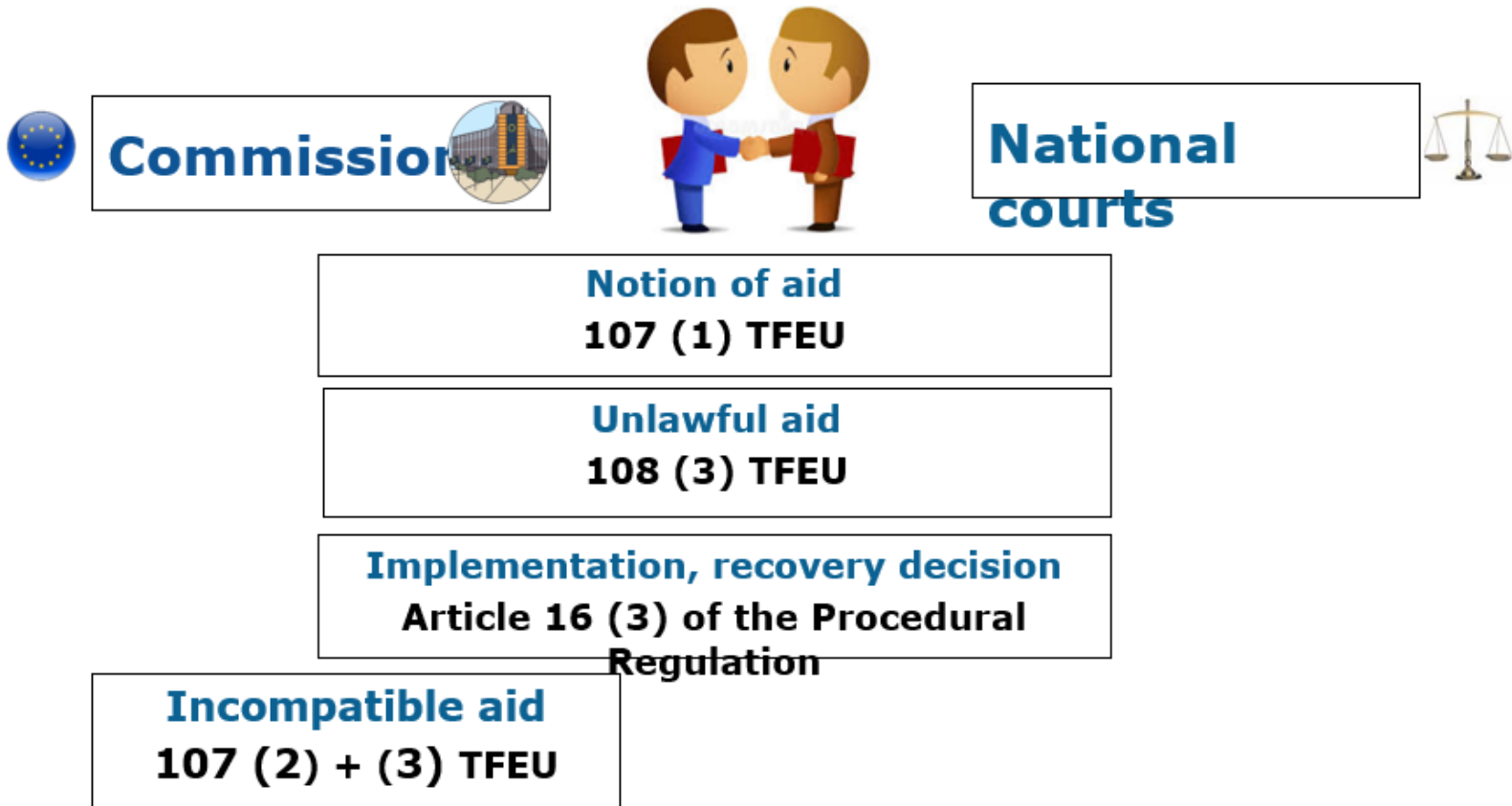
- Annual standard monitoring cycle:
 - Pre-selection phase to find schemes to monitor (H4).
 - Check the national legal basis of the scheme and the implementation at level of individual beneficiaries.
 - **ALWAYS check wiki! Not all cycles are carried out in the same manner.**
- Other monitoring types:
 - real-time monitoring of schemes introduced since 2014 GBER (only check of legal basis, no verification of individual aid awards)
 - Targeted monitoring on selected criteria, e.g. "companies in difficulty", incentive effect
 - Unlawful aid

