

MYKOLAS ROMERIS UNIVERSITY
SCHOOL OF LAW
PRIVATE LAW INSTITUTE

SOFIYA HAVRYLYUK
EUROPEAN AND INTERNATIONAL BUSINESS LAW

Enforcement of State Aid Law by National Courts
Master Thesis

Supervisor —
Professor
dr. Raimundas Moisejevas

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LIST OF ABBREVIATIONS

CJEU — European Union Court of Justice

EU — European Union

MSs — the Member States of the European Union

TEU — Treaty on European Union

TFEU — Treaty on the Functioning of the European Union

The Study/the Enforcement Study/2021 Enforcement Study — European Commission Study on the enforcement of State aid rules and decisions by national courts 2019

INTRODUCTION

The relevance of the final thesis. European Union State aid law is a crucial part of the European Union competition law system as well as of the EU's economy. Fairness, equity, and equality are the foundation of the State aid rules.

State aid rules aim to support and maintain free competition and open trade in the Unions' Internal Market, ensure that the competition is not distorted, the trade between the Member States is not affected, and focus on the cessation of the possibility of subsidy races among the Member States. Mainly, State aid law deals with preventing negative market outcomes, which are the result of state subsidies, that increase the economic strength of the recipient of State aid.¹

The goal of State aid rules is to preclude the misallocation of resources and prevent public intervention (intervention of State authorities) that would not take place under normal market conditions, and so do not correspond to the aim of the free market and undistorted competition.²

The internal market requires constant and effective control of State aid which is executed mainly by the European Commission. Well, the Commission is not able to fully fulfil this role and control the granting of State aid in each and every Member State. There is no way to manage the efficient regular control without assistance and cooperation of Member States authorities, and especially Member States national courts.

From the side of national courts, the enforcement of State aid law is a wide and broad question. It includes a huge amount of diverse elements that complement each other.

The Enforcement of State aid law is in constant development and modification. Articles, journals, books, studies are issued every few years, if not more often. Conferences on State aid are held on an annual basis. Regulations, notices, etc. are constantly being changed and updated by the Commission. News on huge cases are more frequent now, and probably the numbers will only increase due to the new State Aid Temporary Framework adopted in response to the Covid-19 pandemic and the economic problems that it brought alongside. Nonetheless, issues arise faster than the adoption of rules or regulations, because it is hard to guess what conditions will lead to new problems and questions that will supposedly need to be resolved. Furthermore, given that the number of State aid cases is still relevantly small, and even zero in some European

¹ Katalin J Cseres and Agustin Reyna, "EU State Aid Law and Consumer Protection: An Unsettled Relationship in Times of Crisis," *Journal of European Competition Law & Practice* 12, no. 8 (October 2021): 618;

² Cseres and Reyna, "EU State Aid Law and Consumer Protection," 619;

Union Member States, it is hard to trace which problem is only a one-time issue, and which has a repetitive nature, in order to focus more on the latter.

Since it is nearly impossible to analyse the entire subject of the enforcement in one thesis, therefore we will research a few problematic aspects that need particular attention. This Master Thesis will target matters that relate to the private enforcement of State aid rules and will mostly focus on the rights of third parties in State aid cases brought before the national courts.

Do third parties have legal standing before national courts? Can they file actions for damages due to unlawful aid granting? How to deal with the burden of proof? How will courts estimate the damages suffered? Can competitors directly sue beneficiaries? Little attention has been paid to these issues, though they are of paramount importance because answers to them can resolve other concomitant problems, i.e. the relatively low percentage of state aid cases brought before national courts by interested parties. Therefore, the questions that relate to the legal status of third parties in State aid cases before national courts constitute a relevant topic that requires detailed research.

Problem of research. Research and analysis of the relevant articles, Commission regulations and notices, recent case law, legislation of Member States, and the new Study on the enforcement of State aid rules and decisions by national courts prepared by Spark Legal Network, ECORYS, European University Institute, and CASELEX raise a lot of additional questions and show the insufficient level of the legal basis on the issues related to the legal status of third parties in the State aid cases before national courts. Analysis of Member States legislation demonstrates an ambiguous approach in this matter, and it is not a bizarre thing, as under the principle of procedural autonomy national courts apply their own rules. As this principle of procedural autonomy is always in action, therefore National procedural rules are not harmonised by EU *acquis* and Member States are not obliged to implement legislation that relates to this particular problem. The fact that national courts when applying national procedural rules shall not forget about their duty to protect the interests of any party, including third parties, having a sufficient legal interest in initial proceedings irrespective of whether they have been directly affected by the distortion of competition arising from the unlawful implementation of State aid measure does not change anything as this is simply not enough to resolve the above-mentioned issues. Current research intends to provide recommendations to the questions that relate to the legal standing of third parties in the light of the enforcement of State aid law by national courts.

Overview of the research. This research includes the analysis of the Notion of State Aid, the roles of the Commission and national courts in the enforcement of State aid, the cooperation tools for mutual assistance between the Commission and the national courts, the legal standing of

third parties before national courts in State aid cases, the action for damages and two ways of bringing them before the court, under EU or national law, estimation of damages suffered, and actions for liability and damages before the beneficiary. The research is mainly based on the “Study on the Enforcement rules and decisions of State aid by national courts” (further - the Study/the Enforcement Study/2021 Enforcement Study) by the Consortium of authors, which present Spark Legal Network, ECORYS, European University Institute, CASELEX and was issued in 2019. The authors made a colossal work and analysed 766 judgement rules between 2007 and 2017 including important cases decided in 2018. The Consortium was supported by a network of national legal experts who were responsible for legal data collection and analysis on the enforcement of State aid rules at the national level, producing case summaries and country reports. Based on the Study, the Commission in 2021 issued a new Notice on the Enforcement of State aid rules by national courts which replaced the previous one of 2009 it focuses mainly on private enforcement of State aid rules and incorporates recent case law of the General Court and the Court of Justice. In addition, the research includes scientific sources, such as articles, journals, and books, and also conference performances, and presentations. Besides that, Master Thesis contains the analysis of CJEU case law, Member States national courts case law, TEU and TFEU, State aid regulations and guidances, statistics and legislation of Member States related to the State aid matters.

Scientific novelty of the research. The enforcement of State aid rules is in constant change, modification, and what is more important, modernisation. Due to the numerous cases of granting unlawful State aid, more cases are being filed to the national courts or EU courts, subsequently, various issues tend to emerge and not always the solution to them is consistent throughout all Member States. Moreover, the concerns are higher in cases when such incoherent solutions directly concern the effective legal protection of the rights conferred by the Union law. Therefore, this research attempts to identify a few problems related to the legal standing of third parties before national courts in State aid cases, as the level of protection of their rights conferred by the Union is insufficient and there was not enough attention paid to the research of this theme.

The aim of the research. To evaluate the existing legal standing of third parties before the national courts in State aid cases in the Member States by analysing the applicable national legislation, and how legal standing influences the possibilities of third parties to file actions for damages and actions before the beneficiaries of aid measures.

The objectives of the research. In order to achieve the aim of the Master Thesis, it was necessary to:

1. Determine the notion of State aid, its key concepts and general characteristics;

2. Identify the competence of the Commission and the national courts in the enforcement of State aid and the application of cooperation tools;
3. Analyse and compare the current legislation of the Member States applicable to the legal standing of the third parties before national courts in the State aid cases, as well as the recent case law of national courts and CJEU relevant to the issue of third parties locus standi; Suggest possible solution based on the summarization of the analysis.
4. Analyse legislation, case law and statistical data relevant to the action for damages, the possibilities of filing them before national courts. Explain the reasons for the low number of cases for damages filed and suggest feasible solutions for the increase of its quantity.

The significance of the research. This research attempts to analyse the degree of inconsistency of the determination of third parties legal standing before national courts in European Union Member States national legislation, to highlight the issues that arise alongside such disparity and to propose the possible ways for resolving in the form of non-obligatory rules that can be used in future European Commission Notices on the Enforcement of State aid by national courts. Therefore, the Master Thesis can be sufficient for the scholars who deal with State aid related matters, as research can attract their attention to the issues regarding the inconsistency of legal standing of third parties before the national courts in State aid cases; for students who study competition law and desire to figure out what State aid law is, how it is enforced, which roles national courts and the Commission play in the enforcement, and understand the situation around the unlawful granting of State aid in the EU Members States; for the undertakings or natural persons who were affected by the unlawful granting of State aid and are interested in filing cases before national courts.

Research methodology. The following methods were used as a methodological basis of the research:

1. Method of collection and analysis of the information — analysed and structured the applicable legislation of EU Member States, EU law, judgments of the EU courts and Member States courts, studies and existing researches in order to assemble the complete picture, identify the current problems and draw conclusions;
2. Comparative method — attempted to compare the legislation of the EU Member States, different approaches of judges of national courts of the EU Member States relevant to the enforcement of State aid rules regarding issues faced by third parties before the national courts;
3. Logical method (analysis, synthesis, induction, and deduction, and generalisation) — used to identify possible solutions and possibilities of their implementation;

4. Historical chronological method — allowed to see the changes happening over the period of time (increase or decrease) in the number of cases filed before national courts in order to follow the reasons behind such changes.

The structure of the research. This Thesis is separated into three chapters.

The first chapter divided in 3 parts introduces the reader to the State aid. Chapter 1.1. describes the notion of State aid, its key concepts and characteristics. Chapter 1.2. outlines the competence of the Commission and national courts in the enforcement of State aid rules. Conclusive chapter 1.3. defines the possibilities of cooperation between the Commission and national courts and analyzes the percentage of use of cooperation tools by the judges and issues related.

The second chapter copes with the issues related to the vague legal standing of the third parties before the national courts in State aid cases, analyses the applicable legislation of the Member States and relevant case law, and outlines the recommendations to be implemented by the Commission in order to attempt to resolve the issue.

The third chapter mainly deals with the action for damages. Part 3.1. focuses on the determination of action for damages and two ways of bringing actions for damages before national courts — under national legislation and under EU law. Part 3.2. outlines the possible forms of actions for damages to be brought before national courts: third party versus Member State, third party versus beneficiary, and beneficiary versus Member State. Part 3.3. summarises the cases brought before national courts of Member States due to the breach of standstill obligation, analyses the reasons behind their limited number, focuses on the two crucial reasons — the high burden of proof and estimation of damages.

Defence statements:

1. The gap in the State aid rules regarding all the powers, obligations, and the role of national courts in the enforcement of State aid shall not be ignored by the Commission and national legislators, and the implementation of precise guidelines shall be conducted in a few years, to avoid the future misconceptions and issues among the judges, as this directly affects the success of their enforcement of State aid rules.
2. The insufficient level of the legal basis on the issues related to the legal status of third parties in the State aid cases before national courts generates the ambiguous approach of European Union Member States national courts to the locus standi of such third parties, and therefore, the courts do not effectively exercise their duty under EU law to protect the interests of any party, including third parties, having a sufficient legal interest in initial

proceedings irrespective of whether they have been directly affected by the distortion of competition arising from the unlawful implementation of State aid measure. Simply saying, national courts undermine the rights of third parties to effective judicial protection of the rights conferred on them by Union law.

3. Interested parties shall be encouraged by national authorities and by the EU Commission to file claims before the national courts in case of being affected by the unlawful granting of State aid and to be more assured in the successful protection of their rights and case resolution in whole.
1. The Commission needs to remember not only about the big players in the State aid field, but also about the small ones that tend to suffer the most, by implementing additional rules related to the legal standing of third parties and their possibility to protect their rights.

CHAPTER 1. THE NOTION OF STATE AID

The concept of State Aid and its regulation throughout the European Union and its Member States was grounded on the need to protect competition in the internal market among the EU Member States. This is a crucial part of EU legislation. Nowadays we observe a high increase of State Aid cases before the national courts therefore there is a necessity to dive into the Concept of State aid, its general characteristics under EU law, and what role do national courts play in this game.

1.1. The Notion of State Aid Under European Union Law: Key Concepts and General Characteristics

The Notion of State Aid has been constantly evolving and modernising alongside the changes that occurred in the European Union throughout the years of its existence.

Treaty on the Functioning of the European Union³ presents us with three Articles that are constituting the ground of State Aid notion. Article 107 (1) of the TFEU states that 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 the Member States, be incompatible with the internal market⁴. From this, we can presume that TFEU prohibits the Member States from granting State Aid in principle. Certainly, there are exceptions that were decided by the European Commission and are changing from time to time, but the message is sufficiently clear. The following two sections of the Article 107 TFEU indicate the cases of compatible aid. Those cases mostly relate to social areas, exceptional occurrences, economic development and important projects of the common European interest and also one outdated statement concerning the division of Germany.

In addition to Article 107 of TFEU authorities shall consider Articles 93, 106 (2), and 108 when dealing with aid compatibility. Above mentioned Articles point out conditions, general

³ “Consolidated version of the Treaty on the Functioning of the European Union,” EUR-Lex, Accessed 19 October 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN>;

⁴ Ibid., article 107;

principles, and rules of granting State Aid that must be followed⁵. Besides that TFEU indicated roles of national courts, Commission, and CJEU for better enforcement of State Aid rules.

Firstly, we need to focus on conditions or elements of State Aid. Under Article 107 State measure is considered ‘State Aid’ when seven cumulative conditions listed in section 1 are met. These elements are of great importance, as their presence is a cumulative requirement, and if any of those elements are missing — the measure can not constitute State Aid. All elements are hidden in section 1 of Article 107: State Resources, Imputability, Selective Advantage, Undertaking, Effect on Trade and Distortion Competition.⁶

State Resources. As stated in the above-mentioned article the aid must be granted “... by a Member State or through State resources”. Eventually, in order for a measure to constitute a State Aid State Resources must be involved. The first thing that comes to an individual's mind when hearing ‘State resources’ is a simple situation when public authority gives State money to some company. That first example is money transfer, yet those resources can be involved in quite different ways: grant, investment, loan, transfer of State resources, etc. In addition, it can not always be about money. For example, when the State creates a sufficiently concrete and real risk that in the future some transfer of state resources will take place — this is a guarantee, or a tax break — when the firm is dispensed from having to pay the taxes, these two also involve State resources and can be considered a State Aid if other elements will be present. Besides that State resources will be present if the resources belong to the State or over which State, State body, or body appointed by the State has control, even if the control is temporary⁷.

Imputability means a measure that is imputable to the State — State measure. This criterion has two sides. One is particularly clear — there is an entity that is a part of the State and it takes action for the benefit of the beneficiary. Each state body that comes to mind can decide on State measures, from the lower level as some local body, service department, regional administration, to the highest like the Cabinet of Ministers, the Parliament, etc. In this situation, we have an explicit link between the State and the beneficiary. On the other hand, there can be an entity that is owned by the State. In this case, imputability is less evident as the advantage could be granted through a public undertaking⁸. European Court of Justice asserted in its judgement on the case *France v Commission (Stardust Marine)* that “...imputability to the State of an aid measure taken by a public undertaking may be inferred from a set of indicators arising from the

⁵ Ibid., articles 93, 106 (2), 108;

⁶ Ibid., article 107;

⁷ Leo Flynn, “Section I - Criteria for State Aid. State resources and Imputability,” State Aid Online EU, Accessed 18 October 2021, https://state-aid-online.eu/wp-content/uploads/2017/12/Transcript_1_Flynn_EN.pdf;

⁸ “Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01),” para. 40, EUR-Lex, Accessed 18 October 2021, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016XC0719%2805%29](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016XC0719%2805%29;);

circumstances of the case and the context in which that measure was taken.⁹ The indicators that were set out by the Court of Justice in this judgement are following: the need of taking into account the requirements of public authorities, integration of the undertaking into the structures of public administrations, the nature of undertaking's activities, the legal status of the undertaking, the intensity of the supervision exercised by the public authorities over the management of the undertaking¹⁰, and any other indicator showing involvement by the public authorities¹¹. Therefore every measure taken by a state-owned undertaking could not be considered a State Aid and the fact that a state-owned undertaking takes a particular measure does not mean that the State Aid will be present, even if the measure provides an advantage to the beneficiary, affects trade, or distorts competition. Legal adviser of the AIDE Team of European Commission Leo Flynn proposed two valuable questions in the lecture on "The Notion of Aid" in the Online training course for national judges: "Can the measure be attributed to the State?" and "Is it unlikely that the State was somehow involved in the measure taken by the state-owned bank (meaning undertaking)?" which with no doubt will help in answering whether the measure can be imputable to the State¹².

Selectivity. Under Article 107 (1) of the TFEU a State measure "...shall favour certain undertakings or the production of certain goods..."¹³. The word 'certain' leads to the selectivity criterion. Selectivity can be divided into two categories: regional or geographical selectivity and material or sectoral selectivity.

Regional selectivity is a complex category. In the Commission's Notice on the notion of the State Aid it is stated that "In principle, only measures that apply within the entire territory of the Member State escape the regional selectivity criterion laid down in Article 107 (1) of the Treaty". This suggests that if the measure is general it can not constitute State Aid but if it does not cover the whole territory of the Member State then it constitutes the Aid. In such a case the whole territory of the Member State is a system of reference. Nevertheless, the system of reference can be diverse. For example, if the entire territory of the State is a reference, then the measure applied only to a certain part of the State, even if it is a general measure available for all, could be considered as a State Aid and be regionally selective. On the other hand, there could be local authorities, municipalities, etc, that have decentralised powers to grant some aid. In such

⁹ "Judgement of the Court of 16 May 2002. French Republic v Commission of the European Communities (Stardust), Case C-482/99," para. 55, EUR-Lex, Accessed 18 October 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999CJ0482>;

¹⁰ Ibid., para. 56;

¹¹ Rein Wesseling, "State aid without the State?," Berliner Gesprächskreis, Accessed 18 October 2021, http://www.berliner-gespraechskreis.eu/mediathek/file/279/nyxy3QfbxrggSniR200ecfFmEEdCUeHyRbYim0gd1Ro/veranstaltungen/veranstaltung-24/Presentation_Rein_Wesseling.pdf;

¹² Leo Flynn, *supra note*, 7;

¹³ "Consolidated version of the Treaty on the Functioning of the European Union," *supra note*, 3: article 107;

situations each unit might have its own system of reference and the aid granted by them will not always be regionally selective. All the more if there are two cities in one Member State which grant some aid to undertakings that are located under their authorities, but the aid granted in one city is more beneficial in comparison to the other. Will that mean that there is a regional selectivity? No, because the undertakings are in different factual and legal situations. They are incomparable. Besides that, there can be situations when local authorities have an uneven delegation of powers. Here the criterion of regional selectivity will depend on whether the local authority in question has sufficient power to govern itself, in other words, has a high level of autonomy from the Member State's government.¹⁴ All in all, CJEU, or more precisely the Advocate General, pointed out in paragraph 54 of his Opinion in the judgement on the case C-88/03 Portugal v Commission that three above mentioned situations must be marked off to evaluate regional selectivity.¹⁵ That said, geographic selectivity is a tricky criterion especially when it concerns tax matters and every case or situation of granting a measure needs to be deeply analysed in order to decide whether regional selectivity took place.

