Recovervy of Illegal State Aid: The role of national courts as guardians of Article 108(3) TFEU

Margarita Akritidou

SCHOOL OF ECONOMICS, BUSINESS ADMINISTRATION & LEGAL STUDIES
A thesis submitted for the degree of Law’s Master (LLM) in Transnational and European Commercial Law, Mediation and Energy Law

August 2018
Thessaloniki – Greece
Student Name: Margarita Akritidou
SID: 1104150001
Supervisor: Prof. Antonis Metaxas

I hereby declare that the work submitted is mine and that where I have made use of another’s work, I have attributed the source(s) according to the Regulations set in the Student’s Handbook.

August 2018
Thessaloniki - Greece
Acknowledgments

My studies at International Hellenic University would not have been possible without the support and emotional encouragement of my family, to whom I am grateful.

I am deeply indebted to my supervisor, Antonis Metaxas, who granted me the academic freedom to pursue a topic dear to my own research interests. The clarity of his thinking and his devotion to the state aid field have been sharp tools that defined this effort.

Last but not least, I would like to express my gratitude to the professors at the International Hellenic University, who provided me with the essential academic knowledge, and above all, to my mentors, Prof. Athanasios Kaissis and Ass. Prof. Komninos Komnios, for their continuous support and guidance.
Abstract

This dissertation, is written as part of the LLM in “Transnational and European Commercial Law, Arbitration, Mediation and Energy Law” at the International Hellenic University. The EU state aid rules are again under the word’s spotlight after the Commission’s largest-ever adverse state aid decision against Apple. In the last two years, much attention has been focused on the need of the modernization process of EU state aid law with practitioners highlighting the need for the revitalization of the enforcement of state aid rules, especially using private enforcement and judicial enforcement. In that context, the role of national court in the Enforcement of European state aid rules seems to be even more important as an active mover in the shaping and enhancement of the notion of state aid. How can national courts better fulfill their obligation to safeguard the rights of individuals under Article 108(3) TFEU? How much use can national courts be in dealing with State aids?

This paper explores the powers and duties of national courts when they enforce EU state aid law, particularly when, they deal with the assessment of whether a national measure constitutes illegal state aid. The main argument is that the role of national judges in the state aid field is growing in terms of practical importance. While the first principles that set the basis for the competences of judges in the Member States’ courts are unchanged, the environment in which those principles come into effect has shifted. Acknowledging this increasing trend in national court’s role, the paper concludes with some recommendations on what European Commission could do to encourage the national courts to take up as fully as they could their role as enforcers of the rights and obligations arising from Article 108(3) TFEU and their duties in the broader recovery context.

Keywords: state aid, recovery, national courts, enforcement
Contents

ACKNOWLEDGMENTS ........................................................................................................ III

ABSTRACT ...................................................................................................................... IV

CONTENTS ..................................................................................................................... V

INTRODUCTION ............................................................................................................. 1

CHAPTER I. THE LEGAL FRAMEWORK ....................................................................... 5

1.1 DEFINITION OF “STATE AID” ........................................................................... 5

1.1.1 Granted by a Member State or through state resources .................................. 6

1.1.2 A benefit or an advantage on a selective basis .............................................. 6

1.1.3 Distortion of competition .............................................................................. 7

1.1.4 Effect on inter-state trade .............................................................................. 8

1.2 DEROGATIONS FROM ARTICLE 107(1) .......................................................... 9

1.3 PROCEDURAL RULES ....................................................................................... 12

CHAPTER II. THE ADMINISTRATIVE PROCEDURE .............................................. 17

2.1 PROCEDURE REGARDING NOTIFIED AID .................................................. 17

2.2 PROCEDURE REGARDING UNLAWFUL AID ............................................ 18

2.3 FORMAL INVESTIGATION PROCEDURE .................................................... 19

CHAPTER III-ROLE OF NATIONAL COURTS IN THE RECOVERY PROCEDURE ...... 23

3.1 THE ROLE OF NATIONAL COURTS BEFORE THE FINAL DECISION OF THE COMMISSION ........................................................................................................ 25

3.1.1 Preventing the payment of unlawful aid ....................................................... 26

3.1.2 Recovery of unlawful aid ............................................................................ 26

3.1.3 Recovery of interest .................................................................................... 28

3.1.4 Damage claims ............................................................................................ 29

3.1.5 Damages claims against the aid recipient .................................................. 32

3.1.6 Interim measures ........................................................................................ 33

3.2 THE ROLE OF NATIONAL COURTS IN THE IMPLEMENTATION OF COMMISSION’S RECOVERY DECISION .................................................................................. 34

CONCLUSIONS ............................................................................................................ 39
TABLE OF CASES .......................................................................................................................... 43

BIBLIOGRAPHY .............................................................................................................................. 44
Introduction

State aid is one of the sectors in which the EU legal order seeks to find a balance between the role of the European Commission and the role of national courts. Identifying this balance tends to be quite challenging for the EU, considering the increasing role of national courts in the enforcement of state aid rules. More importantly, over the years, state aid control provisions, have evolved, stemming from the Treaty, secondary legislation, as well as case law. The result of this regulatory and jurisprudential stratification is the increasing complexity of state aid law, rendering, thus, the need for effective enforcement more important than ever.¹

The European Court of Justice has repeatedly confirmed that both the European Commission and national courts play essential, but distinct, roles in the context of state aid enforcement.² The first one, according to Article 108 (1) and (2) TFEU, as interpreted by Community courts jurisprudence, has the exclusive authority in the assessment of the compatibility of the aid. As for the latter, neither the Treaty nor Regulation 659/1999, expressly mentioned Member State’s national judge, until the amendment introduced by Regulation 734/2013 of July 2013.³ Nevertheless, the ECJ identified the role of national courts in the enforcement of state quite early. However, in the light of the recent EU case law, many practitioners have expressed concerns with regards to it.

This paper aims to elucidate the role of national courts in the enforcement of the European State aid rules in the light of the recent EU case law with a particular focus on the standstill obligation, as laid out in Article 108(3) TFEU. Acknowledging the increasing role of Member State’s national judge, the main argument of this paper is

that its role is closely linked, on the one hand, to the direct effect of the standstill clause, on the other hand, to the activity of the Commission.

Accordingly, this thesis will start by providing in Chapter I a general overview of the legal framework covering “state aid.” Beginning with the definition of “state aid” and the analysis of the main elements consisting its notion, it further proceeds with the analysis of the conditions on the compatibility in the various sub-categories created by the Community law. Thus, de jure compatible aid under Article 107(2) and aid subject to a discretionary assessment according to Article 107(3) are addressed. The following step will entail the analysis of the procedural rules focusing on the notification obligation and standstill obligation, which seems to set the basis for the intervention of national courts in the enforcement of European state aid rules.

Similar, for a successful report on their role, it is necessary to put it in its context. An additional purpose of this thesis is therefore to clarify the administrative procedure and the privileged dialogue between the European Commission and the Member State concerned. In doing so, Chapter II does not solely provide a commentary on the administrative procedures in relation to state aid investigation, but also examines their main gap, the limitations on the rights of interested parties, leaving thus space for the intervention of national courts.

Further on, Chapter III will be dedicated to the role of national courts as “full partners in the enforcement of the state aid discipline”⁴. In particular, a detailed analysis of the remedies that national courts may adopt in order to offset the negative consequences of the unlawful state aid will be provided with a particular focus on the assessment of the 2009 Commission Notice on the enforcement of State aid by national courts. This thesis concludes with the recommendations on what more the Commission and national courts can do to render the enforcement of state aid law a robust force in national litigation.