Cooperation with national courts

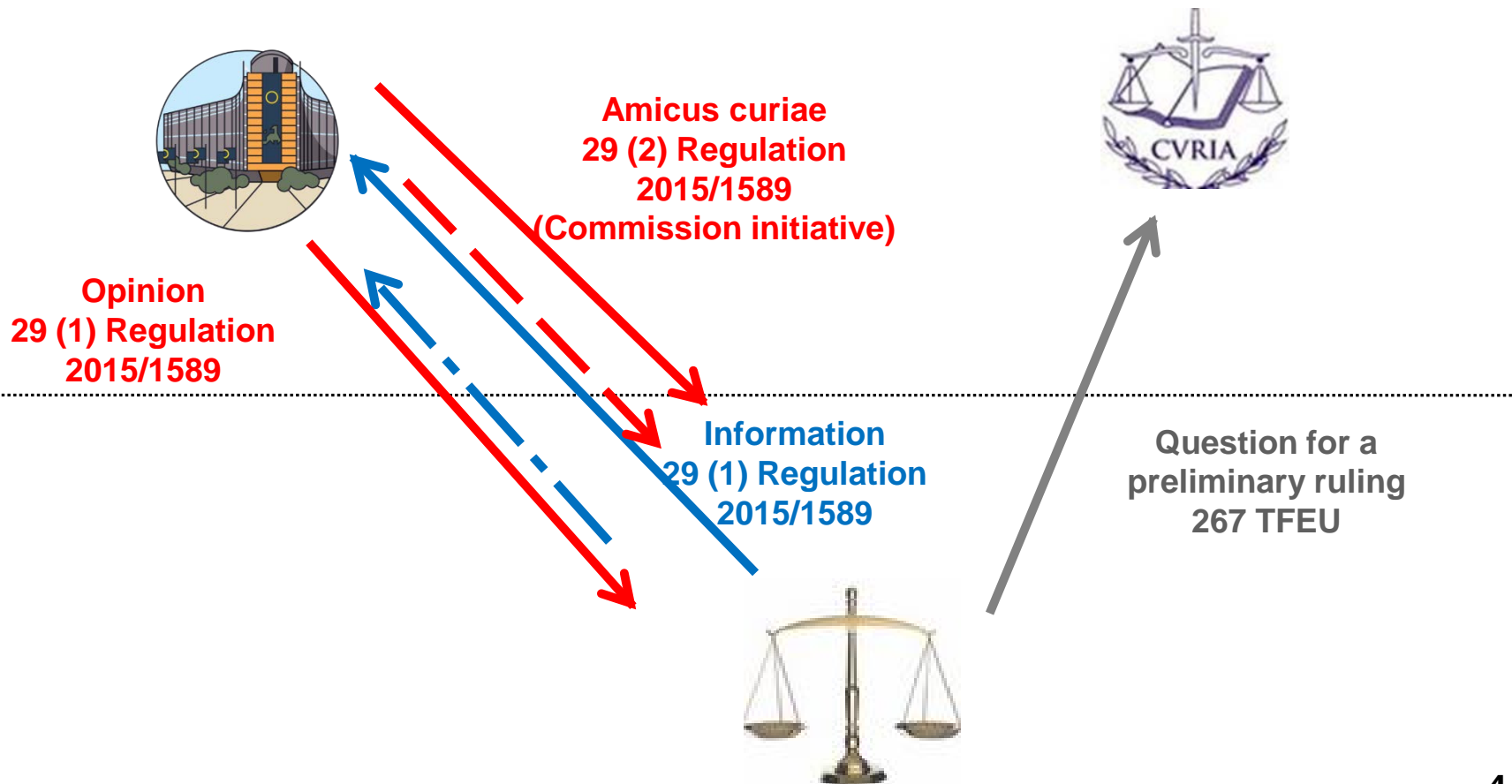
Cooperation with national courts ⁽¹⁾

- Loyal cooperation is laid down in
 - Article 4(3) TEU.
 - Paragraphs 3.1 and 3.2 of the Commission notice on the enforcement of State aid by national courts ([Enforcement Notice](#))
 - Under review. Study on the Enforcement of State aid rules and decisions published in July 2019
 - Article 29(1) of Council Regulation (EU) 2015/1589 ([Procedural Regulation](#))

Cooperation with national courts ⁽²⁾



Cooperation with national courts (3)



Cooperation with national courts ⁽³⁾

Guidance to national courts is provided by the Commission solely if they apply EU law and followed by the following principles:

- respect the national court's independence
- Commission's opinion is not binding the national court
- Respect the national court's duty of professional secrecy and safeguard its own functioning and independence
- Commission provides assistance which is neutral and objective and forms part of the Commission's duty to defend the public interest
- Observations and opinions are submitted in the framework of national procedural rules and practices
- Observations and opinions from the Commission are without prejudice to Article 267 TFEU (possibility or obligation of a court to refer the question for a preliminary ruling to the ECJ).

Cooperation with national courts can take place in the form of

- (i) Requests for information,
- (ii) Requests for opinion and
- (iii) *Amicus curiae* interventions.

Cooperation with national courts ⁽⁴⁾

Unit H4 is in charge of the management of national court cooperation procedures.

Get in contact with H4 as soon as you receive requests from national courts or when to envisage an *amicus curiae* intervention.

To ensure timely and orderly follow-up - timetables apply!