Sectoral selectivity according to Commission Notice on the Notion of State Aid applies only to certain undertakings or groups of undertakings or certain sectors of the economy in a Member State and can be established *de jure* or *de facto*¹⁶. Consequently, *de jure* selectivity arises from the formally set legal regulation or criteria regarding granting a measure to certain undertakings that fall under the defined category. *De facto* selectivity looks as if it was a general requirement for the application of a measure from first sight, however in reality the structure of this requirement benefits a limited circle of undertakings. When deciding on the question of whether there is sectoral or material selectivity it is necessary to establish that advantage specifically benefits one or more undertakings¹⁷. In brief, if there is a measure that provides an economic advantage to one undertaking, then in principle that measure is selective. This measure shall create a difference between undertakings that are in a comparable situation with regards to the objective of the measure and it places particular undertaking(s) in a more favourable situation¹⁸. From one side there shall be discrimination which leads to the question "was such

¹⁴ "Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01)," *supra note*, 8: para. 142-144;

¹⁵ "Judgement of the Court (Grand Chamber) of 6 September 2006, Portuguese Republic v Commission of the European Communities, Case C-88/03," para. 63-67, EUR-Lex, Accessed 19 October 2021, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62003CJ0088>;

¹⁶ "Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01)," *supra note*, 8: para. 120;

¹⁷ "Judgement of the Court (Sixth Chamber) of 30 June 2016 Kingdom of Belgium v European Commission (TSE), Case C-270/15 P," para. 48-49, EUR-Lex, Accessed 20 October 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0270_SUM;

¹⁸ "Judgement of the Court (First Chamber) of 4 June 2015 European Commission v MOL Magyar Olaj- és Gázipari Nyrt, Case C-15/14 P," para. 59, EUR-Lex, Accessed 20 October 2021, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62014CJ0015>;

difference justified?” Leo Flynn mentioned in his lecture for judges on ‘Selectivity’ that the justification question is essential because not every difference of treatment necessarily creates selectivity, but the justification must be applied in a coherent manner.¹⁹ After all, it is all about argumentation.

Advantage. CJEU in the Judgement of 11 July 1996 of the SFEI and Others case indicated that recipient undertaking shall receive an economic advantage which it would not have obtained under normal market conditions²⁰. The Court also confirmed this in the case C-342/96 Spain v Commission. Therefore CJEU formed the definition of the advantage under Article 107 (1). When deciding whether the measure in question is a State Aid for this criterion counts the effect of the measure, not the intention behind it. Previously there were two models ‘quid pro quo’ and ‘freeing from a cost’ and the Court developed a hybrid solution for them. In the Altmark case of 2003 CJEU developed a test for when compensation for the provision of public services does not constitute an advantage. The Court stated that if four conditions are fulfilled then there is no advantage and no State Aid. Those conditions are the following: an undertaking must have to execute a clearly defined public service obligation, the parameters for the compensation must be laid down in advance, the service provider must not be overcompensated, so the compensation must be necessary, and compensation must be provided at least cost to the community.²¹ Besides that Altmark test, the Union Courts have developed the ‘Market economy investor principle’, ‘Private creditor test’, ‘Private vendor test’ and one general ‘Market economy operator test’. The latter can be explained as, if the State engages in some market transaction and acts in the same way as a private operator would act in a comparable situation, then there will be no State Aid. The Commission Notice on the Notion of State Aid notes that the purpose of this test is to assess whether the State was not acting like a market operator with regard to certain transactions. It is applicable if the State acts like an economic operator rather than as a public authority, to see if the private operator would have agreed to the terms and conditions of the same transaction as the State agreed. To conclude, these tests are like

¹⁹ Leo Flynn, “Section II - Selectivity,” State Aid Online EU, Accessed 20 October 2021, https://state-aid-online.eu/wp-content/uploads/2017/12/Transcript_2_Flynn_EN.pdf.

²⁰ “Judgement of the Court of 11 July 1996, Syndicat français de l'Express international (SFEI) and others v La Poste and others, Case C-39/94,” para. 60, EUR-Lex, Accessed 20 October 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61994CJ0039>; “Judgement of the Court (Sixth Chamber) of 29 April 1999, Kingdom of Spain v Commission of the European Communities, Case C-342/96,” para. 41, EUR-Lex, Accessed 20 October 2021, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61996CJ0342>;

²¹ “Judgement of the Court of 24 July 2003, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht, Case C-280/00,” para. 87-95, EUR-Lex, Accessed 20 October 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CJ0280>;

guidance on the question of whether a benefit can be considered to be obtained under normal market conditions, or is it a State Aid²².

Undertaking. When referring to Article 107 (1) it is underlined that aid shall favour certain undertakings. So the undertaking is a beneficiary of a measure. Basically, anything can be considered an undertaking if it engages in economic activity. If an entity offers goods or services in the market it can be seen as an undertaking regardless of its legal form, the existence of a separate legal personality, or funding. Therefore, the only relevant criterion is whether it carries out economic activity.²³ However, there could be situations where an entity will not be considered as an undertaking in terms of Article 107 (1) despite the fact that it provides services or goods. The first one will be when an entity's activities are part of the essential functions of the State or are connected with such functions. Frankly speaking, when entities carry out functions that are a state or public prerogative²⁴. The second is when entities provide activities on the basis of solidarity. These activities are mostly of a social nature, have a social purpose, the affiliation is compulsory, it is non-profit, and supervised by the State.²⁵ Consequently, it seems like it is easier to find out what is not an undertaking than to list all possible varieties of undertakings.

Effect on Trade and Distortion of Competition. Despite the fact that these two conditions are separate, they are solidly related²⁶. Under Article 107 (1) of the TFEU "...aid granted shall distort or threaten to distort competition by favouring certain undertakings in so far as it affects trade between the Member States...". In order to distort competition or threaten to distort its aid shall suffice to improve the beneficiary's competition abilities in comparison with its competitors in a liberalised sector. There are exceptions, as always. The Commission Notice on the Notion of State Aid indicates that possible distortion of competition is excluded when the goods or services are produced under a legal monopoly that complies with the European Union law. There are also tough conditions that must be followed, but nevertheless, it is possible. Another point is that the Commission has a particular approach to the effect on trade and distortion of competition. In a couple of decisions, the Commission has taken the view that the effect on trade and distortion of competition is not so one-sided. CJEU in its judgement from January 2015 in the case *Eventech v The Parking Adjudicator* and in previous cases explained that "... in accordance with the

²² "Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01)," *supra note*, 8: para. 73-76;

²³ *Ibid.*, para 6-16;

²⁴ Leo Flynn, "Section IV - Undertaking. Effect on trade and distortion of competition," State Aid Online EU, Accessed 22 October 2021, https://state-aid-online.eu/wp-content/uploads/2017/12/Transcript_4_Flynn_EN.pdf;

²⁵ "Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01)," *supra note*, 8: para. 19-21;

²⁶ "Judgement of the Court of First Instance (Fourth Chamber, extended composition) of 15 June 2000, *Alzetta Mauro and others v Commission of the European Communities*, Joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98," para. 81, EUR-Lex, Accessed 22 October 2021, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61997TJ0298>;

Court's settled case-law, for the purpose of categorising a national measure as State Aid, it is necessary, not to establish that the aid has a real effect on trade between the Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition²⁷." There could be numerous examples of how the trade can be affected, however, there are a couple of decisions of the Commission where due to the specific circumstances of the cases the measure had only a local impact and no effect on trade between the Member States.²⁸ The Commission stated that if the aid is granted to the undertaking that provides goods or service solely in one locality, where other providers of such services or goods will not operate and this limited area is unlikely to attract customers from the other Member States, it will not be considered as affecting the trade between the Member States. Therefore, even if in most cases the distortion of competition and effect on trade is sufficiently clear, there could be facts that seem small and when appropriately set out could become an exception.

Therefore, all aforementioned elements have to be met cumulatively for a measure to constitute a State Aid, but Article 107 of TFEU in its paragraphs 2 and 3 highlights certain situations in which measure shall or may be compatible with the internal market.

As a general rule, State Aid is incompatible with the EU internal market. However, when reading slightly below the first paragraph of Article 107 one can clearly see exclusions from this strict rule.

Paragraphs 2 and 3 can only be applicable to the measures that meet all cumulative conditions from Article 107 paragraph 1, therefore they constitute State Aid. These measures can be exempted according to paragraph 2 that states: "the following aid shall be compatible with the internal market..." and paragraph 3: "the following aid may be considered to be compatible with the internal market...". The latter paragraph is vague by virtue of words used, but exceptions under both paragraphs may be allowed only on the basis of the decision of the Commission. This

²⁷ "Judgement of the Court (Second Chamber) of 14 January 2015, Eventech Ltd v The Parking Adjudicator, Case C-518/13," para. 65, EUR-Lex, Accessed 22 October 2021,

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62013CJ0518>;

"Judgement of the Court (First Chamber) of 8 May 2013, Eric Libert and Others v Gouvernement flamand (C-197/11) and All Projects & Developments NV and Others v Vlaamse Regering (C-203/11), Joined Cases C-197/11 and C-203/11," para. 76, EUR-Lex, Accessed 22 October 2021,

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62011CJ0197>;

"Judgement of the Court (Second Chamber) of 15 December 2005, Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1, Case C-148/04," para. 54, EUR-Lex, Accessed 22 October 2021,

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62004CJ0148>;

"Judgement of the Court (Second Chamber) of 10 January 2006, Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze SpA, Fondazione Cassa di Risparmio di San Miniato and Cassa di Risparmio di San Miniato SpA, Case C-222/04," para. 140, EUR-Lex, Accessed 22 October 2021,

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62004CJ0222>;

²⁸ "Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01)," *supra note*, 8: para. 196;

competence stems from Article 108 TFEU, yet it also has exceptions: ‘Block Exemption Regulation’ and ‘De Minimis Aid’²⁹.

Overall, the notion of State Aid is not strictly clear and straightforward. The Commission and CJEU decisions, as well as the Commission’s Notice of the Notion of the State Aid help to clarify it, but still the rules are not harmonised, so there is plenty of room for future interpretations.

1.2. Role of the Commission and National Courts

Enforcement of State aid rules is all about the roles of the Commission and national courts and the communication between them. While on the role of communication between the Commission and national courts and trending issues we will concentrate in part 1.3. of this Master Thesis, firstly it is better to figure out who does what and who plays a more essential role in the enforcement of State aid rules.

Running ahead, it can be stated that both the Commission and national courts play a major role, as each of them has distinct responsibilities assigned by the TFEU, however, their roles and responsibilities are complementary.

The Commission is the leading chief of the enforcement of State aid rules. It directs all other bodies in their enforcement of State aid rules. The Commission constantly provides guidance, notices, decisions, etc. regarding State Aid measures. For example Guidance on how to interpret the notion of State aid, Notice on the enforcement of state aid rules by national courts, and so on and so forth. Also, it sets out conditions by regulations as *de minimis* regulation, General Block Exemption Regulation, and so on.

Controlling power of the Commission consists of the duty to keep under constant review all systems of existing aid. This is the main role of the Commission, indicated by the TFEU, as a main legislative act on State Aid. The Commission shall ensure that only compatible aid is implemented. This is the system of prior control — defer the implementation of planned aid until doubt as to its compatibility is resolved by the Commission’s final decision³⁰. Also, the Commission shall assess any plans by a Member State to grant new aid or alter existing aid. For

²⁹ Marie Sciskalová and Michael Münster, “Definition and Characteristics of State Aid,” *Procedia - Social and Behavioral Sciences*, 110 (January 2014): 228-229, <https://doi.org/10.1016/j.sbspro.2013.12.865>;

³⁰ “Judgement of the Court (Grand Chamber) of 12 February 2008, Centre d’exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d’édition (SIDE), Case C-199/06,” para. 48, EUR-Lex, Accessed 25 October 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62006CJ0199&qid=1635159175645>;

the Commission to perform this review and assessment effectively, Member States must cooperate by providing any relevant information and by notifying State aid measures.³¹

The exclusive competence of the Commission is to assess the compatibility of aid measures with the internal market. The assessment consists of two steps. Firstly, the Commission assesses whether the measure qualifies as State aid under Article 107 (1) TFEU³² and secondly, the Commission examines whether the measure is compatible with the internal market³³. Despite the first sentence about the exclusive competence of the Commission, national courts also can assess whether the measure qualifies as State aid as they may have to establish if a measure is subject to the standstill obligation.³⁴ On the contrary, the second step can be exercised only by the Commission and is of its exclusive responsibility. Such compatibility assessment must be included in a decision³⁵, and this decision further can be subject to review by the Union Courts³⁶.

The Commission can decide on whether the measure is compatible or not by following a preliminary examination or a formal investigation. The preliminary investigation is used when the Commission has no doubts on whether the measure is compatible or not. Conversely, the formal investigation will be used where in the context of the preliminary examination it had doubts as to the measure's compatibility with the internal market. In case of the formal investigation the Commission adopts a decision on preliminary assessment as to the aid character of the measure and lays out its doubts about the compatibility with the internal market — opening decision.³⁷ This opening decision can somewhat limit the exercise of the national courts' competence of applying Articles 107 (1) and 108 (3) TFEU, as it has legal consequences on the national courts' proceedings. In the *Buonotourist v Commission* case, it is stated that:

...the exercise of such a power implies that the Commission may examine, pursuant to Article 108 TFEU, whether a measure constitutes State aid which should have been notified to it, in accordance with paragraph 3 of

³¹ "Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01)," para 8, EUR-Lex, Accessed 2 December 2021,

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021XC0730\(01\);](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021XC0730(01);)

³² "Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01)," *supra note*, 8: para. 34;

³³ "Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01)," *supra note*, 31: para 36;

³⁴ "Judgement of the Court (Ninth Chamber) of 4 March 2020 *Buonotourist Srl v European Commission* C-586/18 P," para 90, EUR-Lex, Accessed 2 December 2021,

[https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0586;](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0586;_ga=2.248010009.1589137041.20211202.1589137041.20211202.1589137041.20211202.1589137041)

³⁵ "Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union," articles 4, 9, EUR-Lex, Accessed 2 December 2021,

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.248.01.0009.01.ENG;](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.248.01.0009.01.ENG;_ga=2.248010009.1589137041.20211202.1589137041.20211202.1589137041.20211202.1589137041)

³⁶ "Judgement of the Court of Justice of 19 July 2016, *Tadej Kotnik and Others v Državni zbor Republike Slovenije*, C-526/14," paragraph 37, EUR-Lex, Accessed December 1 2021,

[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0526;](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0526;_ga=2.248010009.1589137041.20211202.1589137041.20211202.1589137041.20211202.1589137041)

³⁷ "Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union," *supra note*, 35: article 4 (3), (4);

that article, in a situation where the authorities of a Member State have taken the view that that measure did not satisfy the conditions laid down in Article 107(1) TFEU, including where those authorities have complied, in that regard, with the assessment of a national court. That conclusion cannot be invalidated by the fact that that court has adopted a decision having the force of *res judicata*. It should be emphasised that the rule of exclusive competence of the Commission is necessary in the internal legal order as a consequence of the principle of the primacy of Union law.³⁸

Commission decisions are binding on national courts and they must follow the Commission's assessment of the existence of aid.³⁹ national courts prior decisions can not prevent the Commission from exercising its exclusive competence even if it is contrary.

To conclude the formal investigation and order the recovery of the aid the Commission needs to adopt a final decision — 'recovery decision'.⁴⁰ Also, in some instances, pursuant to Article 13 of the Procedural Regulation, the Commission can adopt provisional measures while it completes the compatibility assessment. In particular, the Commission may issue suspension or recovery injunctions, provided that a number of conditions are fulfilled.⁴¹ Such measures seek to limit the damage associated with the implementation of the aid in breach of the notification and standstill obligations.⁴²

Besides all other duties of the Commission, it also shall assist national courts when they apply Union law. This is a duty of mutual assistance. The Commission assists the national courts in the fulfilment of its tasks and *vice versa*. On the role of assistance, we will elaborate below in part 1.3. of the Master Thesis.

If the Commissions' main role is to examine the compatibility of an aid measure with the internal market, then what is the essential role of national courts in State aid enforcement?

The national courts have competence in State aid matters and unlike the Commission, whose role is to enforce competition, they have a duty to uphold the rights and obligations of

³⁸ "Judgement of the Court, *Buonotourist Srl v European Commission* C-586/18 P," *supra note*, 34: para 93-94;

³⁹ "Judgement of the Court (Fifth Chamber) of 15 September 2016, *PGE Górnictwo i Energetyka Konwencjonalna SA v Prezes Urzędu Regulacji Energetyki*, C-574/14," para 33, 36-37, EUR-Lex, Accessed 2 December 2021, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62014CJ0574>;

⁴⁰ "Judgement of the Court of 14 February 1990, *French Republic v Commission of the European Communities*, C-301/87," para 9-22, EUR-Lex, Accessed 1 December 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0301>;

⁴¹ "Judgement of the Court of 14 February 1990, *French Republic v Commission of the European Communities*, C-301/87," *supra note*, 40: 19-20; "Judgement of the Court of 21 March 1991, *Italian Republic v Commission of the European Communities*, C-303/88," para 46, EUR-Lex, Accessed 1 December 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61988CJ0303>;

⁴² "Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union," *supra note*, 35: 13 (1), (2);

individuals, making them potentially a more attractive forum for redress.⁴³ National courts are involved in the enforcement of State aid rules in relation to two types of legal proceedings: Implementation of recovery decisions, or so-called public enforcement of State aid rules and Enforcement of Article 108 (3) TFEU, the private enforcement of State aid rules.⁴⁴

Public enforcement of the State aid rules is in the case when the Commission adopts a recovery decision. By such a decision the Commission is ordering a Member State to recover an incompatible aid previously implemented and the national courts will be involved in the recovery proceedings,⁴⁵ as the aid beneficiary may try to challenge the recovery order or any other implementing act that was adopted by national authorities before the national courts in order to avoid the implementation of the recovery decision. Implementation of the recovery order of the unlawful/incompatible aid requires national courts to assess certain issues:

- Quantification of the aid to be recovered and applicable interest;
- Identification of the aid beneficiary;
- Requests of aid recovery suspension;
- Indirect challenges against a Commission decision;
- Aid recovery in the context of insolvency proceedings;
- Assessing the impossibility of aid recovery⁴⁶;
- Assessing the recovery time limit (10 years from the moment the aid is granted).

Quantification of the aid to be recovered and applicable interest. National authorities will try to quantify the exact amount of the aid to be recovered from the date when the aid was put at the disposal of the beneficiary until the moment of the effective recovery. national courts may result in resolving a dispute between the beneficiaries and the State in relation to such quantification.⁴⁷

Identification of the aid beneficiaries. There might be situations when national authorities need to identify both the direct and indirect aid beneficiaries from whom the aid should be recovered. Therefore, litigation in a national court is possible if there will be a dispute as to the identification of the beneficiary.⁴⁸

⁴³ “EU State aid rules and the national courts: an opportunity for German litigators,” Heuking.de, Accessed 2 December 2021, <https://www.heuking.de/en/news-events/newsletter-articles/detail/eu-state-aid-rules-and-the-national-courts-an-opportunity-for-german-litigators.html>;

⁴⁴ “Commission notice on the enforcement of State aid law by national courts 2009/C 85/01,” section 2.2-2.3, EUR-Lex, Accessed 2 December 2021, [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0409%2801%29](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC0409%2801%29;);

⁴⁵ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, “*Study on the enforcement of state aid rules and decisions by national courts*,” Luxembourg Publications Office Of The European Union, (2019), p. 14, <https://op.europa.eu/en/publication-detail/-/publication/264783f6-ec15-11e9-9c4e-01aa75ed71a1>;

⁴⁶ Ibid., p. 20;

⁴⁷ Ibid., p. 14;

⁴⁸ Ibid., p. 14-15;

Suspension of the recovery procedure. As it was previously mentioned the Commission shall adopt a recovery decision of the unlawful and incompatible aid. And the general rule is that national courts do not have jurisdiction to review the legality of the Commission decision. Nevertheless, in the Atlanta and Zuckerfabrik cases, the CJEU ruled that in exceptional circumstances a national court can order the suspension of the recovery decision. In these judgments, the CJEU identified four cumulative conditions to justify the suspension of the implementation of the recovery decision by a national court.