---

As far as the methodological aspects of the research are concerned, a theoretical approach is adopted, involving a comparison and contrast of a wide variety of sources, including the examination of the relevant literature, the study of the relevant legislative sources, and the approaches already established by the Court of Justice case-law. What needs to be emphasized is that the literature on state aid in the national courts is rarely written by academics but is commented on by practitioners, judges, European Commission officials etc.
CHAPTER I. THE LEGAL FRAMEWORK

This chapter aims to provide a general overview of the legal framework covering “state aid.” Acknowledging the complexity of the European state aid law, the first section deals with the notion of state aid, with a particular focus on the four elements. It examines the criterion of state origin the notion of undertaking, the criterion of advantage and selectivity, the distortion of competition and the effect on trade between EU Member States.

1.1 Definition of “State Aid”

When dealing with competition law and state aid, the fundamental rules can be found in the Treaty on the Functioning of the European Union. While the Treaty itself does not provide a concrete definition of state aid given the complexity of its nature, Article 107 TFEU lays out four criteria which must all be met in order for a measure to be considered as state aid. More precisely, according to Article 107 TFEU:

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

As provided by this article, to be classified as state aid a measure needs to (1) contain some kind of intervention from a state or through state resources, (2) confer the

---


6 “The concept of an aid is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies them self, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect”.

recipient a benefit or an advantage on a selective basis (3) threaten or distort the competition (4) have an impact on the inter-state trade. These four criteria are cumulative meaning that all must be fulfilled before the Member State measure falls within the scope of Article 107 TFEU. In order to get a better understanding of the “state aid” concept, the following sections briefly describe the aforementioned conditions.

1.1.1 Granted by a Member State or through state resources

The first condition requests that there has been an intervention by the state or through state resources which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.). Defining whether a measure emanates from the state or not, is essential for the regulation of Article 107 TFEU. The European Court of Justice (hereinafter referred to as the ECJ) has interpreted this criterion quite broadly including beneficial treatment not only from the central governance but also from regional or local government bodies. Indeed, what is crucial in Court’s view is whether the decision to grant aid can be attributed to the state, the so called “imputability criterion”. The imputability criterion was established in the Stardust Marine case, which involved aid to a boat company given by a publicly owned bank. The Commission considered the aid to be granted through state resources, because the Bank was controlled by the state. However, the Court followed a different approach introducing the imputability criterion and concluded that there was no state aid involved, because the aid could not be attributed either directly or indirectly to the state, simply by taking into account the legal personality of the public undertaking.

1.1.2 A benefit or an advantage on a selective basis

After acknowledging the origin of the aid, one has to consider whether the measure confers a benefit or an advantage on the recipient. In doing so, the Court has

---

9 Case C-379/98 PreussenElektra v Schleswag, EU:C:2001:160, para 58
10 Case C-482/99. French Republic v Commission of the European Communities, ECLI:EU:C:2002:294
introduced a test, the “Market Economy Investor Principle”, whose aim is to safeguard effective competition within the internal market. The idea behind the MEIP is that “when a public authority invests in an enterprise on terms and in conditions which would be acceptable to a private investor operating under normal market economy conditions, the investment is not a state aid.”\textsuperscript{12} This test – though not mentioned directly in the Treaty-has been used extensively by the Court while interpreting what the Treaty means by “favouring” in Article 107(1).\textsuperscript{13}

However, not all granted economic benefits constitute state aid unless they display a degree of selectivity. This selective advantage can be granted to an individual undertaking, to a group of undertakings or to undertakings operating in certain economic sectors.\textsuperscript{14} Hence, subsidies granted to individuals or general measures open to all enterprises without distinction can therefore not constitute State aid. As with the definition for state aid, again, there is no definition for either a selective or a general measure. The most common example of the latter is general taxation measures or employment legislation.

1.1.3 Distortion of competition

The distortion of competition criterion is met if a measure is liable to improve the beneficiary’s position compared to other undertakings with which it competes. In other words, the Community courts will consider the company’s position before and after the measure in order to assess whether the aid has improved the situation for the undertaking in relation to its competitors.\textsuperscript{15} In that context, it is crucial that the market is structured in a way that competition can be distorted.\textsuperscript{16} For example, in the

\textsuperscript{14} An undertaking is considered every legal entity that carries an economic activity.
\textsuperscript{16} See Joined Cases T-298/97, T-312/97 etc. Alzetta, judgment of 15 June 2000, paras. 141 to 147; Case C-280/00 Altmark Trans, judgment of 24 July 2003.
case of a legal monopoly for a particular sector there is no prospect of competition and thus, distortion of competition.\textsuperscript{17}

1.1.4 Effect on inter-state trade

The last condition in Article 107(1) –effect on interstate trade- is often linked with the previous one with both of them being interpreted broadly by the Commission and the European Courts. Indeed, the concept of interstate trade presupposes a cross-border economic activity involving at least two EU Member States; in the absence of trade between EU Member States it is impossible to have an impact on it.\textsuperscript{18} Therefore, it is more likely that effect on trade between EU Member States occurs when the aid beneficiary exports its products or services; it sells goods or provides services in other EU Member State or to customers from these States.\textsuperscript{19} However, this does not necessarily mean that state aid granted to an undertaking which operates only at local level could not affect state between EU Member States. More precisely, even in the case where the beneficiary provides only local services, an economic advantage may lead to the increase of domestic activity reducing, thus, the chance for undertakings in other EU Member State to penetrate the market of the EU Member State concerned.\textsuperscript{20}

\textsuperscript{17} “Slaughter and May - The EU Rules on State Aid.”
\textsuperscript{19} See C2000/536/EC –Seleco SpA v Commission
\textsuperscript{20} See supra note 17
1.2 Derogations from Article 107(1)

The prohibition set out in Article 107(1) TFEU does not necessarily mean that all state aid measures granted by Member States are incompatible with the internal market. Despite the general rule, in some circumstances government interventions is necessary for a well-functioning and equitable economy.\(^{21}\) Hence, the Treaty “leaves room for a number of policy objectives for which State aid can be considered compatible.”\(^{22}\) Indeed, the Treaty contains some exemptions or derogations from the prohibition, which is neither absolute nor unconditional. Article 107(2) TFEU sets out categories of aid that are compatible with the Internal market while Article 107(3) provides certain categories that may be considered compatible. Contrary to the notion of state aid, the exemptions contained in paragraphs (2) and (3) of Article 107 TFEU should be interpreted narrowly.

As far as the first group of aid measures is concerned, these are automatically considered compatible with the internal market, provided that the preconditions set out in the Article 107 (2), for each one of them, are satisfied. More precisely, the first category in subparagraph (a) of the Article regards aid having a social character to be compatible under the assumption that it benefits final consumers and secures indiscrimination related to the origin of the products concerned.\(^ {23}\) When it comes to the second category, according to Article 107(2) TFEU “aid to make good the damage caused by natural disasters or exceptional occurrences” can be considered compatible with the internal market. It comes as no surprise that the Commission and the Court have introduced strict criteria in assessing the term “natural disasters” focusing mainly

\(^{21}\) “What Is State Aid? European Commission.”
\(^{22}\) Ibid
\(^{23}\) See Article 107(2) The following shall be compatible with the internal market:
(a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
(b) aid to make good the damage caused by natural disasters or exceptional occurrences;
(c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.
on the agricultural sector.\textsuperscript{24} Similarly, the notion “exceptional occurrence” referred to the second part of the provision is –in Commission’s view– quite difficult to be determined.\textsuperscript{25} Lastly, the last subparagraph of Article 107(2) TFEU concerns aid measures granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany after World War II. However, this provision is no longer used due to the unification of Germany.

On the other hand, the types of aid measures laid out in Article 107(3) TFEU are discretionary derogations. This is derived from the word “may”, contained in the first sentence of Article 107(3) TFEU and Article 108 TFEU. \textsuperscript{26}The legislation further stipulates these exemptions with the laws being regularly reviewed to meet the needs for less but better targeted state aid.\textsuperscript{27} Article 107(3) clearly states that:

\textit{“The following may be considered to be compatible with the internal market:}

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;

(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.”

\textsuperscript{24} Georgios Kamaris, “A CRITICAL ANALYSIS OF THE EUROPEAN UNION’S STATE AID POLICY IMPLEMENTATION,” n.d., 429. Available at http://bura.brunel.ac.uk/handle/2438/8089

\textsuperscript{25} Ibid

\textsuperscript{26} Ibid

\textsuperscript{27} “What Is State Aid? European Commission.”
As a result, the Commission has the authority to apply its discretionary powers in a quite broad way while assessing the compatibility of the aid measure with the internal market. In so doing, it takes into consideration a series of complex, economic, social, regional and sectoral factors, which can be only reviewed by the Court on the grounds of their legality. This means that the Court does not have the authority to substitute the Commission’s assessments but can only examine that the Commission has not erred by a manifest error or by a misuse of powers in its decision.\footnote{Article 263 TFEU}
1.3 Procedural Rules

The procedural law of the state aid area is regulated by Article 108 TFEU, the Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (hereinafter Procedural Regulation) and the Community court’s case law. According to these legal texts, the Commission shall in close cooperation with Member States control all systems of existing aid schemes. If there is a necessity, it shall propose any appropriate measure required for effective functioning of the internal market.

The state aid system is based on the *ex ante* control.²⁹ Article 108 TFEU stipulates the obligation for Member States to notify the Commission in advance of any plans to grant state aid or to alter existing approved aid schemes unless an exemption applies. The obligation to notify is waived for new measures that meet certain requirements under applicable regulations and are thus exempt from the notification requirement, including the Block Exemption Regulation³⁰, the *de minimis* Regulation³¹ and the SGEI Decision³².

Notifications must be made by the Member State concerned through the Member States’ Permanent Representations in Brussels, as described in the Implementing Regulation.³³ The purpose of this obligation is to allow the Commission to exercise a

---

³² European Commission, Decision of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).
preliminary investigation as to whether a planned aid is compatible with the common market and can be implemented or whether it should proceed with the formal investigation procedure, as it will be discussed in the next chapter. In any case, it is the Commission that has the “exclusive authority” to assess the compatibility of state aid adopting decisions which are subject to review by the European Court of Justice.\(^\text{34}\) The reason for this is that Article 107(3) TFEU exclusively allows the approval of State aid in the public interest and the Commission is the body independent of the Member States called upon to be the guardian of the common interests.\(^\text{35}\)

Besides the Commission’s central role, though, the Council has certain powers in exceptional circumstances. On application by a Member State, it may, acting unanimously, decide that the aid is compatible with the internal market.\(^\text{36}\) At the meantime, if the case has already been initiated by the Commission the application has an effect of suspending that procedure, until the Council has made its attitude known. If, however, the Council has not given its opinion within three months, the Commission can proceed with its decision.

In addition to notification, Article 108(3) TFEU sets out an obligation on the Member States not to implement any aid measures until the procedure followed by the Commission has resulted in a final decision. The so-called standstill-obligation is designed to ensure that aid measures cannot become operational before the Commission has had a reasonable period in which to study the proposed measures in detail and, if necessary, to initiate the procedure provided for in Article 108(2).\(^\text{37}\) Therefore, a Member State infringes on the standstill obligation if it puts a proposed measure in effect prior to a final positive decision of the Commission according to

\(^{34}\) Case C-248/12 Deutsche Lufthansa AG v.Flughafen Frankfurt-Hahn GmbH ECLI:EU:C:2013:755, para 28


\(^{36}\) Article 108 TFEU para.2

Articles 4(2), 4(3), 9(3) or 9(4) of Regulation 2015/1589.\textsuperscript{38} Similarly, the misuse of state aid by the recipient also constitutes an infringement of the standstill obligation.

State aid granted in breach of the aforementioned procedural obligations of Article 108 (3) is being regarded as unlawful. It follows, thus, that the unlawful or illegal nature of a measure relies exclusively on facts: if the aid was granted without prior authorization, it is illegal or unlawful and remains so forever, since these factual elements cannot be changed retroactively. In that context, it is important to highlight that the unlawfulness of the aid, resulting from the breach of the standstill clause, is independent of the compatibility of the aid. In other words, the consequences of the unlawfulness cannot be inked to the outcome of the examination of the compatibility of the aid. National courts are expected to enforce Article 108(3) TFEU as a directly effective provision and draw all the appropriate conclusions of the infringement, even when the state aid is finally considered to be compatible with the internal market. They can declare an aid measure to be illegal in the absence of proper notification and require recovery, whereas the Commission has the power to act so only when the formal procedure is finished. The national courts are therefore “the guardians of the standstill rule”, as clearly confirmed in the ECJ rulings, with a duty to decide which are the appropriate conclusion in every case.\textsuperscript{39}

Additionally, the compliance with the formal notification requirements set the basis for the distinction between the two categories of aid that Regulation 2015/1589 identifies: the “notified” and “unlawful” state aid. “Notified” aid refers to any new aid measure that has followed the requirements of notification and non-implementation prior to the Commission taking a position, as foreseen by Article 108 TFEU. On the other hand, “non-notified” or “unlawful” refers to any aid measure that has been implemented either without prior proper notification to the European Commission or that was notified but put into effect before the Commission has reached to its final


\textsuperscript{39} Hofmann and Micheau, State Aid Law of the European Union, p.342
conclusion on the compatibility with the internal market.\textsuperscript{40} This distinction has a direct impact on the kind of procedure to be followed.\textsuperscript{41}

Another distinction laid out in the Procedural Regulation is between new and existing aid. Article 1(c) defines new aid as “all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid”. Similarly, the definition of existing aid is provided for in Article 1(b) of Regulation 2015/1589 according to which existing aid is considered to be\textsuperscript{42}:

1. Aid that existed before the establishment of the EEC or the accession of a country to the EEC/EC/EU.
2. Aid that has been approved or is deemed to have been approved by the Commission.
3. Aid that, because of the state of evolution of the internal market, was not aid when it was implemented.
4. Aid that was granted more than ten years before it came to the attention of the Commission [aid for which the limitation period of ten years has expired].

What makes this distinction of particular importance is that existing aid escapes the scope of the “standstill obligation” and Member States do not need to notify the Commission, since the aid scheme is regarded as “authorized aid” under Article 1(b). As a result, State aid granted under an existing aid scheme is normally exempted from the risk of recovery.\textsuperscript{43} On the other hand, new aid bears- from the outset- a negative presumption on its compatibility with State aid rules with the beneficiary running a great risk of having to repay the granted aid.\textsuperscript{44}

\textsuperscript{40} Hofmann and Micheau.p.349
\textsuperscript{43} Hofmann and Micheau, \textit{State Aid Law of the European Union}, p. 351
\textsuperscript{44} For an extensive analysis on alteration of existing state Aid and new aid see Metaxas Antonis; Spyrou Smaragda, Alteration of Existing State Aid and New Aid: On the Criteria of This Legal Categorisation, 2017 Eur. St. Aid L.Q. 73(2017),”Developments on New and Existing State Aid. Judgment C-590/14, DEI v
categories of state aid, the following chapter will further analyze the administrative procedure between the Commission and the Member State concerned depending on the type of the aid in question.