These four conditions are the following:

- The national court has ‘serious doubts’ about the validity of the Commission decision. The national court should refer a request for a preliminary ruling to the CJEU unless the Commission decision has already been challenged before the CJEU.
- There is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief.
- The national court takes due account of the interest of the EU.
- The national court must respect the CJEU case law.⁴⁹

Aid recovery in the context of insolvency proceedings is an alternative way to the full recovery of unlawful/incompatible aid.⁵⁰ Insolvency procedures are carried out in accordance with national law and also with CJEU case law general principles that should guide national courts in insolvency procedures involving the recovery of incompatible/unlawful aid.⁵¹

In the Study on the Enforcement of State aid rules by national courts of 2019, the Consortium provided a percentage of Interim measures and recovery orders enforced by national courts from 2007 to 2018.⁵²

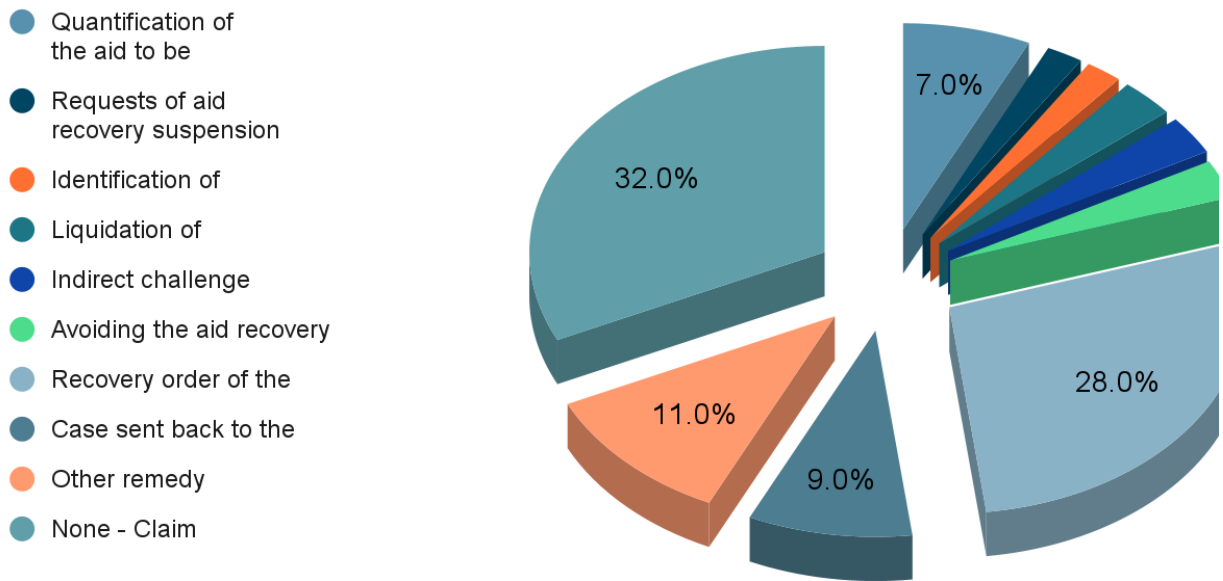
⁴⁹ “Judgement of the Court of 9 November 1995, Atlanta Fruchthandelsgesellschaft mbH and others v Bundesamt für Ernährung und Forstwirtschaft, Case C-465/93,” para 51, EUR-Lex, Accessed on 2 December 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61993CJ0465>; “Judgement of the Court of 21 February 1991, Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn, Joined cases C-143/88 and C-92/89,” para 33, EUR-Lex, Accessed 2 December 2021, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61988CJ0143>;

⁵⁰ “Judgement of the Court of 14 September 1994, Kingdom of Spain v Commission of the European Communities, Case C-42/93,” para 31-35, EUR-Lex, Accessed 3 December 2021, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61993CJ0042>;

⁵¹ “Study on the enforcement of state aid rules and decisions by national courts,” *supra* note, 45: p. 16;

⁵² *Ibid*;

Interim measures and recovery orders enforced by National courts from 2007 to 2018



- Requests of aid recovery suspension - 2%
- Identification of the aid beneficiary - 2%
- Liquidation of the aid beneficiary - i.e. aid recovery in the context of insolvency proceedings - 3%
- Indirect challenge against Commission decision via CJEU preliminary ruling - 3%
- Avoiding the aid recovery due to impossibility of recovery - 3%
- Quantification of the aid to be recovered - 7%
- Case sent back to the lower court for reassessment - 9%
- Other remedy imposed - 11%
- None - Claim rejected - 32%⁵³

Private enforcement of State aid rules is when interested third parties bring an action before a national court as to the direct effect of the standstill obligation under Article 108 (3) TFEU. For example, competitors can ask for the recovery of the aid implemented in breach of the standstill obligation (unlawful aid), independently of the compatibility assessment carried out by the Commission, or start damage actions. In the context of private enforcement, national courts rule on whether the challenged measure fulfils the conditions to be considered State aid

⁵³ Ibid., p. 48;

under Article 107(1) TFEU, thus representing unlawful aid since it has not been notified to the Commission.⁵⁴

The aforesaid competence of the Commission to assess whether the measure qualifies as State aid under Article 107 (1) TFEU includes national courts as they may have to establish if a measure is subject to the standstill obligation. national courts must establish whether State aid has been granted in accordance with Article 108 (3) TFEU within the limits set by the Commission's exclusive competence to assess the aid's compatibility and any pre-existing Commission decision on the same measure. In order to do that national courts need to⁵⁵:

- Assess the existence of aid
- Assess whether there is a breach of the standstill obligation
 - ◆ Whether the measure falls under block exemption regulations
 - ◆ Whether aid concerned constitutes existing aid
- Safeguard the rights of individuals faced with the breach of the standstill obligation
 - ◆ Suspension or termination of the implementation of the measure
 - ◆ Recovery
 - ◆ Interim measures
 - ◆ Action for damages
 - ◆ Reimbursement of the taxes paid for financing unlawful aid⁵⁶

In order for the national court to assess whether a State measure qualifies as 'State aid', and thus determine if it was implemented unlawfully, it must assess if the aid fulfils the following exceptions:

- Cumulative conditions under Art. 107(1) TFEU;
- The General Block Exemption Regulation (GBER), if compatible then there is no need to notify the Commission;
- The State aid *de minimis* Regulation, if lower than a certain amount, can be considered to be 'too small' to have a distortive impact on the competition in the internal market under Article 107 (1) TFEU, and if compatible, then there is no need to notify the Commission.
- Existing aid. State aid measures granted by a Member State before joining the EU or previously approved by the Commission are considered existing aid⁵⁷. Existing aid measures are not unlawful and thus they cannot be subject to private

⁵⁴ Ibid., p. 14;

⁵⁵ "Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01)," *supra note*, 31;

⁵⁶ Ibid;

⁵⁷ "Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest," Article 21, EUR-Lex, Accessed 2 December 2021, [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32012R0360](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32012R0360;);

enforcement claims in national courts. national courts, therefore, may verify if a measure qualifies as ‘existing aid’, but the Commission has exclusive competence to ask for modifications/abolition of the aid measure in view of new developments in the market.⁵⁸

The major role of national courts is to safeguard the rights of individuals faced with a possible breach of Article 108 (3) TFEU. national courts shall take all appropriate actions, in accordance with their national law, to address the consequences of an infringement of the standstill obligation. In order to accomplish this goal, national courts can adopt different types of remedies depending on the situation. They can suspend or terminate the implementation of the measure, order the recovery of the sums already disbursed, or adopt different provisional measures to otherwise safeguard the interests of the parties concerned. Furthermore, they may be asked to rule on compensation for damages suffered by third parties as a consequence of the unlawful implementation of the State Aid. The national courts must offer to individuals the certainty that all appropriate actions will be taken, in accordance with their national law, to address the consequences of the infringement of Article 108 (3). There are at least 5 actions that can be taken: suspension or termination of the implementation of the measure, recovery, interim measures, action for damages, reimbursement of the taxes paid for financing unlawful aid.⁵⁹

Suspension or termination of the implementation of the measure can be applied where a State authority has not yet implemented a State aid measure granted in violation of Article 108(3) TFEU⁶⁰ and it can be suspended or terminated, where the State aid measure has entered into force, but the aid has not yet been disbursed and national courts need to take effective measures to prevent the disbursement of the unlawful aid to the beneficiary. As practice shows, the national courts can also annul the granting act⁶¹, declare the aid granting contract null and void, or suspend future payments if aid is granted in instalments.⁶²

Recovery shall be used when the unlawful aid has already been paid to the beneficiary. In such cases, national courts must, in the absence of a Commission decision declaring the aid compatible, order the full recovery of the unlawfully paid amount. The idea is for the national courts to restore the situation existing before the aid was granted. Therefore, they must abolish the unlawful advantage of the beneficiary.⁶³ This advantage consists not only of the aid but also

⁵⁸ “Study on the enforcement of state aid rules and decisions by national courts,” *supra note*, 45: p.18;

⁵⁹ “Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01),” *supra note*, 31;

⁶⁰ *Ibid*;

⁶¹ “Judgement of the Court (First Chamber) of 8 December 2011, *Residex Capital IV CV v Gemeente Rotterdam*, C-275/10,” para 44-47, EUR-Lex, Accessed 2 December 2021,

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62010CJ0275>;

⁶² “Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01),” *supra note*, 31: para 72-76;

⁶³ *Ibid.*, 76-82;

of the illegality interest that the undertaking would have paid if it borrowed the amount that is equivalent to the amount of the aid, on the market during the period of unlawfulness⁶⁴, as such aid resulted in the improvement of the competitive position of the aid beneficiary⁶⁵. Consequently, national courts must order the recovery of both the amount of the aid granted and the illegality interest. In cases when the Commission declares the aid compatible, Union law requires the Member States to recover the illegality interest in respect of the period of unlawfulness⁶⁶, which runs from the aid's payment until the declaration of its compatibility.⁶⁷

Interim measures are applied in accordance with the national law, but such application shall fulfil the conditions of equivalence and effectiveness. Interim measures can be used by the national court either when presumably unlawful aid has already been paid or is about to be paid. Also, such measures can be used as a way to address the consequences of potential infringement of the standstill obligation. Interim measures shall be adopted along with the satisfaction of such conditions: the national court has no doubt regarding the existence of State aid; aid was already implemented or is about to be implemented; there are no exceptional circumstances, which could make the recovery inappropriate^{68, 69}.

Action for damages. In cases of granting of unlawful aid, affected third parties can bring an action before national courts for compensation of damages caused to them by such unlawful State aid. Such actions will be held in accordance with the national law that should comply with the principles of equivalence and effectiveness. When such actions are successful, they provide the claimants with direct financial compensation for the loss suffered.⁷⁰ In Part 3 of the Master Thesis, we will elaborate extensively on the issues around the action for damages.

Reimbursement of the taxes paid for financing unlawful aid. This may be possible when third party taxpayers have an interest in bringing an action to obtain the refund of the amount

⁶⁴ "Judgment of the Court (Grand Chamber) of 5 March 2019, Eesti Pagar AS v Ettevõtjluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium, C-349/17," para 134, EUR-Lex, Accessed 24 October 2021, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62017CJ0349>;

⁶⁵ Ibid., para 132;

⁶⁶ "Judgement of the Court (First Chamber) of 8 December 2011, Residex Capital IV CV v Gemeente Rotterdam, C-275/10," para 39, EUR-Lex, Accessed 24 October 2021, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62010CJ0275>;

⁶⁷ "Judgement of the Court of Justice of 5 March 2019, Eesti Pagar, C-349/17," *supra note*, 58: para 134;

⁶⁸ "Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01)," *supra note*, 31: para 76-82;

⁶⁹ "Judgment of the Court (Fourth Chamber) of 11 March 2010, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE), C-1/09," para 36, EUR-Law, Accessed 25 November 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0001>; "Order of the General Court of 3 March 2015, Gemeente Nijmegen v Commission, T-251/13," para 45, EUR-Lex, Accessed 25 November 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013TO0251>;

⁷⁰ "Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01)," *supra note*, 31: para 83-86;

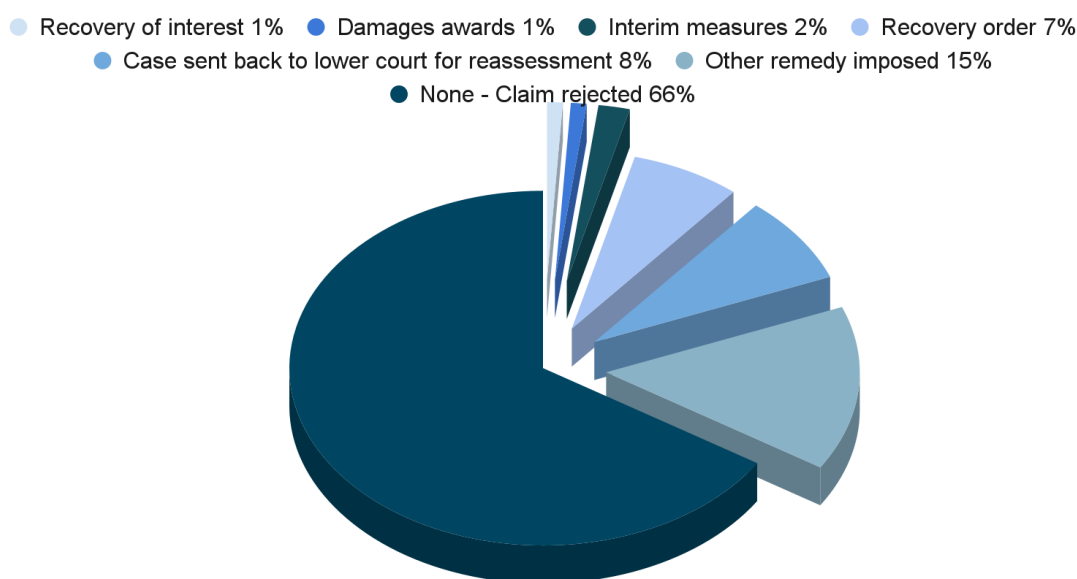
⁷¹ "Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01)," *supra note*, 31: para 87-88;

levied in breach of the standstill obligation, where the tax or levy to which they are subject forms part of the financing of the unlawful State aid.⁷¹

As always national courts can award other additional remedies in order to safeguard the rights of individuals.

In the Study on the Enforcement of State aid rules by national courts of 2019, the Consortium provided a percentage of the remedies awarded by national courts from 2007 to 2018.⁷²

Percentage of the remedies awarded by National courts from 2007 to 2018



- Reimbursement of the taxes paid for financing an unlawful aid - 0%
- Recovery of interest - 1%
- Damages awards to third parties - 1%
- Interim measures - 2%
- Recovery order - 7%
- Other remedy imposed - 15%
- Case sent back to the lower cost for reassessment - 8%
- None - claim rejected - 66%⁷³

One more responsibility of the national courts is to take all the necessary measures to ensure fulfilment of their obligations under Union law and refrain from taking decisions that may

⁷¹ “Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01),” *supra note*, 31: para 25-26;

⁷² “Study on the enforcement of state aid rules and decisions by national courts,” *supra note*, 45;

⁷³ *Ibid.*, p. 77;

jeopardise the attainment of the objectives of the TEU and the TFEU. This is a duty of mutual assistance and stems from Article 4 (3) TEU.⁷⁴ National courts assist the Commission in the fulfilment of its tasks and *vice versa*. Detailed information on collaboration is provided below in part 1.3. of the Master Thesis.

In order to understand the roles of the Commission and national courts in a more clear way, it is better to form a list of the competencies of both bodies.

Competence of the Commission⁷⁵

- Provide guidance, notices, decisions on the State Aid measures, set out conditions by regulations (de minimis, General Block Exemption Regulation, etc)
- Keep under constant review all systems of existing aid
- Assess any plans by a Member State to grant new aid or alter existing aid
- Assess the compatibility of aid measures with the internal market (exclusive competence)
 - ◆ Assess whether the measure qualifies as State aid under Article 107(1) TFEU (both by the Commission and national courts)
 - ◆ Examine whether the measure is compatible with the internal market (exclusive responsibility) - The compatibility assessment must be included in a decision, which is subject to review by the Union Courts
- Assists national courts when they apply Union law (mutual assistance)

Competence of National Courts⁷⁶

Public enforcement

- Implement recovery order of the unlawful/incompatible and assess certain issues:
 - ◆ Quantification of the aid to be recovered and applicable interest;
 - ◆ Identification of the aid beneficiary;
 - ◆ Requests of aid recovery suspension;
 - ◆ Indirect challenges against a Commission decision;
 - ◆ Aid recovery in the context of insolvency proceedings;
 - ◆ Assessing the impossibility of aid recovery;
 - ◆ Assessing the recovery time limit.

Private enforcement

⁷⁴ “Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01),” *supra* note, 31: para 17-18;

⁷⁵ *Ibid*;

⁷⁶ *Ibid*;

- Establish if a measure is subject to the standstill obligation
 - ◆ Assess the existence of aid
 - ◆ Assess whether there is a breach of the standstill obligation
 - Whether the measure falls under block exemption regulations
 - Whether aid concerned constitutes existing aid
- Safeguard the rights of individuals faced with the breach of the standstill obligation
 - Suspension or termination of the implementation of the measure
 - Recovery
 - Interim measures
 - Action for damages
 - Reimbursement of the taxes paid for financing unlawful aid
- Can refer the matter to a Court of Justice for a preliminary ruling
- Ask the Commission for an opinion

Duty of mutual assistance

The major issue related to the roles of the Commission and the national courts is that it is quite hard to clearly identify their roles. If with the Commission it is a bit easier, when the case comes to the national courts it is a disaster. There is no Procedural Regulation that would contain provisions relating to the powers and obligations of national courts. Their powers continue to be governed by the provisions of the TFEU, as interpreted by the Court of Justice. No wonder that the amount of State aid cases is still relatively small. Nearly nobody is thoroughly acquainted with the State aid rules. Individuals or legal persons can not rely on things they know nothing about or do not understand and do not know that they have ways to protect their rights related to State aid measures before their national courts, especially when the unlawful aid was granted. The same goes with the judges of national courts who definitely do not know their role in such cases until there will be a real case pending before them.

After analysing the competence of national courts it shall be stated that the Commission needs to perform one of its competencies and provide guidance or regulation that will outline explicitly, in a clear and detailed manner all powers, obligations, and the role of the national courts in the enforcement of State aid. There is a definitive gap regarding this issue and it needs to be filled in. Hopefully, such measure would increase the number of State aid cases especially in private enforcement, decrease the time of the proceedings before the national courts, and raise awareness and competency of the judges of Member States national courts.

1.3. Cooperation Between the Commission and National Courts

Cooperation tools between the Commission and national courts begin from the principle of sincere cooperation that is embedded in the Treaty on European Union and runs through all EU legislation. Article 4 (3) of TEU requires the Commission to provide national courts with whatever information they may seek, as it declares that “Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties⁷⁷.” Thus, given the key role which national courts play in the enforcement of the State aid rules, the Commission is committed to supporting national courts where they need assistance in reaching a decision on a pending case⁷⁸.

Article 29 (1) of the State Aid Procedural Regulation indicates such cooperation tools as the request for information and the request for an opinion on questions concerning the application of State aid rules. Paragraph 2 of the same article defines one more tool, *amicus curiae* observations, where the coherent application of Article 107 (1) or Article 108 TFEU so requires, the Commission, acting on its own initiative, may submit written observations to the courts of the Member States that are responsible for applying the State Aid rules. But the Commission shall inform the Member State concerned of its intention to submit observations⁷⁹. Therefore, both the request for information and the request for opinion can be used only on the national courts’ initiative. On the other hand, *amicus curiae* observations can be launched only on Commissions’ own initiative.

The first two tools, speaking about request for information and the request for an opinion, seem like a helping hand from the Commission in cases when judges from national courts need a booster shot. Commission Notice on the Enforcement of State Aid Rules by national courts, issued in 2021, gives more precise information on above-mentioned tools. Paragraph 105 states examples of information that can be requested: whether a procedure regarding a State Aid measure is pending before the Commission; whether a Member State has duly notified a certain aid measure in accordance with Article 108 (3) TFEU; whether the Commission has initiated a formal investigation; and whether the Commission has already adopted a decision. When the court has received the information requested, it may ask for regular updates on the ongoing process⁸⁰. Besides that, national courts may request the transmission of documents from the

⁷⁷ “Consolidated version of the Treaty on the Functioning of the European Union,” *supra note*, 3: article 4 (3);

⁷⁸ “Application of State Aid Law by national courts,” EC.Europa, Accessed 1 November 2021, https://ec.europa.eu/competition-policy/state-aid/national-courts/application-state-aid-law_de;

⁷⁹ “Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union,” EURLex, Accessed 1 November 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.248.01.0009.01.ENG;

⁸⁰ “Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01),” *supra note*, 31: para 105, Accessed 30 July 2021;

Commission, like copies of existing Commission decisions, factual data, statistics, market studies, economic analysis. This information also includes information that is covered by the obligation of professional secrecy: confidential information and business secrets. With no doubt, national courts shall guarantee the protection of such information. Still, there is some information that can not be transmitted to national courts. In paragraph 110 of the Commission Notice on the Enforcement of State Aid Rules by national courts it is stated that the Commission may refuse to transmit information to a court of a Member State where such transmission would interfere with the functioning and independence of the Union, where disclosure would jeopardise the accomplishment of the tasks entrusted to the Commission⁸¹.