CHAPTER II. THE ADMINISTRATIVE PROCEDURE

It has now been established beyond doubt that the Treaty has given the Commission a great margin of discretion in the area of competition. The aforementioned procedural obligations constitute an excellent example of how the Commission retains considerable freedom in a series of aspects: as to whether to start a state aid investigation, in the way it chooses to conduct the various stages of the investigation, in how and when it decides to close it, and under what terms and conditions. In order to take that decision over the compatibility, the Commission follows a two-step procedure whose parties are the Commission itself and the Member States concerned; the preliminary assessment and the formal investigation procedure. These two stages are the same regardless of the type of the state aid. (notified-non notified). In general, the procedure for non-notified aid is the same as for the notified aid with some particularities, that will be highlighted below.

2.1 Procedure regarding notified aid

After receiving the complete notification from the Member State concerned, the Commission shall execute a preliminary investigation of the proposed aid within two months and take a decision. Should the Commission fail to take such a decision, the aid shall be deemed to have been authorized and the Member State will be able to implement the measure after notifying the Commission once again. This period can be extended if the Commission deems necessary to request for extra information in order to reach a prima facie conclusion on the compatibility of the notified aid. The first stage can be completed in three different ways. Firstly, if the Commission finds out that the measure does not constitute a state aid, it shall issue a decision. Secondly, the Commission can conclude that there is no doubt over the compatibility with the internal market and issue a positive decision. (decision not to raise objections). This
means that in Commission’s view the measure constitutes state aid, which is, however, compatible with the internal market. Lastly, the Commission can initiate the formal investigation procedure pursuant to Article 108(2). The last scenario happens in cases where the Commission retains doubts as to the compatibility of the measure with the internal market. Before going to the analysis of the formal investigation procedure, it needs to be mentioned that even in cases where decisions are favorable, the Commission has still the power to revoke them as long as these were based on imprecise information. (Article 11 of the Regulation).

2.2 Procedure regarding unlawful aid

As already mentioned, the procedure followed in cases of unlawful aid does not present significant differences as to the one described above in cases of notified aid. What seems to be different, though, is that in the former the Commission has the power to examine any information regarding unlawful aid from any source, with a particular focus on competitors. The idea behind this is that the unlawful aid has already been implemented. Furthermore, the time limits applicable to the duration of the initial examination phase for notified aid are way stricter than those applicable for unlawful aid. Most importantly, the Commission has additional means at its disposal through the use of injunctions when Member States are not willing to cooperate. In particular, there are three different types of potentional injunctions. The “information injunction” allows the Commission by decision to require information in cases where the Member State has not provided the information requested at first place or it has provided incomplete information. After the Commission has issued an information injunction to the Member State, it is entitled to reach a decision on the basis of the information available to it. Another option-though not so common- is for the Commission to adopt a decision demanding the Member State to prevent the payment of the aid until the Commission has taken its final decision on the

---

50 European Commission and Directorate-General for Competition, State Aid Manual of Procedures., Section 3.2
51 Ibid
compatibility of the measure (suspension injunction) in accordance with the Procedural Regulation. Finally, the last possibility gives the Commission the power to provisionally recover any unlawful aid provided that the three requirements laid out in Article 13 (2) of the Regulation are met. (there are no doubts about the aid character, there is an urgency to act and most importantly risk of the substantial and irreparable damage to a competitor). What needs to be clarified at this point is that since unlawfulness refers to procedural issues only (non-notification), it is still possible that the measure may be assessed as compatible and the aid therefore be approved.

2.3 Formal Investigation Procedure

If the Commission has still doubts about the compatibility of the measure with the internal market, it can proceed with the formal investigation procedure, which is an extensive investigation. This decision reflects the existence of serious doubts as to the compatibility of the measure with the internal market or procedural difficulties in gathering the necessary information. Among the factors indicating serious doubts is the duration of the preliminary phase, the number of information requests, meetings with the Member State and complaints. The aim of these proceedings is to ensure a comprehensive examination of the base by exploring any doubtful matters and by listening to the views of interested parties. In that context, the decision to open the investigation procedure is of particular importance for the Member State concerned, potential beneficiaries and their competitors since the opening of the procedure enables interested parties to comment. The latter have a period of one month to submit comments that can be extended for specific reasons. At this point, it has to be mentioned that according to the Commission’s manual the term “interested parties”

---

53 Ibid, p.498
54 Injunctions foreseen in Article 13 of Regulation 2015/1589 should not be confused with the interim measures that national courts adopt as analyzed in the next chapter. It follows from the binding nature of such injunctions that national courts are bound and that, if they are seized by an individual who relies on the standstill clause, they are not allowed to take a position different from that of the Commission.
55 See supra note 50
56 European Commission and Directorate-General for Competition, State Aid Manual of Procedures, section 6-3
58 Article 6 of Regulation 2015/1589
includes not only “the firms or firms receiving aid but also firms, individuals or
associations whose interest might be affected by the grant of the aid-such as
competitors and trade associations”.

In general, the case law of the EU courts has proven that interested parties have few
procedural rights during the administrative phase beyond the right to submit written
comments. For instance, the Court’s approach in Fleuren clearly illustrates the severe
limitations placed on third party rights. In this case, the Court confirmed its previous
ruling that “while Article 108(2) requires for the Commission to seek comments from
interested parties before it takes a decision, it does not, though, prevent the
Commission from determining aid to be incompatible with the common market in the
absence of any such comments.”

The formal investigation procedure is more or less completed in the same way as the
preliminary investigation. With regards to the notified aid, the Commission has one of
the following options; the aid measure does not constitute state aid or the aid is
compatible with the common market and thus can be implemented (positive decision),
the aid is compatible but subject to stated conditions (conditional decision), the aid is
incompatible and cannot be implemented, the Member State has withdrawn its
notification. Similarly, as far as the unlawful aid is concerned the Commission might
find that after the modification by the Member State the measure either does not
constitute state aid or that it is now compatible. Other possible scenarios are that the
measure is existing aid or that the aid is compatible but subject to stated conditions.
The last one concerns the situation where the Commission finds that the aid- though
granted- is incompatible. In this case the Commission has to order the recovery of the
aid following the procedure.

59 See supra note 56, section 6-10
60 See Case T-231/06 Kingdom of Netherlands and NOS v Commission [2010] ECR II 5993, Case T-109/01
61 See Case C-113/00 Spain V Commission [2002] ECR i-7601, para 39
   Section 6-14
An interesting question arising from the recent EU case law with further implications on the national court’s role, as will be examined in the following chapter, is whether the Commission’s decision to open the formal investigation procedure is bound for the national courts and if so, under which circumstances. According to the case law, the preliminary assessment of the Commission in an opening decision as to the State aid character of a measure is binding. In the recent Lufthansa AG/FFH judgement the ECJ held that “the standstill obligation also extends to measures that may constitute state aid” meaning that the national court has to assume an infringement once the Commission has issued an opening decision. In other words, the EJC has concluded that once the Commission has adopted a decision about the aid measure in its decision to open the formal investigation procedure, the discretion of a national court is limited to determining the appropriate measures. National courts have to “draw the appropriate conclusion from a possible infringement of the last sentence of Article 108(3)”. Their obligation extends to the to the adoption of all necessary final and provision measures, that will be further analyzed in the next chapter.

As follows from the above description, national courts examining the measure in question and being aware of the Commission’s decision to open the formal investigation procedure do not need to address the issue of whether the measure constitutes state aid. The Commission has already answered this question by making a preliminary assessment and expressing its doubts over the compatibility of the measure with the internal market. Despite the provisional nature of this decision, it should not be disregarded that it explicitly illustrates the Commission’s doubt about the measure. As the ECJ ruled, “national courts must refrain from taking decision which conflict with a Commission decision, even if it is provisional”. Hence, the adoption of this decision suffices to regard the aid unlawful or illegal because it should not have been enforced until the Commission adopted a final decision authorizing the aid.

63 Case C-284/12 Lufthansa AGvFFH [2013] ECLI-755,[34]
65 Ghazarian, “Recovery Of State Aid.”p.229
66 “EU Competition and State Aid Rules - Public and Private Enforcement | Vesna Tomljenović | Springer.”, p.230
67 Deutsche Lufthansa para 44.
In this regard, it is also important to note the new mechanism of the Amicus Curiae procedure provided to national courts according to Article 29 of Regulation (EU) 2015/1589 in case of doubts. National courts can use it to request information and consult the Commission’s opinion on whether the measure at issue constitutes state aid or not, or if it is subject to notification obligation. In general, if the national court disagrees, it may diverge from the opening decision, but the principle of sincere cooperation, as laid out in Article 4(3) and 12 TFEU, requires the national court to request a preliminary ruling from the CJEU in order to determine the validity of the decision.

As national courts are bound by the Commission’s opening decision or at least they should take it into account in their reasoning and they cannot adopt a fully autonomous opinion on the notion of aid, one could easily argue their role in the enforcement of the state aid rules secondary or ancillary. The following chapter will try to shed some light on it.

---

68 See supra note 62, p.230
70 Ibid
CHAPTER III-ROLE OF NATIONAL COURTS IN THE RECOVERY PROCEDURE

The recovery of aid is the “logical consequence” of the finding that an aid is incompatible with the internal market and follows form the use of the word “abolish” in Article 108(2).\(^71\) Indeed, neither Article 107 nor Article 108 explicitly state that incompatible aid has to be recovered from the beneficiaries. The Commission’s power to order recovery was established by the ECJ through the landmark Kohlegesetz case in 1973, when the ECJ stated for the first time that the European Commission may order recovery of unlawful and incompatible state aid.\(^72\) Some initial jurisprudence referred to “illegal aid” rather than “incompatible aid”, meaning that failure to comply with the procedural obligations causes the obligation on the Member State to recover.\(^73\) However, case law has made it clear that the Commission does not have the power to recover aid in the mere absence of notification.\(^74\) Indeed, in the CELF Case the Court took the position that Community law does not impose an obligation of full recovery of unlawful aid in the event that the Commission subsequently declare the aid in question compatible with the common market.\(^75\) This does not stop, however, an interested party from seeking recovery of “unlawful aid” before the national courts of the relevant Member State within the framework of its own domestic law. Should the


\(^{72}\) Case C-70/72 Commission v Germany ECLI:EU:C:1973:87 (Kohlegesetz case)

\(^{73}\) See supra note 65

\(^{74}\) Case C-301/87 France v Commission ECLI:EU:C:1990:67 (Boussac Case)

Commission however decide that no exception under Article 107 TFEU is applicable, the State aid is illegal and must be recovered.

In this case, it is the Member State that bears the responsibility to take all necessary measures to recover the aid from the recipient as outlined in Article 14 of the Procedural Obligation. The decision shall then be executed without delay and in accordance with the procedures under the national law of the Member State concerned. The purpose of recovery is to re-establish the situation that existed on the market prior to the granting of the unlawful aid and to guarantee the practical effect of the standstill obligation. This will generally be through the repayment by the recipient of all the unlawful aid plus interest at an appropriate rate fixed by the Commission. Interest is payable from the date on which the unlawful aid was at the disposal of the aid beneficiary until the date of its recovery.

The description of the recovery procedure constitutes yet another example of the separate and complementary roles that national courts and the Commission fulfil with regards to the supervision of Member States’ compliance with their obligations under Articles and of the Treaty. As already mentioned, Community Courts can review the Commission’s decisions while national courts-which have no jurisdiction to access the compatibility of a state aid measure-are to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of state aid to the Commission is violated. The following section will try to shed some light on the role of national courts in enforcing unlawful state aid.

As stated in the previous chapter, while the Commission has the “exclusive authority” to rule on the “compatibility or incompatibility” of state aid, it is for the national courts to ensure that the rights of individuals are safeguarded where the procedural obligations provided in Article 108(3) of the Treaty are infringed. In other words, the role of the national court depends on the aid measure at issue and whether that

---

76 Case C-610/10 Commission v Spain [2012] ECLI-781, [103]; Case C-348/93 Commission v Italy [1995] ECLI-95, [27]
77 “Slaughter and May - The EU Rules on State Aid.”, p.11, Procedural Regulation Article 14(2)
measure has been duly notified and approved by the Commission.79 While trying to assess the intervention of national courts in the recovery procedure, one could easily proceed to a distinction based on a mixed- mainly time but substantial as well- criterion. More precisely, national courts are often asked to intervene both in cases where a Member State has granted aid in breach of either the notification or standstill obligation and cases with regards to the enforcement of the recovery decisions in line with Article 14 (1) of the Procedural Regulation. The protection of multiple and diverse interests, including those of the beneficiaries, the competitors, the “interested parties” in general and the Member States, pose a great challenge to the national courts, whose role is sometimes narrowly defined. For a better understanding of their role, the following analysis will be divided into two different stages: a) the role of national courts before the final decision of the Commission and b) the role of national courts after the recovery decision.

### 3.1 The role of national courts before the final decision of the Commission

The standstill obligation set out in Article 108(3) of the Treaty gives rise to directly effective individual rights of affected parties such as the competitors of the aid recipients. Those affected parties, in turn, can claim their rights by bringing legal action before competent national courts against the granting Member State.80 Protecting individual’s rights arising out of violations of the standstill obligation is one of the national courts’ key responsibilities in the state aid field. The rationale behind this is that the Commission itself has limited powers to protect competitors and other third parties against unlawful aid. Indeed, the Court has repeatedly held that the Commission cannot order the recovery of an aid measure solely because of the infringement of the notification obligation.81 On the contrary, it must conduct a full compatibility assessment taking into consideration multiple financial, geographical and political factors. This gap in the Commission’s powers compounded by the fact that the compatibility assessment might be time-consuming has created a challenging situation for the competitors and the interested parties in general, whose position seems to be

---

79 Ibid, p.137  
80 Ibid  
81 Case C-301/87 France v Comission ECLI:EU:C:1990:67 (Boussac Case)
quite vulnerable in community level. As a result, proceedings before national courts offer an important means of redress for those affected by unlawful State aid giving them the opportunity to resolve state aid related concerns directly at national level.\textsuperscript{82} The objection of the national court’s task is therefore to declare measures appropriate to remedy the unlawfulness of the implementation of the aid, so that the aid may not retain at the free disposal of the recipient while waiting for the Commission’s final decision. However, it should be noted that after the opening decision, the discretion of a national court is limited to determining the appropriate measures.\textsuperscript{83} They may decide to a) prevent the payment of unlawful aid, b) order the recovery of payments already made regardless of compatibility, c) order the recovery of illegality interest or d) order interim measures in order to preserve both the interests of the parties concerned and the effectiveness of the Commission’s decision to initiate the formal procedure.