Regarding the request for an opinion, it may cover all economic, factual, or legal matters relating to State aid that arise in the context of the national proceedings. The previous mentioned Notice distinguishes sufficient samples: whether a certain measure has aid elements, and following that the guidance on how to quantify the amount of the aid; whether a certain aid measure fulfils a requirement of a block exempt regulation or a requirement of a de minimis regulation; whether an individual aid falls under an aid scheme or whether it qualifies as an existing aid; whether exceptional circumstances, which would prevent the national court from ordering full recovery under Union law, exist; what the legal prerequisites are for damage claims under Union law and guidance on how to quantify the damage incurred; how to calculate the amount of the aid to be recovered and how to calculate the recovery interest. It is quite clear that national courts can not assess the compatibility of an aid measure as it is not their jurisdiction, that's why they can not ask the Commission to provide its opinion on the comparability of certain aid measure with the internal market, but what they can ask is whether the Commission is already assessing the compatibility of a certain aid measure. Keep in mind that the Commission opinion is not binding for the national courts, therefore they must not neglect the obligatory duty to protect the rights of individuals under Article 108 (3) of the TFEU during the period in which the Commission prepares its opinion, as this duty applies irrespective of any Commission opinion.⁸²

What about the so-called *amicus curiae*? This shall be translated as 'friend of the court' from Latin and is frequently used for example by the Supreme Court of the United States. In the sense that was invested in this notion by EU legislation, it means practically the same. The Commission, as a 'friend' of Member States national courts, may submit its observations on the case that is pending before the national court in question on its own initiative. The observations may be written or oral, and the latter shall be submitted with permission from the national court.

⁸¹ Ibid., para 110;

⁸² Ibid., para 112-119;

Despite the fact that Article 29 of the Council Regulation 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union does not recall the fact that national courts or the parties to a case pending before a national court may, however, ask the Commission to provide *amicus curiae* observations in a case where State aid matters are at stake, but the 2021 Commission Notice on the enforcement of state aid rules by national courts states such opportunity, even in spite of the fact that such observations are the prerogative of the Commission. Certainly, there are things that the Commission must consider before intervening as the *amicus curiae*. For example, Commission shall think over whether the case is significant enough; whether such observation will contribute to the effectiveness of the enforcement of State aid in this particular case; whether the case is pending before a court whose judgement cannot be subject to further appeals and whether such case involves a novel question of substance, which is not covered by the Commission decision-making practice or notices and guidelines. Before submitting its observations, the Commission informs the Member State concerned by sending a letter to its Permanent Representation to the Union and the submission shall be held in accordance with the Member States' procedural rules and practises, including those safeguarding the rights of the parties. The key thing to remember is that these observations, as well as previously mentioned opinions, are not binding to the national courts.⁸³

The aforestated duty of sincere cooperation between the Commission and national courts will not be fully executed if there is no mutual assistance. The Member States, as well as their authorities, need to support the Commission by forwarding without a delay a copy of any written judgement they have issued after sending a request for information or opinion to the Commission, or for *amicus curiae* observations. Such assistance will aid both the Commission and national courts, as their apropos help will in future save time for submitting the observations and opinions.

In spite of the increasing number of private enforcement cases and parallel State Aid proceedings, national courts rarely ask for information and opinions from the Commission⁸⁴.

According to the Study on the enforcement of State Aid rules and decisions by national courts (the Study) held in 2019 and also amenably to the official statistics that can be seen on the European Commission website, in the period from 2008 till 2018 the Commission received only seven requests for information, twenty-one requests for an opinion since 2009 and until 2018. To note, most of them were related to the question of whether a measure would constitute State aid or not, whilst others to the notion of an undertaking, *de minimis* aid, methods to calculate market

⁸³ Ibid., 120-126;

⁸⁴ Pier Luigi Parcu et al., *EU State Aid Law. Emerging Trends at the National and EU Level*, (Cheltenham: Edward Elgar Publishing Limited, 2020), 13;

prices, and applicability of the GBER in the State aid cases. Furthermore, the Commission provided at least twenty *amicus curiae* observations, of which only one observation to Polish court, two in 2017 to German and Swedish courts, also two in 2016 for the Estonian and Greek courts, one in 2015 to French Court, and three in 2014 to French court and Romanian. As for *amicus curiae* to other courts e.g. arbitration courts, only one was issued in 2020, three in 2019, two in 2018, two in 2016, one in 2015 and one in 2014 and mostly all of them to United States District Courts.

Compared to the number of cases before national courts between 2008 and 2018, precisely 172 cases of public enforcement and 594 of private enforcement, altogether 766 cases, the number of cooperation tools usage is miserable⁸⁵. Even more, as reported by a 2016 Study on judges' training needs in the field of European competition law, the number of judges who may potentially have to deal with State Aid law is 16192 in the first instance, 5058 for the intermediate instance (if applicable), and about 1258 in the final instance. Each judge of almost twenty-three thousand can potentially make use of the foreknown cooperative tools, unlike in competition law⁸⁶. But why do judges of national courts rarely use these helpful tools?

The Study outlined a few reasons for that. The first one is that judges prefer to find an answer by themselves or using the help of their assistants. This approach is somehow right, as it is better to seek an answer by yourself, invest time and effort into this than to address the issue to higher institutions immediately. Also, this can save some time for the case, as for example, the Commission has one month for transmission of information to national courts, and four months for the transmission of opinions on the application of State aid rules. It does not mean that that national courts will not protect the rights of individuals under Article 108 (3) TFEU during the period in which the Commission prepares the requested opinion, as this national court's obligation, including interim measures, applies irrespective of an outstanding Commission opinion, but still this likely will delay the case. The second step for judges after seeking the answer by themselves will more likely be the consultation with fellow judges at the same court. Moreover, national judges will most likely request a preliminary ruling from the CJEU rather than approach the Commission, despite the fact that such a request is also not the easiest choice for the judges⁸⁷. Nina Niejahr, European and Competition Law counsel, in her e-presentation on the State Aid recovery cases before national courts shared information about her own experience. She said that in her professional life she has faced only once the situation where judges finally filed a request for a preliminary ruling to the CJEU. She explained that it was not easy for them,

⁸⁵ "Study on the enforcement of state aid rules and decisions by national courts," *supra note*, 45: p. 10;

⁸⁶ Academy of European Law et al., *Study on judges' training needs in the field of European competition Law* (Trier/Brussels: European Commission, 2016), p. 4, Accessed 1 November 2021, <https://ec.europa.eu/competition/publications/reports/kd0416407enn-esen.pdf>;

⁸⁷ "Study on the enforcement of state aid rules and decisions by national courts," *supra note*, 45: p. 10-11;

as it was the first time, they did not have any guidance on how to file that request, and also judges can doubt whether the question has been already decided, is not so important, or that there is a different rationale on which one could decide the case and the judge did not see it⁸⁸. Despite the fact that the presentation was held in 2016, the information is still fairly relevant.

The second reason for such limited use of cooperation tools is a lack of awareness of the existence of the cooperation tools among judges. A large number of judges know little if any information at all regarding State Aid rules and cooperation tools. During the Study, judges were asked if they knew about cooperation tools, and if yes, whether the use of it was satisfying or helpful. About forty per cent of judges who participated in the questionnaire stated that they had not heard about the cooperation tools at all before participating in the Study. Although, those who have used them indicated that the possibility to communicate with the Commission is highly valued and the majority stated that they were satisfied with the information obtained. However, the number of judges that actively participated in the Study is reasonably small. Twenty-seven judges were interviewed and seventy-eight judges took part in the online questionnaire. Keeping in mind the number of judges in the Member States that could possibly be tangled to the State Aid cases in future, the survey in the Study cannot be decisive.

In conclusion, according to the findings of the abovementioned studies on the enforcement of State Aid law by national courts, most national judges that might be involved in State Aid proceedings are unaware of the existence of the State Aid cooperation tools and the per cent of judges that are aware of them and use those tools is so far too low in order to see the effectiveness of such assistance. As a result, the potential of cooperation tools has not been fully exploited. However, this situation can be easily turned upside down, after all, the use of the tools is seen more as a positive past or future experience for most of the judges. Only due to the lack of awareness among the judges and to reasons why those who know about the tools do not wish to actively use them, the cooperation tools shall be slightly modified and the Commission must think how to spread the knowledge on them amidst all Member State judges that can be involved in State aid cases or are interested in them. EC should improve practical guidance, as a lot of judges noted that they even do not know how they can reach the Commission, shall these requests be filled in online or on paper and sent by regular post or fax. After all, many judges think that they will receive a clear answer to their questions, and when they receive it and see that the Commission's opinion is wide and shall be interpreted, they are simply not satisfied with it and do not want to waste time in the next case. The Commission needs to create an online network for judges only, where they will be able to ask questions, read all information necessary

⁸⁸ Nina Niejahr, "State Aid Recovery Cases before National Courts: Procedural Requirements arising from EU Law," YouTube, Accessed 1 November 2021, <https://www.youtube.com/watch?v=lr0DW0lafmQ&t=2230s>;

about the State Aid, share their knowledge with fellow judges, exchange views and ideas. Such an online system will only boost the progress in the use of cooperative tools and successfully assist judges of the Member States national courts whilst deciding on the State Aid cases especially nowadays since everything goes online, decisions need to be made even faster to keep up with the fleeting world.

2. LEGAL STANDING OF THIRD PARTIES IN STATE AID CASES

When we think about State aid, we primarily imagine the relationship between the European Union (the EU Commission, if more precisely) and the Member States. Member States include all authorities, be they in the executive, legislative, or judicial branch. Not to forget about the private market participants — beneficiaries of State aid measures and their competitors, who often appear as third parties in State aid cases.

As to the European Union law, the Commission shall examine any complaint of any alleged unlawful aid or misuse of aid submitted by an interested party. Who can be an interested party? Article 1 (h) of the Procedural Regulation defines interested parties as "... any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations."⁸⁹ For the successful submission of the complaint, the Commission provides a detailed form to be filled out and submitted. When referring to Annex 1 of this Master Thesis, one can clearly see that the Commission in part 3 "Please select one of the following options, describing your identity" firstly mentions competitor of the beneficiary or beneficiaries, and after that also 'trade association representing the interests of competitors', 'non-governmental organisation', 'trade union', 'EU citizen', and does not limit the circle of complainants by adding 'other'. So, it can be seen that the circle of interested parties is reasonably wide. Also in this form complainants shall provide a certain amount of information in a form that the Commission should be empowered to set out in an implementing provision. In order not to discourage prospective complainants, implementing provision should take into account that the demands on interested parties for lodging a complaint should not be burdensome.⁹⁰ This provision is significant, as in bringing cases before national courts one of the biggest issues is on the contrary because interested parties have a high burden of proof which forces them to forget about the idea of logging a case before national courts.

Third-party rights are, however, in practice, poorly protected in State aid proceedings with the consequence that they may take only a limited part in the Commission's initial assessment and increase if the Commission opens an in-depth investigation. However, third parties may play a major role in the process of any State aid decision before the European Courts in Luxembourg.

In paragraph 27 of the 2021 Enforcement Notice it is stated that in light of Article 47 of

⁸⁹ "Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union," *supra note*, 69: article 1;

⁹⁰ *Ibid.*, para 33;

the Charter of Fundamental Rights of the European Union, individuals and organisations with no standing to request the annulment of a State aid decision under Article 263 TFEU should be given the opportunity to challenge the aid or measures implementing the aid before national courts and trigger a reference under Article 267 TFEU to the Court of Justice for a preliminary ruling on the interpretation or validity of the Commission decision authorising that aid. In that situation, not only economic interests but also other interests of individuals and organisations can be relevant to establish their standing in proceedings relating to the national measures implementing the aid, depending on the measures and national procedures in question.⁹¹

Still, while the Commission stage of a complex State aid case could easily take up to two years or more, if an in-depth investigation is launched, a Court appeal action would typically add at least four years to the period of legal uncertainty. Third parties can materially add to the period of legal uncertainty in State aid cases.⁹²

Therefore, third parties can protect their rights before the European Union Commission, before the CJEU, and also before the national courts of Member States. The latter is of the most interest, as it directly relates to the enforcement of State aid rules by national courts.

Bringing cases before MSs national courts can and shall become a more effective way for the third parties to protect rights that were affected by the granting of the unlawful State aid in comparison with the above-mentioned means. In spite of the fact that third parties have poor complainant rights before the Commission, it surely wants to encourage private enforcement at the national level and pays a great amount of attention to the legal standing of third parties in national litigation in its 2021 Enforcement Notice.⁹³

Determination of an individual's legal standing and legal interest in state aid proceedings before courts is mainly grounded on the principle of effectiveness, according to which the applicable national legislation must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by the Union law.⁹⁴ Considering this, national rules on individuals' legal standing and interest in bringing proceedings should not undermine their right to effective judicial protection of the rights conferred on them by Union law. As an example, CJEU in its judgement on joined cases C-87/90 to C-89/90 Verholen and Others 1991 in paragraph 24 and in the judgement on the case C-13/01 Safalero in paragraph 50 stated that "As regards the national rules relating to the determination of an individual's standing and legal interest in bringing proceedings, the Court has held that

⁹¹ "Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01)," *supra note*, 31: para 27, Accessed 26 November 2021;

⁹² "EU State Aid Quickguide," Ashurst, Accessed 2 December 2021, <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---state-aid/>;

⁹³ *Ibid*;

⁹⁴ "Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01)," *supra note*, 31: para 20, Accessed 26 November 2021;

Community law requires that such rules do not undermine the right to effective judicial protection when exercising the rights conferred by Community law”.

National courts have the responsibility to offer effective legal protection to third parties.⁹⁵ Third parties shall have the right to effective judicial protection of the rights conferred on them by Union law.⁹⁶ These statements were constantly repeated and confirmed by the CJEU and the Commission, even in its 2021 Enforcement Notice.

The European Commission official website has a brief FAQ for citizens of the European Union Member States and explains in a simple language the key points to be acquainted with the State aid concept and rules and, furthermore, on filing the complaint to the Commission and on bringing the case before a national court.

The EU Commission states that the Member States have the obligation to notify planned State aid to the Commission, the so-called ‘standstill obligation’, and indicates that such obligation has direct effect. The direct effect of the standstill obligation means that parties affected by State aid granted in disregard of the standstill obligation (‘unlawful aid’) can bring direct action before national courts. Hence, natural or legal persons whose interests have been adversely affected by the alleged unlawful aid can pursue the matter before the national courts. national courts in return must assess the case regardless of the existence of any parallel proceedings before the Commission. Actions before national courts are of extreme importance, as they can offer a significant remedy, which can bring immediate relief to the complainant affected by unlawful State aid. As was already mentioned, available remedies before national courts include: preventing the payment of unlawful aid, recovery of unlawful aid (regardless of compatibility), recovery of illegality interest, damages for competitors and other third parties, and interim measures against unlawful aid.⁹⁷

Analysing this statement it can be concluded, that there shall be such ‘conditions’ for bringing a case before the court:

- granting an unlawful aid (breach of standstill obligation);
- legal or natural person;
- affected interests of a legal or natural person by such granting of unlawful aid;

⁹⁵ “Judgement of the Court of Justice of 11 December 1973, *Lorenz GmbH v Bundesrepublik Deutschland and Others*, C-120/73,” para 8, EUR-Lex, Accessed 26 November 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61973CJ0120>; “Judgement of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90,” para 11 EUR-Lex, Accessed 26 November 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=cecli%3AEU%3AC%3A1991%3A440>; “Judgement of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94,” *supra note*, 20: para 39;

⁹⁶ “Judgement of the Court of Justice of 13 January 2005, *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën*, C-174/02,” para 18, EUR-Lex, Accessed 26 November 2021, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62002CJ0174>;

⁹⁷ “State Aid Complaint Form,” EC.Europa, Accessed 2 December 2021, https://ec.europa.eu/competition-policy/state-aid/complaints_en;

- interests were affected in a way that prevented success or development; unfavourable and harmful effects.

But are the competitors the only third parties that can have an interest in State aid cases? In the CJEU case practice as well as in the 2021 Enforcement Notice it can be seen that clearly, the answer to this question is ‘No’. In the *Streekgewest* case, the CJEU recognised that a third party can challenge its tax burden when the tax payment “forms an integral part of the aid measure”. So, the claimant can challenge the unlawful aid even if it is not a competitor of the aid beneficiary, and thus even if it is not directly affected by the unlawful aid.⁹⁸ Following the CJEU case law, the Commission in the 2021 Enforcement Notice indicates elements that should be considered by national courts when assessing third parties’ legal standing in cases concerning State aid granted through fiscal measures. In paragraph 25 of the above-mentioned Enforcement Notice it is stated that third party taxpayers may be regarded as having an interest in bringing an action to obtain the refund of the amount levied in breach of the standstill obligation only where the tax or levy to which they are subject forms part of the financing of the unlawful State aid. This relates to the cases where the unlawful aid is financed by a levy to which the plaintiff is subject. To this point, their legal standing does not rely on the existence of a competitive relationship with the aid beneficiary.⁹⁹ There is always a contrary side to the situation and this is not an exception. While a third party can challenge its tax burden when the tax payment “forms an integral part of the unlawful State aid measure”, a third party cannot obtain from a national court an exemption from the payment of a tax which is equivalent to the unlawful aid. Such exemption, in fact, would broaden the number of beneficiaries of the unlawful aid, rather than reduce it.¹⁰⁰

Since this is a whole other thing to discuss, we shall return to requirements of legal standing, as with the Member States requirements it is not as clear who can be that third party. The simple reason is that each Member State of the European Union has its own legal system with national legislation and procedural laws or rules that are applicable to the State aid cases.

According to the Enforcement Study, most cases before national courts are brought by competitors of the aid beneficiary, as they are directly affected by the distortion of competition arising from the implementation of the unlawful aid. Under the principle of procedural autonomy, national courts apply their own rules, and when applying them, national courts shall not forget about their duty to protect the interests of any parties, including third parties, having a sufficient legal interest in initial proceedings irrespective of whether they have been directly

⁹⁸ “Judgement of the Court of Justice of 13 January 2005, *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën*, C-174/02,” *supra note*, 86: 16;

⁹⁹ “Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01),” *supra note*, 31: para 25, Accessed 28 November 2021;

¹⁰⁰ *Ibid.*, para 26;

affected by the distortion of competition arising from the unlawful implementation of State aid measure.¹⁰¹

The legal standing requirements can be rather different from those stated by EU law though Member States can rely on EU law or apply their national rules. Differences in approaches can be seen clearer after analysing the Country reports on the Member States that were made alongside the Enforcement Study 2019.