3.1.1 Preventing the payment of unlawful aid

The EU case law has consistently held that “it is for the national courts to draw all the necessary consequences of the infringement of Article 108 (3) TFEU in accordance with national law”\textsuperscript{84}. This does not mean that court’s obligations are limited to unlawful aid already granted. On the contrary, they also extend to cases where an unlawful payment is about to be made. As part of their duties, national courts are required to do everything within their powers to give effect to the prohibition laid out in Article 107(1) TFEU and to the procedural obligations of Article 108(3). Therefore, in cases where unlawful aid is about to be implemented, the national court is obliged to suspend it.

3.1.2 Recovery of unlawful aid

As expressed in the SFEI case, “national courts must offer to individuals the certain prospect that all the appropriate conclusions will be drawn from an infringement of

\textsuperscript{82} Knade-Plaskacz, “The Role of National Courts in Enforcing Unlawful State Aid.”, p.139

\textsuperscript{83} Ghazarian, “Recovery Of State Aid.”, p.228

the last sentence of Article 93(3) of the Treaty, in accordance with their national law.”  

Most importantly, a finding that aid has been granted in breach of Article 108(3) must in principle lead to its repayment in accordance with the procedural rules of domestic law.  

The word “in principle” should be interpreted in a way meaning that there might be exceptional circumstances, which are beyond the scope of this thesis, under which the repayment of the aid could be deemed inappropriate.

Ordering the full recovery of unlawful aid is part of the national court’s duties to safeguard the individual rights of the claimant under Article 108(3) TFEU. In doing so, national courts are not required to take into consideration the compatibility of the aid measure meaning that they must order the recovery of unlawful aid regardless of its compatibility. However, the ECJ with its ruling in the “CELF” Case clarified that the national court is not bound to order the full recovery of unlawful aid, where the Commission has adopted a final decision declaring that aid be compatible with the common market. In the Court’s view, given the purpose of the prohibition laid out in Article 108(3) is to guarantee that only compatible aid can be implemented, this can no longer be frustrated when the Commission adopts a positive decision. While after a positive decision, national courts are no longer obliged under Community law to fully recover the unlawful aid, the ECJ also made it clear that within the framework of its domestic law, national court may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the Member State’s right to re-implement it, subsequently.

Once the national court has decided that unlawful aid has been disbursed in violation of Article 108(3) of the Treaty, it must quantify the aid in order to determine the amount to be recovered.

---

86 Ibid, para 60
87 Case C-199/06, CELF and Ministre de la Culture et de la Communication v. Societe international de diffusion et d'edition (CELF I) ECLI:EU:C:2008:79, para 49
88 Ibid, para 55
3.1.3 Recovery of interest

Community law may not require the national court to order full recovery of the unlawful but compatible state aid, it requires, however, the national court to “order the measures appropriate effectively to remedy the consequences of unlawfulness” including the recovery of interest in respect of the period of unlawfulness (hereinafter referred to as illegality interest).89 The idea behind this is that the beneficiary acquires a financial advantage arising from the early payment of the aid. More precisely, as expressed in the CELF case:

“From the aid recipient’s point of view, the undue advantage will have consisted, first, in the non-payment of the interest which it would have paid on the amount in question of the compatible aid, had it had to borrow that amount on the market pending the Commission’s decision, and, second, in the improvement of its competitive position as against the other operators in the market while the unlawfulness lasts.90”

Therefore, the undue advantage obtained by the beneficiary needs to be restored meaning that the illegality interest needs to be recovered as part of the of the national courts’ obligation under Article 108(3) of the Treaty. Most importantly, the Court in its ruling also confirmed the national court’s obligation to order recovery of illegality interest even after a positive Commission decision. While in Commission’s view this might seem quite important for potential claimants,91 since it also offers a successful remedy in cases where the Commission has already declared the aid compatible with the common market”, this paper follows a different approach.91 To be more precise, it is beyond doubt that the unlawfulness of state aid itself can result in an imbalance among the competing market operators. It is highly questionable, though, whether this unbalance could be fully restored by solely imposing the obligation to pay the illegality interest on the

90 CELF (n89), para 51
91 See supra note 91,
beneficiary. Considering that the recipient of unlawful aid not only obtains an advantage consisting in the non-payment of the interest, as expressed by the ECJ, but also could improve his position in the market compared to his competitors by reinforcing his brand recognition, one could easily argue that only the payment of interest is not sufficient. As for the interest rate to be applied in this context, Article 9 of the Commission Regulation (EC) 271/2008 lays down detailed rules with respect to the method for fixing the recovery interest rate.92

3.1.4 Damage claims

Legal protection for third parties under Article 108 (3) is not limited to ordering recovery of unlawful aid and illegality interest. The Court has also consistently ruled that the national court’s obligation may include awarding damages to competitors of the recipient and to other third parties for losses resulting from the unlawful aid.93 Such legal actions are usually brought against the state aid granting authority. This is because State aid rules, including Article 108(3) TFEU, are addressed to Member States and not to private parties, and so it would normally be impossible to establish that an aid recipient has committed a breach of EU law which has caused loss or damage.94 However, there may be situations in which a cause of action based on national law, rather than on a breach of EU law, provides a basis for damage claims to be lodged against the aid beneficiary. Similarly, the plaintiff will most frequently be a competitor of the beneficiary, but other parties, such as the aid beneficiary itself or a third-party creditor, may on occasion suffer loss or damage.

93 Case C-199/06, CELF and Ministre de la Culture et de la Communication, cited above footnote 89, paras 53 and 55; Case C-368/04, Transalpine Ölleitung in Österreich,; and Case C-334/07 P, Commission v Freistaat Sachsen, judgment of 11 December 2008, para 54.
94 Goyder and Dons, “ARTICLES - STATE AID AND NATIONAL JURISDICTIONS - Damages Claims Based on State Aid Law Infringements.” p. 419
As the ECJ has confirmed in numerous cases, national law provides legal basis for claims for damages based on infringement of Article 108(3) TFEU. Hence, a comparative study on the legislative framework governing the enforcement of state aid law at national level among the countries of the community can easily prove that the legal bases on which claimants have relied in the past are quite diverged such as national tort law, national rules on state liability or unfair competition.\(^95\)

Regardless of the existing possibilities under national law, the national court can generally order the payment of the compensation by a Member State directly on the basis of community law as a result of the directly effectively nature of Article 108(3). The ECJ identified a direct effect to the standstill obligation in its very early case law, when interpreting the former Article 93 TCEE.\(^{96}\) Breaches of the standstill obligation can thus, in principle, trigger damage claims in line with the *Brasserie du Pêcheur* doctrine.\(^97\) According to this doctrine, Member States are required to compensate for loss damage caused to individuals as a result of breaches of Community law for which state is responsible if the following prerequisites are met.\(^98\)

First, the infringed EU law rule must be intended to confer rights on individuals. Second, the breach must be sufficiently serious. Third, there must be a direct causal link between the breach of the Member State’s obligation and the damage suffered by interested parties. The first two conditions are generally easily satisfied since the ECJ has repeatedly confirmed that Article 108(3) confers rights on individuals and in cases where the authority in question has no discretion in complying with an explicit rule, the mere infringement of such rules suffices for there to be a serious breach.\(^99\) As to the third Brasserie condition, however, it seems that constitutes the

---

\(^{95}\) Knade-Plaskacz, “The Role of National Courts in Enforcing Unlawful State Aid.”, p.142

\(^{96}\) Case C-6/64 Costa v ENEL ECLI:EU:C:1964:66

\(^{97}\) Goyder and Dons, “ARTICLES - STATE AID AND NATIONAL JURISDICTIONS Damages Claims Based on State Aid Law Infringements.”, p.423