For instance, in Austria competitors are not recognized as a party enjoying *locus standi* in public enforcement cases. This is due to national legislation on administrative proceedings with no specific rules for State aid cases.¹⁰²

According to the Country Report on Belgium, made alongside the Enforcement Study 2019, under Belgian law, a third party can bring an action for damages against the State for having granted unlawful and incompatible aid and also against the aid beneficiary for having benefited from unlawful and incompatible aid in accordance with the rules that apply to classic liability actions. Hence, a third party must demonstrate sufficient interest in challenging the aid measure and that it is directly affected by the unlawful State aid, as being put at a competitive disadvantage.¹⁰³ For instance, take a look at the two following cases. In 2002, an action for suspension was launched by an association of Christian employers of the Limburg Region and the Chamber of commerce of Limburg against amendments to directives on soft aid for consultancy, training and studies in Flanders. The Council of State dismissed this action based on the ground that a measure can be suspended only if the claimants concerned can demonstrate that they suffer irreparable damage because of the implementation of the measure. Thus, associations cannot act on behalf of their members. Similarly, in the Agence Bruxelles Propreté case in 2018, an association of private waste collecting companies was considered not to have such interest.¹⁰⁴

Bulgarian legislators came further, as they adopted a State Aid Act. Before this, Bulgarian national law did not provide the necessary legal basis for competitors of the aid beneficiary to start an action in a national court in order to ask for the recovery of State aid. As of now, any interested person can seek recovery of the State aid, remedy for an infringement of

¹⁰¹ Ibid., para 23-24;

¹⁰² CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of state aid rules and decisions by national courts. Country report: Austria*, (Luxembourg: Publications Office of the European Union, 2019), p. 2, <https://state-aid-caselex-accept.mybit.nl/report>;

¹⁰³ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Belgium*, (Luxembourg: Publications Office of the European Union, 2019), p. 3, <https://state-aid-caselex-accept.mybit.nl/report>;

¹⁰⁴ Annabelle Lepièce, “GCR Know How State Aid 2019 – Belgium,” CMS.LAW, p.3 Accessed on 4 December 2021, <https://cms.law/en/media/local/cms-db/files/publications/publications/gcr-know-how-state-aid-belgium>;

the standstill obligation, remedy for damage suffered by the competition as a result of the unlawfully granted State aid, etc.¹⁰⁵

In Croatia, the situation is quite different. Third parties have the possibility to seek protection and remedies before commercial and administrative courts as an interested party. Yet, the issue is that there are no State aid cases. Croatia became a member of the EU only in 2013 with a different economy and politics. Due to the specific environment in the country, proceedings initiated by third parties are not workable or practical.¹⁰⁶

Cyprus is another difficult country for analysis, as it lacks cases on State aid. Despite the fact that there is a Public Aid Control law 30(I)/2001 that states that there can be claims for compensation of damage caused due to a violation of national law or EU State Aid rules and it is presumed that these claims can be presented against a beneficiary of State aid by the competitor, there is no any relevant information or case law to analyse a real situation.¹⁰⁷

In the Czech Republic, there is an opportunity to file a lawsuit by a competitor if the causal link between the harm sustained by the competitor and the breach of statutory or contractual obligation by the grantor of unlawful State aid can be proved. However, competitors do not hurry to file claims, as proceedings tend to be lengthy and worthless procedures.¹⁰⁸

As for Estonia, if somebody wants to file a claim to the court, he/she must have the right of action (*kaebeõigus*) to protect the rights before an administrative court. Also, the non-enforcement of a recovery decision must breach plaintiffs' rights (being the competitor of the aid beneficiary can be satisfactory).¹⁰⁹

In France, a party that wants to bring an action before the court shall have an interest in taking legal action. It seems like any party directly or indirectly affected by the measure

¹⁰⁵ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Bulgaria*, (Luxembourg: Publications Office of the European Union, 2019), p. 3, <https://state-aid-caselex-accept.mybit.nl/report>;

¹⁰⁶ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Croatia*, (Luxembourg: Publications Office of the European Union, 2019), p. 3-4, <https://state-aid-caselex-accept.mybit.nl/report>;

¹⁰⁷ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Cyprus*, (Luxembourg: Publications Office of the European Union, 2019), p. 4, <https://state-aid-caselex-accept.mybit.nl/report>;

¹⁰⁸ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Czech Republic*, (Luxembourg: Publications Office of the European Union, 2019), p. 4, <https://state-aid-caselex-accept.mybit.nl/report>;

¹⁰⁹ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Estonia*, (Luxembourg: Publications Office of the European Union, 2019), p. 2, <https://state-aid-caselex-accept.mybit.nl/report>;

(addressee of the measure, competitor, public authority), or groups representing the interests of those who have been directly or indirectly affected by the measure (consumer association, trade union, etc.) can bring an action before the national courts concerning the public enforcement of State aid rules. Competitors are among the main actors, but the majority of the cases brought by competitors claiming damages against the State were rejected by the French court on the grounds of not being well-founded. Meaning that in most cases it is hard to prove a causal link between the commercial harm and the granting of the aid. In the Study report, it is noted that this can be also due to the fact that national courts tend not to recognise the liability of the State in granting unlawful or incompatible State aid.¹¹⁰ However, there are few cases in which courts awarded damages to competitors of State aid beneficiaries for the commercial harm caused by granting the aid.¹¹¹

German rules are more specific and concrete in comparison to other countries. Under Article 823(2) of the German Civil Code, competitors can bring the case before the court, and oblige the aid grantor to effect recovery. This is with the conjunction of Article 108 (3) TFEU¹¹². To claim damages, the competitor needs to prove that the public financing of the State aid beneficiary caused economic disadvantage to the competitor.¹¹³

In Greece, civil courts are competent to listen to State aid cases and to the claims of interested parties for example a competitor, which are brought against the State aid beneficiary with a request of restoration of the damage suffered because of the grant of State aid to the beneficiary.¹¹⁴

Italy has few legal provisions that are applicable to State aid cases. One indicates that civil courts are competent to hear proceedings on claims for damages following Commission decisions, which are brought by competitors of an aid beneficiary against national authorities,

¹¹⁰ French Ministry for Economy and Finance, *Vade-mecum des aides d'Etat*, (Imprimé en France Paris, 2016), p. 309-310,

https://www.economie.gouv.fr/files/files/directions_services/daj/publications/vademecum_aides_etat-2016/pdf-vade-mecum-aides-etat/Vade-mecum_aides_etat-2016_complet.pdf;

¹¹¹ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: France*, (Luxembourg: Publications Office of the European Union, 2019), p. 4,

<https://state-aid-caselex-accept.mybit.nl/report>;

¹¹² CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Germany*, (Luxembourg: Publications Office of the European Union, 2019), p. 3,

<https://state-aid-caselex-accept.mybit.nl/report>;

¹¹³ Baden Württemberg Ministerium für Finanzen und Wirtschaft, *EU-Beihilfenrecht Grundlagen*, (Stuttgart, 2016), p. 95-96, Accessed 29 November 2021,

https://wm.baden-wuerttemberg.de/fileadmin/redaktion/m-wm/intern/Publikationen/Wirtschaftsstandort/Leitfaden_EU-Beihilfenrecht_Grundlagen_Band-1_web.pdf;

¹¹⁴ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Greece*, (Luxembourg: Publications Office of the European Union, 2019), p. 3,

<https://state-aid-caselex-accept.mybit.nl/report>;

and also on potential damage claims brought by the competitor against the aid beneficiary. Nevertheless, such claims for damages brought by competitors of an aid beneficiary are rarely brought.¹¹⁵

In Latvia, interested parties (such as competitors) are allowed to submit claims for damages against the State aid granting body or the beneficiary of the State aid. The legal standing is directly based on Article 108 (3) TFEU and thus national courts may rely on the definition of ‘interested party’ of the Procedural Regulation to determine whether a person has legal standing in a case. Civil courts will review such cases according to the Latvian Civil Law. Also, administrative courts can hear the proceedings on State aid as grant decisions by which the state aid measures are applied are administrative acts.¹¹⁶

In the report on Lithuania, the only thing stated is that a party whose interests have been infringed by the State aid granted can submit a claim on recovery.¹¹⁷

In Portugal, third parties are usually not involved in State aid cases. National rules state that the party shall have a personal and direct interest, meaning that it shall be directly affected by the challenged act in the case in order to have legal standing. Portuguese case law assumes that competitors can have such interest under certain circumstances. Moreover, national rules state that if the party does not have legal standing before administrative courts, it can have legal standing before the civil courts. In cases where a party cannot protect the right in the administrative proceeding, there always is a civil proceeding. This is stated in the Portuguese Civil Procedure Code (Código do Processo Civil).¹¹⁸

Romania provides definitive rules on legal standing. The Civil Procedure Code of Romania states that any person who is affected by an unlawful State aid measure has legal standing in court. Furthermore, this Code is applicable to a claim for damages, and as in Francovich case it requires a plaintiff to prove the existence of the wrongdoing, the amount of

¹¹⁵ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Italy*, (Luxembourg: Publications Office of the European Union, 2019), p. 3,5, <https://state-aid-caselex-accept.mybit.nl/report>;

¹¹⁶ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Latvia*, (Luxembourg: Publications Office of the European Union, 2019), p. 2-3, <https://state-aid-caselex-accept.mybit.nl/report>;

¹¹⁷ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Lithuania*, (Luxembourg: Publications Office of the European Union, 2019), p. 2, <https://state-aid-caselex-accept.mybit.nl/report>;

¹¹⁸ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Portugal*, (Luxembourg: Publications Office of the European Union, 2019), p. 2, <https://state-aid-caselex-accept.mybit.nl/report>;

the damage incurred and the causality between the delict and the damage. This means that such cases are brought mainly by competitors of the beneficiaries of unlawful State aid.¹¹⁹

Slovenia is a relatively small country with no to few State aid cases. There are no specific procedural rules concerning the State aid rules and quite a lot of uncertainties. As for the general rules that apply to the State aid cases there are no cases initiated by a competitor of a State aid beneficiary or by another affected market participant to date. There are no exact rules on whether the State aid beneficiary can be sued by the competitor. The proof of legal interest is also unclear.¹²⁰

Spain has relevant laws to procedural enforcement of State aid. Article 19 of the Administrative Jurisdiction Law 29/1998, recognises the *locus standi* of individuals or legal entities that have a right or legitimate interest. According to the Unfair Competition Act (Law 3/1991 of 10 January 1991), competitors can initiate an action directly against the aid beneficiary especially in cases of unlawful State aid under the direct effect of Article 108 (3) TFEU. Competitors and other interested parties may request the adoption of interim measures under Article 129 of Law 29/1998, or obtain damages from the granting authority under State liability for breach of Union law, established under national Law 40/2015 on the Legal Regime of the Public Sector. But, as always, national courts rarely recognize those damages because it is difficult for competitors to prove actual damage and causal link between the national measure granting aid to a competitor and the damage actually suffered.¹²¹

Sweden, despite being a very developed country, has relatively small State aid cases. There are no special rules for the private enforcement of State aid rules. As for the cases that were analysed in the Enforcement Study report, the legal standing for proceedings is governed by the Local Government Act, Administrative Procedure Act (Förvaltningslagen, 2017:900), or the Code of Judicial Procedure (Rättegångsbalken, 1942:740), depending on the circumstances and the type of the case concerned. As for the competitors, it may be difficult to have the standing to challenge municipality decisions as they are not necessarily residents in the

¹¹⁹ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Romania*, (Luxembourg: Publications Office of the European Union, 2019), p. 2, <https://state-aid-caselex-accept.mybit.nl/report>;

¹²⁰ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Slovenia*, (Luxembourg: Publications Office of the European Union, 2019), p. 3, <https://state-aid-caselex-accept.mybit.nl/report>;

¹²¹ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Spain*, (Luxembourg: Publications Office of the European Union, 2019), p. 3, <https://state-aid-caselex-accept.mybit.nl/report>;

municipality. The lack of specific rules granting interested parties the possibility of challenging unlawful aid makes it hard to some extent to get access to the court.¹²²

Though the UK is not a Member State of the European Union it's worth mentioning. In England and Wales, only parties that have sufficient interest in the matter to which the application relates can apply for judicial review.¹²³ This must involve personal interest in the decision that the party wishes to challenge.¹²⁴ It is mentioned in the Enforcement Study report that sufficient interest is way broader in its meaning than the concept of direct and individual concern. The competitor of aid beneficiary of allegedly unlawful aid is meeting the criteria of sufficient interest and surely has a legal standing before courts in the UK to challenge the decision awarding the aid.¹²⁵

Analysis of the Enforcement Study 2019 reports on 18 Member States of the European Union and the United Kingdom brought to the following conclusions. In the majority of the countries, third parties (mostly competitors of the beneficiary of the State aid) have legal standing before national courts and can protect their rights. Six of them have specific national rules that will apply in cases on the enforcement of the State Aid, others apply generic national rules or directly EU rules, as in Latvia. The bitter part is that such developed countries as Austria and Sweden have no specific rules and either do not recognise or have difficulties in recognising the *locus standi* of third parties. Few countries have no case law, so there is no evidence of which rules shall apply.

National courts shall remember that when applying the national rules on standing, they shall always take into account the duty to protect the interest of any parties having a sufficient legal interest in initiating proceedings irrespective of whether they have been directly affected by the distortion of competition arising from the unlawful implementation of the aid measure.¹²⁶

Consequently, the majority of national courts of Member States do not successfully cope with the above-mentioned responsibility to offer effective legal protection to third parties despite

¹²² CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: Sweden*, (Luxembourg: Publications Office of the European Union, 2019), p. 2, <https://state-aid-caselex-accept.mybit.nl/report>;

¹²³ "Senior Courts Act 1981," Section 31(3), Legislation.gov.uk, Accessed 26 November 2021, <https://www.legislation.gov.uk/ukpga/1981/54/section/31>;

¹²⁴ "R v Inland Revenue Commissioners Ex p National Federation of Self Employed and Small Businesses Ltd (1982) AC 617," Bailii, Accessed 26 november 2021, https://www.bailii.org/uk/cases/UKHL/1981/TC_55_133.html; "R v Independent Broadcasting Authority, ex parte Whitehouse, case (1984) Times 14 April";

¹²⁵ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, *Study on the enforcement of State aid rules and decisions by national courts. Country report: UK*, (Luxembourg: Publications Office of the European Union, 2019), p. 2-3, <https://state-aid-caselex-accept.mybit.nl/report>;

¹²⁶ "Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01)," *supra note*, 31: para 22, Accessed 26 November 2021;

the fact that CJEU case law states that they shall have the right to effective judicial protection of the rights conferred on them by Union law.

Scholars and practitioners often complain about the apparent insufficiency of procedural guarantees available in cases involving private parties. Various proposals for reforms are debated, but still, they are often objected to. Seems like more pressure, expectations and hope shall be one the national legislators, even though this will not help in the lack of proper legal standing before the EU institutions having decisive and supreme authority to rule on the existence and compatibility of aid.

Beyond any doubt, it is clear that having precise national rules, laws, or other legal acts regarding not just the legal standing of third parties, but also in relation to other peculiarities of the cases on the enforcement of State aid rules will increase the number of cases brought before national courts, and especially the number of successful cases. National legislators shall admit that cases on the enforcement of State aid rules are crucial and it is significantly important to determine the exact laws applicable.

Ideally, the best solution, for now, would be a coordinated, harmonised framework throughout the Member States that would present at least a minimum level of legal standing and protection for private third parties. Indeed, the Commission could do one's bit and contribute their share by presenting tools or instruments similar to those introduced in the area of private enforcement of antitrust law.¹²⁷

¹²⁷ Michał Bernat, "Practitioner's (Biased) Diary on What Beneficiaries Complain About (Mainly in Conference Rooms)," *European State Aid Law Quarterly* 15, no. 2 (2016): 206, <https://www.jstor.org/stable/26694049>;

3. ACTION FOR DAMAGES

One of the basic principles which govern EU law is the principle of the rule of law. According to this principle, a State body that causes damage to an individual as a result of an unlawful act, it is obliged to compensate for the harm suffered. Hence, Member States must adopt the necessary and effective measures in order to secure the rights of the European citizens that derive from EU law. The principles of the direct application and primacy of EU law are duly important. In this context, the national judge, to whom the application of EU law provisions is assigned, has an obligation to ensure their full effectiveness.¹²⁸

When the authorities grant aid without prior notification to the Commission and the Commission subsequently states that the aid is incompatible, the Commission shall order the full recovery of the aid in order to eliminate the distortion of competition. The procedure for the Commission to adopt a final decision on recovery could take several years. Meanwhile, as time goes, circumstances constantly change, and anything can happen. The competitors of the State aid recipient or other interested parties could have gone bankrupt or could have had to cease operating because of such State aid, etc. What shall they do to help themselves meanwhile the implementation of the recovery order? Fortunately, the EU law and national legislations recognise the possibility of third parties that suffered losses from the unlawful granting of State aid to seek compensation for damages before the national courts.

As was mentioned above in Chapter 1.2., safeguarding the rights of individuals faced with the breach of standstill obligation is one of the main duties of national courts in regards to enforcement of State aid measures. As a part of the perseverance of the rights of individuals faced with a breach of Article 108 (3), TFEU national courts are obliged to offer effective legal protection to third parties under national law. This primary role includes different types of remedies that can be offered depending on the situation. It can be suspension of the measure implementations, or termination of such implementation, the recovery of disbursed sums and the illegality interest in respect of the period of unlawfulness, interim measures like repayment of the aid with illegality interest or the provisional transfer of the aid, or prevention of the disbursement of presumably unlawful aid, etc. Still, there is one more measure that could be taken by the court in order to safeguard the rights of individuals — action for damages, as the role of national

¹²⁸ Antonis Metaxas, “The role of the Administrative Judge in the State. Member State Liability For Judicial Breach Of EU Law,” EJTN.EU, Accessed 26 November 2021, <https://www.ejtn.eu/PageFiles/19803/2.Member%20State%20Liability%20Presentation.pdf>;

courts in the application of the State aid rules is not limited only to the recovery of aid granted unlawfully, but also includes compensation where the illegal aid has created damages¹²⁹.

3.1. Two Ways of Bringing Actions for Damages Before National Courts

Actions for damages can be brought against Member State authorities in two ways: under EU law for the non-compliance with Article 108 (3) TFEU, for which Member State liability was mainly established by case-law, and under Member States national laws, as such actions are not limited only to non-compliance with EU State aid laws, but also to non-compliance with national laws.

EU law. The recognition of State liability for the harm suffered due to the breach of EU State aid rules was initially developed in the principles of Francovich (1991), further clarified in Brasserie du Pêcheur (1996) and extended in Köbler (2003), in order to also cover breaches by the judiciary as enriched in Traghetti (2006).

There is no difference which state authority is causing the breach, as the liability can be triggered by breaches of any state body, i.e. the executive, legislature, or judiciary. For example, if there is a clear and obvious breach of EU law caused by the national judge, it can lead to the liability of the respective Member State.¹³⁰

European Law provides a few mechanisms that can be used to protect the infringed rights:

- Under Articles 258-260 of the TFEU;
- Affected individuals can file cases on the grounds of Member States obligation to make good loss and damages caused to individuals lay in Treaty articles (Frankovich);
- National judges must re-interpret, negate or shape national law according to the provisions of EU law (article 4.3 of the Treaty; C-26/62, Van Gend en Loos; C-6/24, Costa v. ENEL; C-106/77, Simmenthal).¹³¹

Under EU law damage actions are based at least on two cases: ‘Francovich’ and ‘Brasserie du Pêcheur’. In the judgement on the joined cases C-6/90 and C-9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic the Court mentioned in paragraph 35, that “ ... principle, whereby a State must be liable for loss and damage caused to individuals

¹²⁹ Christof Lessenich and Thierry Beranger, “The Commission notice on the enforcement of State aid law by national courts,” *Competition Policy Newsletter*, 2 (2009): 16, https://ec.europa.eu/competition/publications/cpn/2009_2_3.pdf;

¹³⁰ “The role of the Administrative Judge in the State. Member State Liability For Judicial Breach Of EU Law,” *supra note*, 126;

¹³¹ The role of the Administrative Judge in the State. Member State Liability For Judicial Breach Of EU Law, *supra note*, 118;

as a result of breaches of Community law for which the State can be held responsible, is inherent in the system of the Treaty.¹³² In general, the Court in paragraphs 30-46 of the aforementioned case stated that grounds for the obligation of Member States to make good loss and damages caused to individuals lay in Treaty articles under which the Member States are required to take all appropriate measures to ensure fulfilment of their obligations under Community law and among them is the obligation to nullify the unlawful consequences of a breach of Community law. Further, the Court lays out the conditions for State liability that depend on the nature of the breach: (a) the individual shall have the rights granted to them, (b) the content of the rights should be easy and possible to identify, and (c) there should be a causal link between the breach of State's obligation and the loss and damage suffered by the injured parties.¹³³

The same three conditions are repeated in Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others*. In paragraph 51 of this Judgement dated March 5, 1996, the Court stated that “ ... Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.”¹³⁴ Therefore, in *Brasserie* the CJEU declared that the liability of the Member State for EU law breaches also includes cases of positive acts or omissions of the national legislator, repeating *Francovich's* reasoning with regard to the nature of liability as inherent in the Treaties. The CJEU further proceeded in the wording of an additional condition, i.e. that the positive acts or omissions of the national judge must blatantly violate the rules of EU law in order to establish Member State liability.¹³⁵

Aforestated Commission Notice on the Enforcement of State Aid rules by national courts 2021 clears up the requirements presented in the aforementioned cases. Paragraph 90 lays out a statement that the first two conditions “... will be generally met in relation to violations of Article 108 (3) TFEU.” Briefly said, this Article defines the so-called ‘standstill obligation’ — the obligation of Member States to notify planned State aid to the Commission in a sufficient time to

¹³² “Judgement of the Court of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, Joined cases C-6/90 and C-9/90,” para 35, EUR-Lex, Accessed 24 November 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61990CJ0006>;

¹³³ *Ibid.*, para 30-46;

¹³⁴ “Judgement of the Court of 5 March 1996, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, Joined cases C-46/93 and C-48/93,” para 51, EUR-Lex, Accessed 26 November 2021, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:61993CJ0046>;

¹³⁵ The role of the Administrative Judge in the State. Member State Liability For Judicial Breach Of EU Law, *supra* note, 118;

enable it to submit its comments¹³⁶. The EU case law determined that the standstill obligation that stems from Article 108 (3) has a direct effect. Paragraph 88 of the Judgement on the Case C-349/17 *Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium* and paragraph 29 of the Judgement on the Case C-284/12 *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH* clearly explain that “ ... the Court has stated that the prohibition on implementation of planned aid laid down in the last sentence of Article 108(3) TFEU has direct effect and that the immediate enforceability of the prohibition on implementation referred to in that provision extends to all aid which has been implemented without being notified.”¹³⁷ Hence, this means that parties injured or affected by State aid granted in disregard of the standstill obligation can bring direct actions before national courts. Individuals, natural or legal persons, can directly ask courts to protect their rights within the meaning of the previously mentioned article, which is one of the courts’ main duties.¹³⁸ Thus, the first requirement “ ... the rule of law infringed is intended to confer rights on individuals ... ” was long ago consolidated by EU case law.

Concerning the second condition that the content of the rights should be easy and possible to identify, or as the Commission Notice states “ ... the breach is sufficiently serious ... ”, this is not hard to follow. The wording ‘sufficiently serious breach’ seems to have a large margin of discretion, and CJEU noted that the state’s liability can only be engaged where the state has manifestly and gravely disregarded the limits of its discretion, and the mistake was not ‘inexcusable’¹³⁹, but not in the case of State aid. There is no margin of discretion¹⁴⁰ as the infringement of Article 108 (3) will in most cases be sufficient to establish the existence of a serious breach under case law of the Union Courts. Article 108 (3) TFEU clearly defines the obligation of Member States authorities to notify the Commission on plans to grant or alter aid. If such authorities have some kind of doubt regarding the measure, they shall then always notify the Commission on the measure prior to its implementation, since they cannot simply state that

¹³⁶ “Consolidated version of the Treaty on the Functioning of the European Union,” *supra note*, 3: Article 108 (3), Accessed 15 November 2021;

¹³⁷ “Judgement of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17,” *supra note*, 58: para 88; “Judgement of the Court (Second Chamber), 21 November 2013, *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH*, Case C-284/12,” para 29, EUR-Lex, Accessed 26 November 2021, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62012CJ0284>;

¹³⁸ “Judgement of the Court (Grand Chamber) of 12 February 2008, *Centre d’exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d’édition (SIDE)*, Case C-199/06,” *supra note*, 30: para 38;

¹³⁹ “Irish Supreme Court finds balance in EU law”, PhilipLee, Accessed 26 November 2021, <https://www.philiplee.ie/irish-supreme-court-finds-balance-in-eu-law/>;

¹⁴⁰ Jacques Derenne and Ciara Barbu O’Connor, “France: An Overview on State Aid”, *GlobalCompetitionReview*, Accessed 26 November 2021, <https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrust-review/2022/article/france-overview-state-aid>;

they were not aware of the standstill obligation.¹⁴¹ The violation of this article shall always be considered as a sufficiently serious breach

The third requirement is the hardest to demonstrate. Referring to the Study on the Enforcement of State Aid rules by national courts, the establishment of the causal link between the harm and the unlawful aid and quantification of the damage are two major obstacles for the claimants, therefore national courts rarely award damages. As a result, the number of successful actions for damages is extremely low. Only in six of the identified relevant rulings did national courts award compensation due to the harm caused by a breach of the standstill obligation by a Member State (i.e. less than 1% of the private enforcement cases identified in the Study).¹⁴²

Succinctly, this small number of successful actions for damages indicates the main issue — there is a high burden of proof laid on the plaintiff. Complainant needs to:

- prove that the challenged measure represents an unlawful aid not previously notified to the Commission;
- prove that the aid measure caused damage to the claimant;
- estimate the damage suffered during the entire period that the unlawful aid was in operation i.e. a loss of profits and/or a loss of market share;'
- establish the causal link between the harm and the unlawful aid.

There was one more case of CJEU regarding the liability matter. Case C-224/01, Gerhard Köbler v Republik Österreich with the judgement on 30 September 2003. In this judgement, the CJEU extended the application of the Francovich principle and thus covered breaches of EU Law by the national judges. The Court considered whether the Austrian Supreme Court violated its referral obligation with regards to questions of free movement of workers. “State liability for an infringement of Community law by a decision of a national court adjudicating at last instance can be incurred only in the exceptional case where the court has manifestly infringed the applicable law”.¹⁴³ Therefore, although the CJEU found that the VGH’s decision was in breach of EU law, in the case at hand, regarded the breach as not ‘sufficiently serious’ to raise state liability.¹⁴⁴

In 2006 there was a judgement of the CJEU on the case C-173/03 Traghetti del Mediterraneo SpA v Repubblica Italiana. In this judgement, CJEU confirmed the principle laid down in the Köbler case and ruled that EU law precludes the existence of two types of national

¹⁴¹ “Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01),” *supra note*, 31: para 90-91, Accessed 15 November 2021;

¹⁴² “Study on the enforcement of state aid rules and decisions by national courts,” *supra note*, 45: p. 8;

¹⁴³ “Judgement of the Court of 30 September 2003, Gerhard Köbler v Republik Österreich, Case C-224/01,” para. 53, EUR-Lex, Accessed 25 November 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62001CJ0224>;

¹⁴⁴ The role of the Administrative Judge in the State. Member State Liability For Judicial Breach Of EU Law, *supra note*, 118;

rules that limit State liability: rules that exclude liability for damages due to an infringement of EU law that arises out of an interpretation of legal provisions or an assessment of facts or evidence carried out by a court adjudicating at last instance, or those limiting liability solely to cases of the intentional fault and serious misconduct on the part of the court if such limitation were to lead to exclusion of the liability of the Member State in other cases where a manifest infringement of the applicable law was committed.¹⁴⁵

Therefore, the CJEU case law established grounds for the State liability and the award of damages, thereby facilitating the life of those suffering from the unlawful conduct of state authorities and breach of European Union Law.

National laws. Under national laws, actions for damages are more or less based on the same conditions that originated from the aforementioned Francovich case, as they became almost a part of national legislation. Interesting enough to mention that the Francovich case was so influential, that there is now a separate word in the English language to define ‘a cause of action in damages against a member state for failure to implement or breach of EU law’ as the Francovich Claim.¹⁴⁶ Also one can find a synonym as Francovich Damages. Getting back to the national legislation, Member State authorities can be held liable for negligence.

The Global Competition Review recently did research on Greece and France regarding the overview of State Aid. In the research on Greece author Dimitris Vallindas mentioned that Greece and its authorities can also be held liable for fault or negligence under articles 104 to 106 of the Introductory Law to the Civil Code. Also, to confirm the words spoken, the author noted that according to Greece Civil Code in such cases it is necessary to prove a fault, the resulting damage and a causal link. These provisions can, therefore, be used to engage the state’s responsibility (including the legislator and even the judiciary in certain circumstances) for adopting an act that breaches EU law¹⁴⁷.

The other research was made by Jacques Derenne and Ciara Barbu O'Connor on State Aid in France. The authors of this research as well as Dimitris Vallindas, the Greek author, noted that national authorities can be held liable under EU law along with the national law. France has specific rules though. According to the rule of the prior decision, before filing a lawsuit to

¹⁴⁵ “Judgement of the Court (Grand Chamber) of 13 June 2006, *Traghetti del Mediterraneo SpA v Repubblica Italiana*, Case C-173/03,” EUR-Lex, Accessed 26 November 2021, <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:62003CJ0173>; The role of the Administrative Judge in the State. Member State Liability For Judicial Breach Of EU Law, *supra note*, 118;

¹⁴⁶ “Glossary”, UK.Practicallaw.Thomsonreuters, Accessed 26 November 2021, [https://uk.practicallaw.thomsonreuters.com/5-382-8090?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-382-8090?transitionType=Default&contextData=(sc.Default)&firstPage=true);

¹⁴⁷ Dimitris Vallindas, “Greece: An Overview on State Aid,” GlobalCompetitionReview, Accessed 26 November 2021, <https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrust-review/2022/article/greece-overview-state-aid>;

administrative courts, the claimant shall request a decision from the administration with permission for damages award from the State. The claimant shall wait for two months, as this is the time that the administration has to react to this request. Only after two months claimant can address to the administrative courts. If the administration leaves the claimant without a decision, he/she has five years to file an action before the administrative courts. This action is more like a request to annul the decision of the administration which refused the damage award or compensation. Conditions for the liability are the same as under the Francovich Claim. The rule breached must intend to confer rights on individuals, and there shall be a direct causal link between the damages and the breach of the relevant law. Besides that, there shall be a fault in most cases, and only in specific ones, the liability can be proven even without proof of fault. The bad news for the claimant is that French administrative courts have recognised a certain margin of appreciation for the legislator and show reluctance to engage the liability of the legislator for infringement of a provision of EU law. It is considered that the illegality enabling state liability to be engaged should be found at the level of the administrative act implementing the law, even if it was adopted in violation of EU law, so it is hard to demonstrate the proof of fault existence.¹⁴⁸ Other examples of national legislation regarding action for damages were already analysed in the previous part of this Master Thesis.

Taking into account all the information that was previously provided, it can be summarised that the rights conferred directly by the EU law can have effective judicial protection either under EU law or under National legislation, as both of them are grounded on the same or typical conditions. As was already mentioned above, the Francovich case, or rather its judgement, has made a huge impact in the field of State aid law, especially regarding the damage claims, and considering the analysis of national legislation of EU Member States, it can be stated that the conditions that were set in the Francovich case can exist as per se, and not only as a part of CJEU case law, they just shall be thoroughly complied and observed by the suffered party and by national judges.

3.2. Possible Forms of Actions for Damages Before National Courts

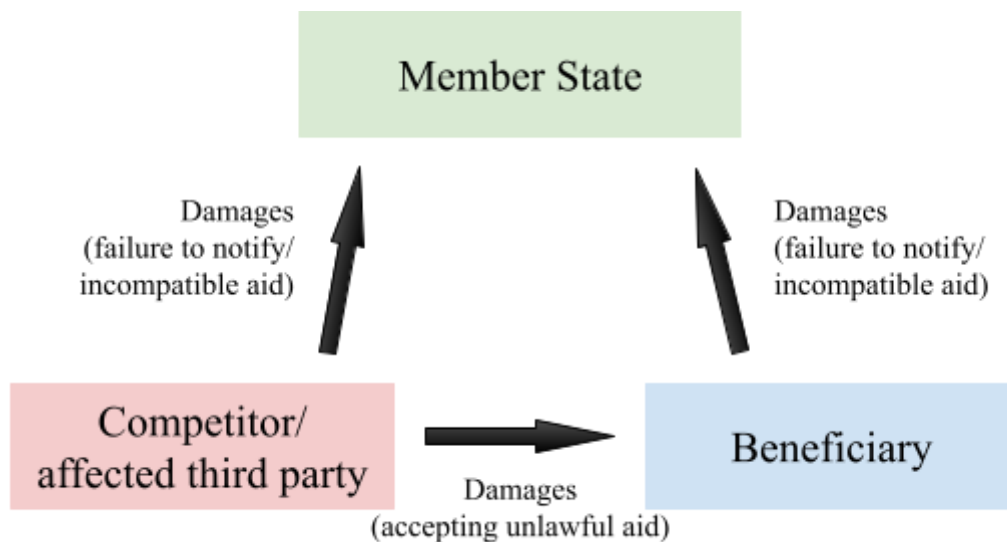
Under the violation of Article 108 (3) TFEU, namely the standstill obligation, certain claims can be filed to the national courts of the EU Member States. Taking into account certain circumstances of the relevant situations, the possible forms of actions for damages before national courts could be the following:

¹⁴⁸ “France: An Overview on State Aid”, *supra note*, 129;

- Interested and affected the third party can file a claim suing the Member State (or its authority that is liable for granting an unlawful aid);
- Interested and affected third party can file a claim suing the beneficiary of the unlawful State aid;
- The beneficiary of the unlawfully granted State aid can file a claim suing the Member State (or the authority that granted such aid).

The main things to deal with, in order to slightly understand the aforementioned claims, are situations that lead to the possibility of such claims, who can be the complainant in damage claims and the importance of circumstances that affect the courts' decision.

For a better understanding of the subjects involved in actions for damages refer to the scheme presented underneath.



Third party versus Member State. In situations, where the authority of a Member State failed to comply with the standstill obligation, i.e. have not notified Commission, or notified, but have not waited for the approval and granted the unlawful State aid, the interested third party can file a claim for compensation due to the damages caused by such unlawful State aid. Such claims can be a direct financial compensation for the loss suffered. This form of action is based on the aforementioned case-law of the CJEU — Francovich and Brasserie judgments, which provide the conditions for State liability.

The third party interested in filing a claim can be not only the competitor of the beneficiary of the unlawful aid, but also a non-competing company affected by this aid, or a taxpayer, who paid taxes which became a contribution to the unlawful State aid, etc. In the Judgment of the CJEU of 13 January 2005, *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën*, it was stated in paragraph 19 that “An individual may have an

interest in relying before the national court on the direct effect of the prohibition on implementation referred to in the last sentence of Article 93(3) of the Treaty not only in order to erase the negative effects of the distortion of competition created by the grant of unlawful aid but also in order to obtain a refund of a tax levied in breach of that provision. ... the question of whether an individual has been affected by the distortion of competition arising from the aid measure is irrelevant to the assessment of his interest in bringing proceedings. The only fact to be taken into consideration is that the individual is subject to a tax which is an integral part of a measure implemented in breach of the prohibition referred to in that provision”¹⁴⁹. Also, it can be a creditor of the aid beneficiary who was harmed by the recovery of the aid and suffered losses.¹⁵⁰

Third party versus beneficiary. What about the actions for liability and damages against the beneficiary? In brief, it's possible under certain conditions, however, such actions rarely occur. Verbosely, competitors might receive compensation from the aid beneficiary if this type of action is allowed under national law.

The Enforcement Notice of 2009, as well as Enforcement Notice 2021, indicated that claimants may want to bring an action for damages against the beneficiary of the unlawful aid and not the granting authority. These kinds of actions are allowed but not required by EU State aid law as there is no basis for such action under EU law. SFEI case with the judgement of 11 July 1996 is a case in which the complainant, express carriers were complaining against alleged State aid granted by French La Poste, to its subsidiary competing for the express carriers on the market of the express carriers industry. The Paris commercial court referred the case to the Court of Justice to know if the beneficiary of aid has the obligation to verify that the aid received was duly notified by the State authorities, and if there is a liability for having accepted that aid without having checked that fact or just by not refusing the unlawful aid from the State. The Court of Justice said that there was no protection against a recovery obligation and the recipient should act as a diligent economic operator but refused to create an obligation under EU law on the recipient of aid. CJEU stated that “... a recipient of aid who does not verify that aid has been notified to the Commission in accordance with Article 93 (3) of the Treaty cannot incur liability solely on the basis of Community law.”¹⁵¹ Therefore, in SFEI the CJEU recognised that the competitors of the beneficiary can be entitled to receive compensation due to the damage caused by the unlawful aid, but such compensation should be paid by the granting institution, rather than by the beneficiary since the latter is not liable for the lack of compliance with the notification

¹⁴⁹ “Judgement of the Court of Justice of 13 January 2005, *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën*, C-174/02,” *supra note*, 86: para 19;

¹⁵⁰ Kelyn Bacon QC, *European Union Law of State Aid*, United Kingdom: (OUP Oxford, 2017), p. 563, para 20.31;

¹⁵¹ “Judgement of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94,” *supra note*, 20: para 76;

obligation. Accordingly, neither Article 88 (3), as the Court referred to in the aforementioned case, nor Articles 107 and 108 TFEU do impose any direct obligations on beneficiaries. In fact, it's quite illogical for the beneficiary to pay damages to the competitor. Beneficiaries are not obliged by Article 108 (3) TFEU to notify the Commission on the planned aid, only granting institutions of Member States have this duty and only they shall be held liable for the nonconformity with the notification obligation. Hence, the conditions of damages for a breach of State aid rules are much the same as State liability for breach of Union law.¹⁵² But the Court of Justice with the SFEI judgement opened the door to the application of national liability law in a situation where a beneficiary accepts an unlawful aid from the State and this may result in damages to be paid by the beneficiary to a competitor. Such claims can be a great way to protect the competitor's rights against a beneficiary.¹⁵³

For example, in Greece, such actions must be brought before the civil courts. The conditions that must be determined by the court are the following: whether the beneficiary benefited from the unlawful State aid, and whether he/she knew or could have known that the aid received was unlawful, more precisely, granted in violation of Article 108 (3) TFEU. After identifying these features, the court then evaluates the amount of damages to be granted.¹⁵⁴

In Germany, however, few judges held that there was no such right of the competitor to sue beneficiary on the basis that Articles 107 and 108 TFEU are not intended for the protection of competitors¹⁵⁵, but the German Federal Court of Justice has confirmed that article 108 (3) TFEU is intended to protect third parties when the national law remedies are available.¹⁵⁶

Nowadays, it all depends on the legislation of Member States, and in some of them, there is no difficulty for the beneficiary of unlawful aid being held liable and compensating competitors on the basis of unfair competition.¹⁵⁷

Beneficiary versus Member State. The rarest situation. The beneficiary wants to receive damages from the Member State authorities that granted the unlawful aid. Such a case can be seen as a circumvention. Beneficiary, who should pay back the granting authority the amount received under the unlawful granting of State aid, tries to recover this amount in the form of damages. Beneficiary argues that there was an alleged breach of the legitimate expectations by the Member State authority. The Court of Justice held that an unlawfully granted measure could

¹⁵² "Study on the enforcement of state aid rules and decisions by national courts," *supra note*, 45: p. 19;

¹⁵³ Jacques Derennes, "The changing role of the national judge in EU State aid cases – Online training course for national judges Other remedies", Accessed 4 December 2021, https://state-aid-online.eu/wp-content/uploads/2018/02/Transcript_4_Derenne_EN.pdf;

¹⁵⁴ "Greece: An Overview on State Aid", *supra note*, 136;

¹⁵⁵ Christoph Arhold, "European Airline Wars: German Courts Divided over Actions against Low-Cost Carriers," *European State Aid Law Quarterly* 7, no. 1 (2008): 31, <https://www.jstor.org/stable/26682864>;

¹⁵⁶ Christoph Arhold, Kai Struckmann, and Franziska Zibold, "Germany," *European State Aid Law Quarterly* 10, no. 2 (2011): 195, <https://www.jstor.org/stable/26686160>;

¹⁵⁷ Kelyn Bacon QC, *European Union Law of State Aid*, *supra note*: 139: para. 20.33, p. 564;

not generate any legitimate expectation for the beneficiary. It stated that the beneficiary should be able to determine whether the correct procedure for the granting of the aid has been followed and such claims should be rejected.¹⁵⁸

Still, in particular circumstances, the damages can be actually granted to the beneficiaries. In the next Chapter 3.3. we will analyse the Italian case with the judgement on 13 June 2017 between Coghene Costruzioni S.R.L and Regione Autonoma della Sardegna. To summarise, due to the breach of EU law, but not exactly the standstill obligation as we think about it, by the public authority that granted the unlawful aid, the national court ruled that the beneficiary really had legitimate expectations and suffered damages due to such granting of unlawful aid, therefore the public authority is liable and shall award damages.