\(^{99}\) Brasserie du Pecheur [55-56]; Case C-5/94 Hedley Lomas 1996 ECLI-205, [28]; Case C-424/9 Haim 2000 ECLI-357, [38,]. See also Commission Enforcement Notice [47].
main obstacle to a successful damage claim. The reason why this happens is, as Goyder and Dons argue, that “the causality requirement involves a two-step test”\(^\text{100}\). In other words, the claimant in state aid damages action must prove firstly that there is a causal link between the grant of the aid and the damaging behavior and secondly that the damage suffered by the claimant can be attributed to the behavior of the beneficiary.\(^\text{101}\) In this context, it might be difficult to quantify the exact loss caused by the aid. The Commission Enforcement Notice in an effort to clarify the circumstance under which the requirement of a causal link could be met provides certain examples.\(^\text{102}\)

Setting aside the theory, the difficulty of proving the existence of causality is elucidated by the Paris Administrative Court Decision in the CELF Case. The Court was called to decide on a damages action brought by SIDE against the French State. SIDE claimed compensation for harm caused by the award of unlawful aid to its main competition, CELF, arguing that those two hold a duopoly on the relevant export market for French library works. The grant of the aid placed CELF in an advantageous position resulting, thus, in a loss of customers be SIDE. The French Court, however, rejected the claim ruling that the existence of a duopoly does not necessarily mean that there is a causal link between the aid and a sale loss for the non-beneficiary duopolist.\(^\text{103}\) Similarly, in the Pantochim judgement, a competitor to the aid recipient sued the French State for damages resulting from the impossibility of marketing certain products which, unlike the products of the beneficiary, had not been subject to a tax exemption.\(^\text{104}\) The Conseil d’Etat concluded that despite the unlawful and incompatible character of the aid with the internal market, no causal link existed between the violation and the loss suffered.

\(^{100}\) Goyder and Dons, “ARTICLES - STATE AID AND NATIONAL JURISDICTIONS Damages Claims Based on State Aid Law Infringements.”, p.423

\(^{101}\) Ibid

\(^{102}\) Commission Enforcement Notice [49]

\(^{103}\) CAA de Paris (Administrative Court of Appeal of Paris), judgment in case 12 PA00767, 12 May 2014

These two cases are just indicative of the reality in the state aid field and more precisely with regards to the state aid damages cases. According to the two studies launched by the European Commission on the application of the State aid Rules by national courts in 2006 and 2009, there are no cases where competitors or third parties were awarded damages in respect of a grant of illegal aid. On the other hand, antitrust damaging claims have marked significant increase during the last years after the intensive efforts of the EU institution and Member States to facilitate the position of claimants. One could easily argue that this different path is attributed to a great extent to the fact that Member States themselves are usually the target of state aid damages claims. In this regard, the need for the national courts to apply the law in a way that gives the maximum possible clarity to both the interested parties and the legal community as to the reasons for the success or failure of the claim is of high importance.

3.1.5 Damages claims against the aid recipient

In addition to or instead of claiming damages against the state aid granting authority, protentional claimants may claim damages directly form the beneficiary. In the “SFEI” judgment, the ECJ held that, because Article 108(3) TFEU does not impose a direct obligation on the beneficiary, there is no EU law basis for such claims. However, this does not in any way rule out a damages action against the beneficiary on the basis of substantive national law. In most Member States claims for damages against the beneficiary rely on national rules governing tort law or unfair competition. In order for a claim to be based on these provisions, the mere fact that a company accepted illegal state aid is usually not enough to drive in a successful result. Additionally, the claimant will need to prove that the recipient engaged in unfair competitive conduct or

106 Goyder and Dons, “ARTICLES - STATE AID AND NATIONAL JURISDICTIONS · Damages Claims Based on State Aid Law Infringements.”, p.429
107 Ibid
108 Case C-39/94, SFEI and Others, paras 72 to 74.
109 For an overview of national law regarding damage claims, see Global Competition Review know-how tool 2016 at <http://www.globalcompetitionreview.com/know-how/topics/i 000037/state-aid>
some other type of harmful conduct. A characteristic example of problematic conduct by an aid recipient that might result in losses for the competitors is the use of unlawful state aid during the tender procedure. The Belgian Commercial Court has ruled that such conduct constitutes an act on unfair competition prohibited by the Law on the protection of commerce and consumers. 110

3.1.6 Interim measures

The duty of national courts to draw the necessary legal consequences from violations of the standstill obligation is not limited to their final judgments. 111 As part of their role under Article 108(3) of the Treaty, national courts are also obliged to take interim measures where this is appropriate to protect the rights of individuals and the effectiveness of Article 108(3) TFEU. The ability of national courts to act rapidly - compared to the Commission - along with the variety of the available measures render them quite flexible and appropriate to address emergency situations, where fast relief is required. According to the ECJ, this will be the case when it is likely that some time will elapse before the national court gives its final judgement on the unlawful grant of State aid. 112 Under these circumstances, it is for the national court to decide whether it is necessary to issue an interim order preventing the illegal disbursement until the final decision in order to protect the rights of the interested parties. In case the illegal state aid has already been implemented, national courts are usually required to order full recovery as part of their guardian duties under Article 108(3). Because of the principle of effectiveness, the national court may not postpone this by unduly delaying proceedings. It comes as no surprise, tough, that despite this general rule, there might be cases where the final judgement is delayed. In light of the above, national courts are required to use all available interim measures under the applicable national procedural framework to at least terminate the anti-competitive effects of the aid on a provisional basis (interim recovery).

111 Commission Enforcement Notice [56]
112 EU Competition and State Aid Rules - Public and Private Enforcement | Vesna Tomljenović | Springer.”p 240
Interim recovery can also be a very effective instrument in cases where national court proceedings run in parallel to a Commission investigation. In this way, national courts can await the Commission’s final decision over the compatibility of the aid by imposing interim measures in the meantime in order to protect individual rights under Article 108(3) TFEU. Kreuschitz and Bermejo take the view that from a formal perspective this solution seems appropriate, however, from a substantive point of view, it raises doubts. This is because once the standstill clause has been infringed, national courts must react against the breach prioritizing “final remedies” over “interim remedies” to address the consequences of unlawfulness.

3.2 The role of national courts in the implementation of Commission’s recovery decision

In addition to the “ex ante” intervention in the recovery procedure, national courts also play an important role in the enforcement of recovery decisions adopted under Article 14(1) of the Procedural Regulation, where the Commission's assessment concludes that aid granted unlawfully is incompatible with the common market and enjoins the Member State concerned to recover it from the beneficiary. Article 14(3) further lays out the conditions for the recovery: it shall be effected “without delay” and in “accordance with procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission’s decision”. The involvement of national courts in such cases usually arises from actions brought by beneficiaries trying to challenge the legality of the repayment request issued by national authorities. However, depending on national procedural law, other types of legal action may be possible as well such as actions by Member State authorities against the beneficiary aimed at the enforcement of a Commission recovery decision or competitors seeking redress against the national authorities’.

As expressed above, under Article 14 (1) of the Procedural Regulation, when a negative decision is adopted in cases of unlawful aid, the Commission “shall” order its recovery.