In France, there were three cases (known as Borotra cases) of 15 October 2003, 23 September 2004, and 21 January 2006. Those cases relate to the previously granted unlawful aid by the French authorities. The French State assured the aid beneficiaries that the aid is legal, that it was approved by the Commission, and that there are no problems. Aid beneficiaries believed the French State and accepted the State aid, thereby rejecting other ideas and possibilities to 'help their businesses'. After they knew that the aid granted was unlawful, and were forced to repay it, the beneficiaries decided to sue the French State for damages suffered from the granting of this unlawful State aid. The French courts recognized the possibility of beneficiaries to obtain compensation for the loss suffered, as this compensation did not replace the recovered aid.¹⁵⁹

Though, in order for the Member State to award damages to the beneficiary there shall be: exceptional circumstances, beneficiary paid back the unlawful aid, and provided that it suffered damages which had nothing in common with the recovery of the unlawfully granted aid.

To think, the recovery of unlawful aid is not a sanction imposed on the beneficiary. It is the simplest and a logical way of restoring the distortion of competition and returning to the initial point. The 2021 Enforcement Notice mentions this category in paragraphs 97-98. The Commission stated here that damages actions cannot have the effect of circumventing the effective application of EU State aid rules.¹⁶⁰ But the Notice emphasises more on the situation

¹⁵⁸ "Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01)," *supra note*, 31: para 98, Accessed 30 July 2021;

¹⁵⁹ Michael Honoré and Nanna Eram Jensen, "Damages in State Aid Cases," *European State Aid Law Quarterly* 10, no. 2 (2011): 268, <https://www.jstor.org/stable/26686169>;

¹⁶⁰ "Judgement of the Court (Full Court) of 29 June 2004, Commission of the European Communities v Council of the European Union, Case C-110/02," para 43, EUR-Lex, Accessed 4 December 2021, <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62002CJ0110>; "Judgement of the Court (Grand Chamber) of 18 July 2007, Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA, Case C-119/05," para 59-63, EUR-Lex, Accessed 4 December 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62005CJ0119>; "Judgement of the Court (Second Chamber) of 11 November 2015, Klausner Holz Niedersachsen GmbH v Land Nordrhein-Westfalen, Case 505/14," para 42-44, EUR-Lex, Accessed 4 December 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0505>;

related to the potential beneficiary of unlawful aid, who might be entitled under national legislation to receive aid which has not been notified and approved by the Commission, but had not received it and thus wants to claim for damages as a compensation (could be even equivalent to the sum of the non-received aid). In such a situation the damages would have constituted an indirect grant of unlawful aid.¹⁶¹

3.3. Summary of Member States National Courts Cases Brought due to Breach of Standstill Obligation and the Reasons Behind Their Limited Number

When analysing cases that were included in the 2019 Study on the Enforcement of State aid rules by national courts done by the Consortium of authors, striking information is that national court awarded compensation due to harm caused by the breach of the standstill obligation by a Members State in less than 1% of the private enforcement cases identified in the Study. The reasons behind such a low number are the following:

- Lack of familiarity with State aid rules among national courts;
- Claimants do not usually put forward well-structured arguments to support their claims
- National courts face difficulties in verifying the conditions concerning the Notion of aid under Article 107 (1) TFRU, under GBER, as well as applying the CJEU case law in relation to Altmark and Market Economic Operator Principle (MEOP);
- The number of State aid claims often require national courts to assess the legality of the measure under different areas of law and the interaction of different legal regimes makes the evaluation of the measure under State aid rules more complex;
- National courts are often reluctant to order the recovery of the unlawful aid while the case is awaiting a compatibility assessment by the Commission;
- Claim generally implies a rather high burden of proof for the claimant in damages claims.¹⁶²

In accordance with the Study, most courts did not accept claims regarding public authorities failure to notify the Commission about the planned aid measure. In Annex 3 of the Study there are fourteen (14) cases that were analysed and in which the ‘damages awards to third parties’ was a sought remedy, but almost all of them were or sent back to the lower court for re-assessment three (3), rejected nine (9). Nevertheless, there are always exclusions and in two of

¹⁶¹ “Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01),” *supra note*, 31: para 97, Accessed 30 July 2021;

¹⁶² “Study on the enforcement of state aid rules and decisions by national courts,” *supra note*, 45: p. 8;

them, damages have been addressed and held to be potentially warranted. It is noteworthy to mention that the two cases were held before French national courts.

The judgement to be analysed is on the case between Société CORSICA FERRIES, as the competitor, and Collectivité Territoriale de Corse (Territorial Collectivity of Corsica), as a public authority, with the judgement held on 23 February 2017. This case was filed as being the outcome of the previous judgement held on 6 April 2016 by the Marseille Administrative Court of Appeal. The Territorial Collectivity of Corsica concluded the public service delegation contract with the SNCM/CMN group by which it granted the financial compensation. The aforementioned judgement stated that this financial compensation constitutes unlawful State aid, which shall have been notified to the Commission, and so without prior notification, it shall be considered as unlawful. With this in mind, Société CORSICA FERRIES filed an action to the national court and stated that that contract caused them damage. As they are competitors of the SNCM/CMN group, they have lost profits due to the number of travellers who used the maritime services provided by the SNCM/CMN group, as the complainants' services and the ones provided by the SNCM/CMN group are perfectly substitutable. The defendant on the other side argued that and stated that the plaintiff could not suffer damages such as loss of profit, because the defendant had no benefits, and provided its services at a loss. SNCM/CMN group noted that there was no causal link between the alleged damage and the contract; there was no proof that the number of travellers that used their services would have used the services of the complainant. The Bastia Administrative Court had to establish whether there was a causal link between the contract and the damage sustained. Unfortunately for the defendant, the court held that the damage was actual and certain, the plaintiff had demonstrated the existence of a causal link between the aid granted by the Territorial Collectivity of Corsica and the damage suffered, and moreover, that the unlawful aid deprived the plaintiff of numerous clients as to its market share. Due to the facts provided, the Court obliged the Territorial Collectivity of Corsica to grant remedies for the damage sustained as a result of the unlawful public delegation service contract.¹⁶³

Thus, in this case, we have the following: competitor as the complainant of the case, public authority as a defendant, unlawful aid granted, damages suffered, and the need to prove the causal link between the granting of such unlawful aid and the damages suffered. Having successfully passed all stages, the competitor received a damages award. This is an example of a fortunate ending to the situation which was begun by the unlawful granting of State aid.

¹⁶³ CASELEX, Directorate-General for Competition (European Commission), ECORYS, European University Institute, Spark, “*Study on the enforcement of State aid rules and decisions by national courts. Annex 3,*” (Luxembourg: Publications Office of the European Union, 2019), p. 152-153, <https://state-aid-caselex-accept.mybit.nl/documents/Procurement%20procedure%20COMP2018001%20Annex%203.pdf>;

There was one more case for the damages to be awarded, but it was filed not by the third party, but by the beneficiary of the allegedly unlawful aid to the public authority — an Italian case with the judgement on 13 June 2017 between Coghene Costruzioni S.R.L and Regione Autonoma della Sardegna. The context of the case is the following: the measures granted by the Sardegna Region in the forms of grants and subsidised loans were meant to be incentives for hotels to renovate. This measure that was cleared by the Commission in 1998 had been altered by the Sardegna Region and these alterations gave rise to a complaint to the Commission in 2003 and opening of the formal investigation in 2004 which was concluded only in 2008. The Commission stated that aid granted to projects started before the application for aid was unlawful and incompatible, and ordered its recovery. In 2012 beneficiaries of unlawful aid started civil law proceedings in order to annul the recovery order and damages. Finally, in 2017 the Court of Appeal of Cagliari granted the beneficiaries' request and awarded damages in a form of quantification of the aid to be recovered, thus overturning the lower instance court judgement. The exceptional thing about this case is that the Court stated that the national authorities breached the legitimate expectations of the beneficiaries.¹⁶⁴

Therefore, this case provides us with: the beneficiary of State aid as the plaintiff, public authority as the defendant, breach of Union law, and the most important — breach of legitimate expectations of the beneficiary of State aid.

Paragraph 98 of the Enforcement Notice 2021 points out that beneficiaries of unlawful aid who claim damages from the Member State because they believe that the State authorities breached their legitimate expectations, shall be rejected. This refers to the established CJEU practice. One of the latest cases on this was the 'Eesti Pagar' case in 2019. Once and again, the Court of Justice emphasised that “...undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article, and furthermore, an economic operator exercising due care should normally be able to determine whether that procedure has been followed...”¹⁶⁵. The similar approach was indicated in such cases as “OTP Bank Nyrt. v Magyar Állam and Magyar Államkincstár” of 19 March 2015, “Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1” of 15 December 2005, “Daewoo Electronics Manufacturing España SA (Demesa) (C-183/02 P) and Territorio Histórico de Álava - Diputación Foral de Álava (C-187/02 P) v Commission of the European Communities” of 11 November 2004, “Commission of the European Communities v Federal Republic of Germany” of 20 September 1990, etc.

¹⁶⁴ Ibid., p. 278-279;

¹⁶⁵ “Judgement of the Court of Justice of 5 March 2019, Eesti Pagar, C-349/17,” *supra note*, 58: para 98-104;

On the other hand, the Italian case was different. State authorities notified the Commission about the aid and it was clarified by the Commission in 1998, therefore it can be stated that state authorities complied with the procedure of notification obligation. However, Sardinian authorities thought that they will deceive the Commission and after the clearance adopted implementing measures which enlarged the circle of aid beneficiaries to projects for which the investments had already been made prior to the application of aid, despite the fact that in its decision on aid clearance the Commission stated that for the measure to have an incentive effect, the beneficiaries needed to request the aid before making the investment. The Cagliari Court of Appeal stated that national authorities breached the legitimate expectations, as they assured beneficiaries that the aid was compatible with Article 107 TFEU. The Region spread only a particular part of the Commission decision declaring the aid compatible, plus authorities admitted that they had induced legitimate expectations, affecting the decision of the beneficiaries to opt for the subsidies, also through public statements made by political actors. Due to certain circumstances, the court granted a recovery order.¹⁶⁶

Hereby, we analysed cases with the successful case resolution and awarding of damages. But, as was already mentioned, the percentage of such cases is too low to make some clarifying summaries. Unfortunately, the majority of cases are being rejected by national courts due to various reasons. Passing one after another it is worth trying to find a certain correlation between them.

Lack of familiarity with State aid rules among national courts. In chapter 1.3. It was already stated that judges of national courts have an insufficient level of knowledge regarding State aid rules. In that chapter, the emphasis was more on the lack of enlightenment on cooperation tools that are available to the judges of national courts, but that does not exclude the fact that the overall awareness of the State aid law is on the base level, in better cases, and lower than that in all other cases. It is like a closed circuit. Judges have an insufficient level of knowledge of State aid rules, such insufficient level generates a lengthy period of time (could be several years) before the final judgement, as they learn how to deal with State aid cases while actually solving the case, and the rejection in the majority of cases, this, in turn, leads to the fact that interested parties do not want to spend their time and money for the case to be rejected and they do not file claims to the national courts, which consecutively causes a small number of cases before national courts, that sequentially affects the level of knowledge, skills, and experience of national court judges on the State aid cases and State aid law. But the grade of National judges' awareness can be increased by other tools. Online lectures, presentations,

¹⁶⁶ “*Study on the enforcement of State aid rules and decisions by national courts. Annex 3,*” *supra* note, 152: p. 278-279;

conferences held by Commission authorities or scholars who specialise in State aid laws and cases; websites, apps, or forums that can be reserved only for the national courts' judges, CJEU judges, scholars, Commission authorities, where they could share their knowledge, etc. Solving the problem of the insufficient knowledge level of national judges will also have a pleasant effect on other related issues.

Poorly structured arguments of the claimants to support their claims. In a majority of cases, claimants tend not to approach the help of qualified lawyers and try to figure out by themselves how the judiciary works. They try to prepare arguments, but such preparation affects the content of the arguments, which in turn shapes the judgments. The rulings tend to be rather concise, because plaintiffs rarely present elaborate arguments with references to the relevant EU State aid acquis, and the judges often reject the cases. Lack of funds or the unwillingness to spend money on the experienced and skilled lawyer leads to the rejection of the case. Preparing by yourself is not an option in the majority of cases.

National courts face difficulties in verifying the conditions concerning the Notion of aid under Article 107 (1) TFRU, under GBER, as well as applying the CJEU case law in relation to Altmark and Market Economic Operator Principle (MEOP). This reason is directly connected with the first one mentioned — lack of familiarity with State aid rules among national courts. The solution is as well to learn more about State aid and to have more practice. In addition, experts who are skilled enough in State aid rules and cases can be hired or invited as professionals to help judges during the proceedings process. The list of experts can be approved by the EU Commission authorities, but such help shall observe and comply with the principle of procedural autonomy of national courts. Besides that, the national judges shall remember about the cooperation tools. One of the main Commissions' duties is to assist the national courts in the fulfilment of its tasks, but judges of national courts have a tendency to forget about this or do not even consider such a possibility. They have three helpful tools: the request for information, the request for an opinion on questions concerning the application of State aid rules, and *amicus curiae* observations that could ease their lives and assist in solving issues that arose before the national judges. From the 145 cases analysed in Annex 3 of the Study only 10 times, national judges referred to the Commission for help. There was one request for information to the Commission in Finland, one in France, two requests for opinion in Germany¹⁶⁷ and one *amicus curiae* observation¹⁶⁸, also one *amicus curiae* observation¹⁶⁹ was provided to the Greek court, and

¹⁶⁷ "Airport Case", EC.Europa.EU, Accessed 2 December 2021,

http://ec.europa.eu/competition/court/airport_case_nc_de.pdf; "Verwaltungsgericht Berlin", EC.Europa.EU, Accessed 2 December 2021, http://ec.europa.eu/competition/court/verwaltungsgericht_berlin_de.pdf;

¹⁶⁸ "Magic Mountain Amicus Curiae Observation", EC.Europa.EU, Accessed 2 December 2021, http://ec.europa.eu/competition/court/magic_mountain_amicus_curiae_observation_de.pdf;

¹⁶⁹ "Hellenic Shipyards Amicus Curiae Observation 1", EC.Europa.EU, Accessed 2 December 2021, http://ec.europa.eu/competition/court/hellenic_shipyards_amicus_curiae_observation_1_el.pdf; "Hellenic Shipyards

one to the Latvian, and lastly, three times national courts of the Netherlands sent a request for information to the Commission and one request for the opinion.¹⁷⁰

The number of State aid claims often require national courts to assess the legality of the measure under different areas of law and the interaction of different legal regimes makes the evaluation of the measure under State aid rules more complex. Interaction of different legal regimes certainly aggravates the already obscure process of assessing the legality of the measure under State aid rules. In such cases, national judges need to either take advantage of the cooperation tools or pre-learn to make things a little bit easier in future cases.

National courts are often reluctant to order the recovery of the unlawful aid while the case is awaiting a compatibility assessment by the Commission. In such cases, national courts shall not forget about their primary role and duty to preserve the rights of individuals faced with the breach of standstill obligation, national courts have the responsibility to offer effective legal protection to third parties. Definitely, the Commission's exclusive power to assess State aid compatibility limits national courts in the exercise of their competence of applying Articles 107 (1) and 108 (3) TFEU and has certain legal consequences on the proceedings before national courts but they need to draw legal consequences from the Commissions' opening decision itself. It is the responsibility of national courts to take all appropriate action to address the potential breach of the standstill obligation and they may decide to suspend the implementation of the measure in question and order the recovery of payments already made, or decide to order other provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's opening decision. national courts cannot delay or stop their proceedings until the Commission has reached a final decision as this would amount to maintaining the advantage on the market in spite of the potential breach of the standstill obligation¹⁷¹.¹⁷²

Claim generally implies a rather high burden of proof for the claimant in damages claims. This reason forces claimants to forget about the idea of logging a case before national courts, and

Amicus Curiae Observation 2", EC.Europa.EU, Accessed 2 December 2021, http://ec.europa.eu/competition/court/hellenic_shipyards_amicus_curiae_observation_2_el.pdf; "Hellenic Shipyards Amicus Curiae Observation 3", EC.Europa.EU, Accessed 2 December 2021, http://ec.europa.eu/competition/court/hellenic_shipyards_amicus_curiae_observation_3_el.pdf; "Hellenic Shipyards Amicus Curiae Observation 4", EC.Europa.EU, Accessed 2 December 2021, http://ec.europa.eu/competition/court/hellenic_shipyards_amicus_curiae_observation_4_el.pdf;

¹⁷⁰ "Raad Van State", EC.Europa.EU, Accessed 2 December 2021, http://ec.europa.eu/competition/court/raad_van_state_nl.pdf;

¹⁷¹ "Judgment of the Court (Fourth Chamber) of 11 March 2010, Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE), C-1/09," *supra note*, 62: para 31; "Order of the Court (Grand Chamber), 4 April 2014, Flughafen Lübeck GmbH v Air Berlin plc & Co. Luftverkehrs KG, Case C-27/13," para 30, EUR-Lex, Accessed 2 December 2021, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62013CO0027>;

¹⁷² "Commission notice on the enforcement of State aid law by national courts 2009/C 85/01," *supra note*, 44: Section 4;

is a major reason for the rejection of the case, as it is nearly impossible to prove the damages, to quantify them, and to provide a causal link between the unlawful granting of the State aid measure and the damages suffered.

All in all, it can be concluded that the majority of previously analysed reasons for such a low percentage of cases when the national court awarded compensation due to harm caused by the breach of the standstill obligation by the Member States is interconnected and the measures to solve them are related and depend on one another. Therefore, at least a few of them can be, if not fully resolved, then at least partially, by the simple increase in knowledge and skills of the national courts' judges and the expansion of their communication and collaboration with the Commission. Unfortunately, the Commission authorities responsible for State aid questions, Member States' authorities, and the judges themselves are not interested in this and do not see the benefits of such actions. Hence, not enough attention is paid to the training of judges. The only applicable and working tool is the "Online training course for National judges on the changing role of the national judge in State aid cases" done by the Academy of European Law (Europäische Rechtsakademie Trier, "ERA"). This is an online tool with relatively up to date information and it is accessible to everyone. It comprises the initial quiz, five e-presentations starting from the Notion of aid, continuing with the exceptions, role of national courts, recovery of aid, ending with the other remedies, final quiz, background documentation and case studies. Each e-presentation is in the form of video and pdf text. Also, there should be a Forum comprising 150 judges from all over Europe where they can exchange views and discuss topics related to State aid, but it seems to not work or to disappear.¹⁷³ The conclusive statement on this matter will be that training of the judges will ensure consistent and coherent application of EU State aid law by national courts.

Still, in the action for damages, there are two major problems: the high burden of proof and estimation of the damages suffered. The problem is that this trend has not changed for more than 15 years. The requirement to prove causation and to quantify the loss suffered appear as the biggest obstacles to a successful action for damages, and this thesis was repeated multiple times in the reports made on the enforcement of State aid, at least in one made in 2009, and in the most recent one in 2019. 2009 Final Report pointed that there is the absence of a clear legal basis under national law and noted that "... the requirement to prove causation between a breach of Article 88 (3) EC and the economic loss sustained by the claimant remains a major problem as this requires the claimant to show how its market share would have developed had the aid not been granted to its competitor."¹⁷⁴ The 2019 Study on the Enforcement of State aid rules by

¹⁷³ "E-Learning tool", State-Aid-Online-EU, Accessed on 3 December 2021, <https://state-aid-online.eu/e-learning-tool/>;

¹⁷⁴ "Damages in State Aid Cases," *supra note*, 148: 269-270;

national courts only confirmed the statements made in the 2009 Report: “... complexities related to the quantification of the harm and the causal link between the harm and the lack of State aid notification are one of the main reasons for the low number of damages awarded. ... damages for violation of State aid rules remain a rather theoretical possibility.”¹⁷⁵ From this, it can be seen that slightly nothing has changed, and still, the third parties that want to claim damages award face difficulties that are extremely hard to overcome.

The burden of proof is so high in damage claims because here the *onus probandi* of showing the existence of aid is compounded by the need to show the causal link between the aid and the damage. Indeed, there can be situations, and we already mentioned them, where the courts simply may be reluctant for specific reasons to find the State liable. The claimants, as it was previously stated, need to prove that the challenged measure represents an unlawful aid not previously notified to the Commission; that the aid measure caused damage to the claimant; estimate the damage suffered during the entire period that the unlawful aid was in operation i.e. a loss of profits and/or a loss of market share; and prove the causal link between the damages and the unlawful aid.

The breach of standstill obligation may cause either a loss of profits and/or a loss of market share for the competitors of the aid beneficiary. In both cases, it can be quite challenging for the claimant to estimate the damage suffered during the entire period that the unlawful aid was in operation. The following questions arise: how can the loss of profits and/or a loss of market share be proved and quantified, and what tools shall be used for this?

The calculation of the damages is highly complex and is hard to adjudicate. There is no specific guidance in European Union State aid law. What tools can be used or applied in order to make a proper quantification? Some practitioners say that the basic elements of evaluation of damages as developed in the antitrust cases can be applied by analogy. In some cases, judicial economic expertise can be used to quantify the amount of the damages. Another solution could be the appliance of the applicable rules of national law, though they must respect the principles of equivalence and effectiveness. Also, the Consortium that created the Enforcement Study noted that the appliance of a Practical Guide summarising the economic techniques concerning damages estimation in cases of private enforcement of EU competition rules¹⁷⁶ published by the Commission in 2013 to the State aid endorsement cases might increase the number of successful damage claims¹⁷⁷. The other tool that can be applied by analogy, or at least some articles, is the

¹⁷⁵ “Study on the enforcement of state aid rules and decisions by national courts,” *supra note*, 45: p. 90;

¹⁷⁶ “Commission Staff Working Document, Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union,” p. 205, EC.Europa.EU, Accessed on 3 December 2021, https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf;

¹⁷⁷ “Study on the enforcement of state aid rules and decisions by national courts,” *supra note*, 45: p. 8;

Damages Directive (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance). For example, part 3 of Article 3 that states “Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.”¹⁷⁸ Article 17 ‘Quantification of harm’ also can be used by the analogy as it states that “the Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult.” This particular article would do so many things in order to make the life of plaintiffs easier. Also, part 3 of the same article “Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority may, upon request of a national court, assist that national court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.”¹⁷⁹ could be used as a reference in State aid cases. For instance, in France in a 2017 judgement, the Tribunal of First Instance awarded damages to a competitor of a State aid beneficiary based on the loss of customers caused by the granting of State aid. In the same case, the Court of Appeal confirmed that the State aid had caused commercial harm to the competitor, but requested judicial economic expertise in order to quantify the amount of the damages.¹⁸⁰ But still, these tools are the temporary solution to the issue of calculating the damages, and the Commission shall draft specific guidance for national courts on State aid matters, as they demand special attention and specific rules which will take into account all the features that are intrinsic to them.

One more time we will return to the French Borotra cases. During the proceedings, the French courts admitted some damages and excluded others. The damages admitted were: the actual loss suffered (reduction in the claimants’ assets); financial and administrative costs linked with the recovery (loan, labour costs); costs that resulted from the commitments made under the aid acceptance; opportunity cost (loss of profits due to postponement of the actions that had to be done prior the acceptance of aid). The damages excluded were: loss of profit (evidence); moral prejudice, image; reduced margins; profits (lack of causation); costs resulting from the aid.

¹⁷⁸ “Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance,” Article 3, EUR-Lex, Accessed 4 December 2021, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32014L0104>;

¹⁷⁹ Ibid. Article 17;

¹⁸⁰ *Study on the enforcement of State aid rules and decisions by national courts. Country report: France, supra note*, 101: p. 4; Marseille Administrative Court of Appeal, 12.2.2018 - 17MA01582-17MA01583, Marseille.Cour-Administrative-Appel, Accessed 3 December 2021, <http://marseille.cour-administrative-appel.fr/content/download/179928/1762863/version/1/file/17MA01582%20-%2017MA01583%20Corsica.pdf>;

Therefore, everything is held on the evidence, the possibility to prove the damages, and of course on the causation.

Not the last thing to keep in mind is the principle of effectiveness and what influence it has on the burden of proof. According to this principle, the applicable national legislation must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by the Union law.¹⁸¹ In Boiron judgment of 7 September 2006, Case C-526/04, *Laboratoires Boiron SA v Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Lyon*, CJEU indicated that:

... in order to ensure compliance with the principle of effectiveness, if the national court finds that the fact of requiring a pharmaceutical laboratory such as Boiron to prove that wholesale distributors are overcompensated, and thus that the tax on direct sales amounts to State aid, is likely to make it impossible or excessively difficult for such evidence to be produced, since *inter alia* that evidence relates to data which such a laboratory will not have, the national court is required to use all procedures available to it under national law, including that of ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.¹⁸²

Thus, if the national court finds that the fact of requiring a claimant to substantiate its claim is likely to make it impossible or excessively difficult for such evidence to be produced, the national court is required to use all procedures available to it under national law. This includes ordering the necessary measures of inquiry. Such measures can help claimants in establishing what loss or damage has been caused by the unlawful granting of State aid.¹⁸³

To that end, it is clear that the burden of proof and estimation of the damages suffered were, still are, and probably will be the major issues in the actions for damages in the State aid cases. These problems are mainly caused by the deficiencies caused by national laws governing the standard of proof or causal link, and the nonexistence of the EU rules on these matters. Unfortunately, it seems like neither national legislators nor the EU authorities want to change the current situation. The level of development of this area is deeply insufficient. However, it is clear

¹⁸¹ “Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01),” *supra note*, 31: para 20;

¹⁸² “Judgement of the Court (Second Chamber) of 7 September 2006, *Laboratoires Boiron SA v Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Lyon*, assuming the rights and obligations of the Agence centrale des organismes de sécurité sociale (ACOSS), Case C-526/04,” para 55-57, EUR-Lex, Accessed 4 December 2021, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62004CJ0526>;

¹⁸³ Joanna Goyder and Margot Dons, “Damages Claims Based on State Aid Law Infringements,” *European State Aid Law Quarterly* 16, no. 3 (2017), p. 419–420, <https://www.jstor.org/stable/26694168>;

that things can change if the relevant authorities want them to change. Distinct parallels can be drawn between state aid damages claims and antitrust damages claims. 10-15 years ago the situation with the antitrust damages claims was nearly the same. There were also rare claims on that matter. When the EU institutions and Member States have made significant efforts to facilitate the position of claimants in damages actions for antitrust infringements, there has been a huge increase in such claims¹⁸⁴. Nonetheless, given that the Member States themselves are usually the target of State aid damages claims, as the Member State authorities violate and breach the EU law by granting the unlawful State aid and cause situations where third parties need to protect their rights, no wonder that the same authorities do not hurry in changing the situation regarding damage claims in State aid matters. In consequence, no expectations are set for the increase of damage cases brought before the national courts of Member States.

¹⁸⁴ Ibid., p. 428;

CONCLUSIONS

1. The Notion of State aid continues to evolve and modernise alongside the changes that occur in the European Union and its Member States. Thus, it is still not strictly clear and straightforward, so the judges of national courts often tend to misunderstand it and even misinterpret it, despite the fact that in cases of doubt they always can turn for help to the Commission, as the Commissions' and CJEU decisions, as well as the Commission's Notice on the Notion of the State Aid help to clarify it. Nevertheless, the concepts and general characteristics are not yet harmonised, so there is plenty of room for future interpretations.
2. The Commission as well as the national courts play a significant role in the enforcement of State aid. Although their competencies and obligations are mostly diverse, they are complementary. Such correlation can be perfectly sustained by the use of cooperation tools stemming from the principle of sincere cooperation which requires both, national courts and the Commission to assist each other in carrying out tasks that flow from the Treaties. Nevertheless, judges of the national courts either are not acquainted with such tools or simply do not see the benefits of their use, as the number of cases where they were used is relatively small. The Commission shall take additional measures of spreading the knowledge to the judges and popularising them.
3. The legal standing of third parties before the national courts in State aid cases is mainly based on the obligation of the national courts to not undermine the right of the third parties to effective judicial protection of the rights conferred on them by Union law and to protect the interest of any parties having a sufficient legal interest in initiating proceedings irrespective of whether they have been directly affected by the distortion of competition arising from the unlawful implementation of the aid measure.
4. The analysis of Member States legislation on the locus standi of third parties resulted in conclusions, that there is no one approach to this matter among the Member States, moreover, in the majority of them, the concept and legislation on the legal standing is so vague, that it is nearly impossible for the interested third parties to protect their rights related to the infringements in State aid matters before the national courts.
5. The locus standi of third parties need to be determined in a coordinated, harmonised framework throughout the Member States and present at least a minimum level of legal standing and protection for private third parties. And this framework shall be presented by the Commission, or leastways with the help of the Commission.

6. Action for damages is one of the remedies available in order to safeguard the rights of individuals that faced the breach of standstill obligation by the Member States authorities. It stems from one of the main duties of national courts in regards to enforcement of State aid measures, but remains the most unappreciated, as the successful case resolution and the awarding of damages is accompanied by difficulties that are extremely hard to overcome.
7. The main difficulties, high burden of proof and estimation of damages suffered, remain the same for more than 15 years leaving us with little hope for things to change in the near future. Deficiencies caused by national laws governing the standard of proof or causal link, and the nonexistence of the EU rules on these matters only assure that it is needless to wait for the increase of the number of actions for damages filed by private third parties before the national courts.

RECOMMENDATIONS

Master Thesis identifies several problems that were outlined during the analysis of the legislation, studies, articles, and other sources relevant to the theme of the “Enforcement of State Aid Law by national courts”.

1. The gap in the State aid rules outlining all the powers, obligations, and the role of national courts in the enforcement of State aid — to implement the new Commission Regulation “Enforcement of State aid rules by national courts” laying down detailed rules pointing out all powers and obligations of the national courts in the enforcement of State aid, describing the role of the national courts, and their competence; or amending the last Commission Notice on the Notion of the Enforcement of State aid by national courts, namely part 4.2.
2. The low number of cases in which the judges of national courts used cooperation tools — conduct lectures, conferences, training (either online or offline) for the judges of the national courts who will presumably deal with the State aid cases, on the matters that relate to the State aid rules; create an online tool or app where the judges could undergo training, access to relevant legislation, case law, rulings, and exchange knowledge between each other; to implement the new Commission Regulation “Enforcement of State aid rules by national courts” laying down a detailed description of the cooperation tools and the possibilities how to use them.
3. The vague and fragile legal standing of third parties before national courts in State aid cases and consecutively, poor protection of their rights — drafting of the harmonised framework throughout the Member States by the Commission that would present at least minimum level of legal standing and protection for private third parties by providing sole rules and conditions on who can be considered as the third party in State aid cases, what are their rights and obligations.
4. High burden of proof for complainants in damages cases (the proof of causality link and estimation of damages) — drafting and implementation of the completely separate “Guidance on the quantification of damages in State aid cases” with the reference to the articles 3 and 17 of the Damages Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance (full compensation shall not lead to overcompensation; the

burden or the standard of proof required for the quantification of damages shall not be practically impossible or excessively difficult; the national court shall be required to use all procedures available to it under national law if the national court finds that the fact of requiring a claimant to substantiate its claim is likely to make it impossible or excessively difficult for such evidence to be produced).

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ABSTRACT

Master Thesis describes the main characteristics of the Notion of State aid, outlines the competence of the national courts and the Commission in State aid enforcement, analyzes the cooperation tools between the national courts and the Commission.

The research analyzes the EU legislation and the legislation of EU Member States on the legal standing of third parties before national courts in State aid cases and identifies the measures that should be implemented.

The Thesis determines the ways and forms of bringing actions for damages related to the unlawful State aid before national courts, summarises the cases of national courts brought due to the breach by Member State authorities of the standstill obligation, analyzes the reasons for the low number of the damage cases, and suggests the norms to be drafted.

Keywords: member states national courts state aid enforcement, action for damages, legal standing of third parties, quantification of damages, burden of proof.

ENFORCEMENT OF STATE AID LAW BY NATIONAL COURTS

Sofiya Havrylyuk

SUMMARY

Master Thesis determines the existing issues in the enforcement of State aid law by national courts through analysis of relevant studies, reports, articles, and legislation of the European Union and European Union Member States.

The first chapter introduces the reader to the State aid by the description of the notion of State aid, its key concepts and characteristics outlines the role and competence of the Commission and national courts in the enforcement of State aid rules, defines the cooperation tools between the Commission and national courts, and analyzes the usage of the named tools.

The second chapter copes with the issues related to the vague legal standing of the third parties before the national courts in State aid cases, analyzes the applicable legislation of the Member States and relevant case law, and outlines the recommendations to be implemented by the Commission in order to attempt to resolve the issue.

Third chapter describes the action for damages, with the focus on the determination of action for damages and two ways of bringing actions for damages before national courts — under national legislation and under EU law; outlines the possible forms of actions for damages to be brought before national courts: third party versus Member State, third party versus beneficiary, and beneficiary versus Member State; summarises the cases brought before national courts of Member States due to the breach of standstill obligation, analyzes the reasons behind their limited number, focuses on the two crucial reasons — high burden of proof and estimation of damages, following with the propositions of the rules for the Commission to be implemented: full compensation shall not lead to overcompensation; the burden or the standard of proof required for the quantification of damages shall not be practically impossible or excessively difficult; the national court shall be required to use all procedures available to it under national law if the national court finds that the fact of requiring a claimant to substantiate its claim is likely to make it impossible or excessively difficult for such evidence to be produced.

ANNEXES

ANNEX 1

FORM FOR THE SUBMISSION OF COMPLAINTS CONCERNING ALLEGED UNLAWFUL STATE AID OR MISUSE OF AID

The mandatory fields are marked with a star (*).

1. Information regarding the complainant

First Name:*

Surname:*

Address line 1:*

Address line 2:

Town/City:*

County/State/Province:

Postcode:*

Country:*

Telephone:

Mobile Telephone:

E-mail address:*

Fax:

2. I am submitting the complaint on behalf of somebody (a person or a firm)

Yes* No*

If yes, please also provide the following information

Name of the person/firm you represent*:

Registration nr. of the entity:

Address line 1:*

Address line 2:

Town/City:*

County/State/Province:

Postcode:*

Country:*

Telephone 1:

Telephone 2:

E-mail address:*

Fax:

Please attach proof that the representative is authorized to act on behalf of this person/firm.*

3. Please select one of the following options, describing your identity*

- a) Competitor of the beneficiary or beneficiaries
- b) Trade association representing the interests of competitors
- c) Non-governmental organisation
- d) Trade union
- e) EU citizen
- f) Other, please specify

Please explain why and to what extent the alleged State aid affects your competitive position / the competitive position of the person/firm you represent. Provide as much concrete evidence as possible.

Please be aware that, by virtue of Article 20(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, only interested parties within the meaning of Article 1(h) of that Regulation may submit formal complaints. Therefore, in the absence of a demonstration that you are an interested party, the present form will not be registered as a complaint, and the information provided therein will be kept as general market information.

4. Please select one of the following two options*

Yes, you may reveal my identity

No, you may not reveal my identity

If not, please specify the reasons:

Confidentiality: If you do not wish your identity or certain documents or information to be disclosed, please indicate this clearly, identify the confidential parts of any documents and give your reasons. In the absence of any indication about confidentiality of your identity or certain documents or information, those elements will be treated as non-confidential and may be shared

with the Member State allegedly granting the State aid. The information contained in points **5** and **6** cannot be designated as confidential.

5. Information regarding the Member State granting the aid*

Please be aware: the information provided under this point is regarded as non-confidential.

a) Country:

b) If known, specify which institution or body granted the alleged unlawful State aid:

Central government:

Region (please specify):

Other (please specify):

6. Information regarding the alleged aid measure*

Please be aware: the information provided under this point is regarded as non-confidential.

a) Please provide a description of the alleged aid, and indicate in what form it was granted (loans, grants, guarantees, tax incentives or exemptions etc.).

b) For what purpose was the alleged aid given (if known)?

c) What is the amount of the alleged aid (if known)? If you do not have the exact figure, please provide an estimate and as much justifying evidence as possible.

d) Who is the beneficiary? Please give as much information as possible, including a description of the main activities of the beneficiary/firm(s) concerned.

e) To your knowledge, when was the alleged aid granted?

f) Please select one of the following options:

According to my knowledge, the State aid was not notified to the Commission.

According to my knowledge, the State aid was notified, but it was granted before the decision of the Commission. If known, please indicate the notification reference number or indicate when the aid was notified.

According to my knowledge, the State aid was notified and approved by the Commission, but its implementation did not respect the applicable conditions. If known, please indicate the notification reference number or indicate when the aid was notified and approved.

According to my knowledge, the State aid was granted under a block exemption regulation, but its implementation did not respect the applicable conditions.

7. Grounds of complaint*

Please note that, for a measure to qualify as State aid under Article 107(1) TFEU, the alleged aid has to be granted by a Member State or through State resources, it has to distort or threaten to distort competition by favouring certain undertakings or the production of certain goods, and affect trade between Member States.

- a) Please explain to what extent public resources are involved (if known) and, if the measure was not adopted by a public authority (but for instance by a public undertaking), please explain why, in your view, it is imputable to public authorities of a Member State.
- b) Please explain why, in your opinion, the alleged State aid is selective (i.e. favours certain commercial undertakings or the production of certain goods).
- c) Please explain how, in your opinion, the alleged State aid provides an economic advantage for the beneficiary or beneficiaries.
- d) Please explain why, in your view, the alleged State aid distorts or threatens to distort competition.
- e) Please explain why, in your view, the alleged aid affects trade between Member States.

8. Compatibility of the aid

Please indicate the reasons why in your view the alleged aid is not compatible with the internal market.

9. Information on alleged infringement of other rules of European Union law and on other procedures

- a) If known, please indicate what other rules of European Union law you think have been infringed by the granting of the alleged aid. Please be aware that this does not imply necessarily that those potential infringements will be dealt with within the State aid investigation.
- b) Have you already approached the Commission's services or any other European institution concerning the same issue? *

Yes No

If yes, please attach copies of correspondence.

- c) Have you already approached national authorities or national courts concerning the same issue? *

Yes No

If yes, please indicate which authorities or courts; also, if there has already been a decision or judgement, please attach a copy (if available); if, on the contrary, the case is still pending, please indicate its reference (if available).

d) Please provide any other information that may be relevant for the assessment of this case.

10. Supporting documents

Please list any documents and evidence which are submitted in support of the complaint and add annexes if necessary

- Whenever possible, a copy of the national law or other measure which provides the legal basis for the payment of the alleged aid should be provided.
- Whenever possible, please attach any available evidence that the State aid was granted (e.g. press release, published accounts).
- If the complaint is submitted on behalf of someone else (a natural person or a firm) please attach proof that you as a representative are authorised to act.
- Where applicable, please attach copies of all previous correspondence with the European Commission or any other European or national institution concerning the same issue.
- If the issue has already been dealt with by a national court/authority, please attach a copy of the judgement/decision, if available.

I hereby declare that all the information in this form and annexes is provided in good faith.

Place, date and signature of complainant”