---

113 Commission Enforcement Notice [59]
114 “EU Competition and State Aid Rules - Public and Private Enforcement | Vesna Tomljenović | Springer.”, p.240
115 Ibid
116 Commission Enforcement Notice [63]
117 Ibid
by the Member State concerned, which shall take all the measures necessary to this purpose. The European Court of Justice has repeatedly interpreted this provision in a way that allows Member States to freely choose the means of fulfilling the obligation to recover unlawful aid “provided that the measures chosen do not adversely affect the scope and effectiveness of European Union law”. 118 Where a national procedural rule prevents immediate and/or effective recovery, the national court must leave this provision unapplied.119 Therefore, national courts are expected to use all appropriate measure and provisions of national law in accordance with the Community law principles of effectiveness and equivalence in order to implement the direct effect of the Article 108(3) prohibition. 120 This includes awarding possible damages to third parties whose interests have been harmed. Like violations of the standstill obligation, failure by the Member State authorities to comply with a Commission recovery decision under Article 14 of the Procedural Regulation can trigger damages claims on the basis of state liability for breach of community law. In procedures before national courts, interested parties could therefore depend on the last sentence of Article 108 (3) TFEU, being a directly effective provision of Community law in line with the “Francovich” and ”Brasserie du Pêcheur” jurisprudence. 121 In the Commission’s view, the treatment of such damages claims reflects the principles with reference to violations of the standstill obligation as described above. 122 The idea behind this is that (i) the Member State’s recovery obligation is focused on safeguarding the same individual rights as the standstill obligation, and (ii) the Commission’s recovery decisions do not leave national authorities any discretion; breaches of the recovery


119 Commission Enforcement Notice [69]

120 “Slaughter and May - The EU Rules on State Aid.” See also C-354/90 Fédération Nationale du Commerce Extérieur des Produits Alimentaires et Others v France, judgment of 21 November 1991, para. 12; Case C-39/94 SFEI and Others, judgment of 11 July 1996, para. 40; Case C-368/04 Transalpine Ölleitung in Österreich, judgment of 5 October 2006, para. 47; and Case C-199/06 CELF and Ministre de la Culture et de la Communication, judgment of 5 October 2006, para. 41.

121 The fact that violations of the State aid rules can give rise to Member State liability directly on the basis of Community law has been confirmed in Case C-173/03, Traghetti del Mediterraneo v Italy, [2006] ECR I-5177, paragraph 41 See also Joined Cases C-6/90 and C-9/90, Francovich and Bonfacci v Italy, [1991] ECR I-5357.Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur and Factortame, [1996] ECR I-1029.

122 Commission Enforcement Notice [69]
obligation are thus, in principle, to be considered as adequately serious.\textsuperscript{123} Hence, the success of a damages claim for non-compliance with the Commission's order for recovery will again be assessed on whether the claimant can prove sufficiently that he suffered loss directly as a result of the delayed recovery.

\textsuperscript{123} Ibid
Conclusions

As provided, European State aid law poses an obligation to the EU Member States not to grant their companies aid that meets the criteria of the notion of “state aid” which unlawfully distorts competition within the European Single Market. As it is a tool primarily designed to control the actions of Member States, from the outset the European Commission was granted more competencies, including the exclusive authority to rule on the compatibility of the aid measure with the internal market.124

In contrast to this question, the analysis of whether and aid measure constitutes state aid or not may be assessed by both the European Commission and national courts of the Member States. Additionally, as analyzed extensively, Article 108 (3) has a direct effect on national legal systems and therefore can be enforced by national courts. This creates a situation in which there is one legal regime but two authorities, that is the Commission and national courts. And it might be noted that the ECJ has identified that they develop complementary but separate roles, however, this is not always so clear.

The analysis of the first two chapters may lead to the conclusion that national courts develop a kind of secondary or ancillary role.125 This may however not be the whole truth, since this role is only apparently secondary, as it has been further proved in the last chapter. On the one hand, in quantitative terms, increasingly litigants are using the national courts to challenge member state policies resulting in a remarkably increase in the number of state aid cases examined by national courts.

On the other hand, in qualitative terms, despite the preponderant role played by the Commission in assessing the compatibility of the aid, national courts develop a significant role by deciding the character of the aid measure at issue when the

---

124 Sierra and Ferruz, “ARTICLES - STATE AID AND NATIONAL JURISDICTIONS - State Aid Assessment.”, p.408
Commission has not adopted yet any decision. Additionally, national courts are obliged not only to enforce recovery decision of the European Commission under Article 108(2) but also, as meticulously examined in Chapter III, to safeguard the rights of individuals violated by an infringement of the standstill obligation of Article 108(3)TFEU. The latter is of particular interest to the interested parties, who have limited rights during the administrative procedure before the Commission and need to act swift against an illegally granted aid.

In that context and considering the complex nature of the tasks that national courts are called to fulfill, cooperation with the Commission seems absolutely necessary. The Notice on the enforcement of State aid law by national courts could be regarded as-albeit not the most successful one- an attempt towards this direction introducing two mechanisms under which the Commission can assist national courts in their application of state aid rules. An interesting question arising nearly 10 years after the adoption of this notice is what more needs to be done to ensure an active dialogue between the Commission, the Court of Justice and national courts.

At first place, national courts need to become fully aware of their important role and use the mechanisms provided to them in order to establish a constructive dialogue with the Commission and avoid contradictory decisions. In doing so, it is of outmost importance for the national judges to understand the European Court’s case law and European Commission policy and soft law communications. An effective judicial training aiming to raise awareness of the tools available among judges and practitioners in the Member States should be the starting point for the continuing modernizations process of EU state aid law.

---

126 “EU Competition and State Aid Rules - Public and Private Enforcement | Vesna Tomljenović | Springer.” p.229
Table of Cases

- C-379/98 Preussen Elektra v Schleswag, EU:C:2001:160
- C-345/02 Pearle, EU:C:2004:448
- C-303/88 Italy v Commission EU:C:1991:136
- C-482/99. French Republic v Commission of the European Communities, ECLI:EU:C:2002:294
- C-148/04 Unicredito, EU:C:2005:774
- C-280/00 Altmark Trans, judgment of 24 July 2003.
- C 2000/536/EC – Seleco SpA v Commission
- C-248/12 Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH ECLI:EU:C:2013:755
- C-113/00 Spain V Commission [2002] ECR i-7601
- C-70/72 Commission v Germany ECLI:EU:C:1973:87
- C-301/87 France v Comission ECLI:EU:C:1990:67
- C-610/10 Commission v Spain [2012] ECLI-781
- C-348/93 Commission v Italy [1995] ECLI-95
- C-368/04, Transalpine Ölleitung in Österreich, [2006] ECR I-9957
- C-199/06, CELF and Ministre de la Culture et de la Communication v. Societe international de diffusion et d'édition (CELF I) ECLI:EU:C:2008:79
- C-368/04, Transalpine Ölleitung in Österreich
- C-334/07 P, Commission v Freistaat Sachsen, judgment of 11 December 2008,
- C-6/64 Costa v ENEL ECLI:EU:C:1964:66
- Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur
- Case C-5/94 Hedley Lomas 1996 ECLI-205
- Case C-424/9 Haim 2000 ECLI-357
- T-298/97, T-312/97 etc. Alzetta, judgment of 15 June 2000
- T-231/06 Kingdom of Netherlands and NOS v Commission [2010] ECR II 5993
- C-173/03, Traghetti del Mediterraneo v Italy, [2006] ECR I-5177
- CAA de Paris (Administrative Court of Appeal of Paris), judgment in case 12 PA00767, 12 May 2014
- Conseil d’Etat, Société Pantochim SA, 31 May 2000, Cases n°192006 and n°196303


Metaxas Antonis; Spyrou Smaragda, Alteration of Existing State Aid and New Aid: On the Criteria of This Legal Categorisation, 2017 Eur. St. Aid L.Q. 73 (2017)


