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Common EU Law Principles of Private Enforcement of State Aid

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I. INTRODUCTION

THE COURT OF Justice of the European Union (CJEU) stated as early as 1964 that the notification and standstill obligation imposed by Article 108(3) of the Treaty on the Functioning of the European Union (TFEU) has direct effect in the Member States.[1] Private parties, therefore, can enforce the notification and standstill obligation by bringing proceedings before national courts. For example, if a company considers that its competitor is receiving, or has received, unlawful State aid (ie, aid that has not been notified to the Commission), its options are not limited to filing a complaint with the Commission. It may also, or as an alternative, initiate an action before a national court alleging that the Member State has violated Article 108(3) TFEU. There are a number of potential benefits associated with such private enforcement actions: they can offer effective remedies to claimants, which in turn create a deterrent effect, arguably leading to more robust State aid enforcement overall;[2] they can also resolve infringements of State aid rules at national level without necessarily drawing on the Commission's (limited) resources.

Notwithstanding the apparent benefits, private enforcement actions of the kind described above have not yet attained prevalence throughout the EU. Thus far, the majority of State aid litigation before national courts, which continues to increase in absolute terms,[3] is not concerned with 'enforcement' in the sense of seeking a

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[1] Case 6/64 *Costa v ENEL*, EU:C:1964:66, 596. See also: Case C-120/73 *Lorenz GmbH v Germany and Others*, EU:C:1973:152, para 8; Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires (FNCE) and Others v France*, EU:C:1991:440, para 11; Case C-284/12 *Deutsche Lufthansa*, EU:C:2013:755, para 29; Case C-672/13 *OTP Bank*, EU:C:2015:185, para 76; Case C-368/04 *Transalpine Ölleitung in Österreich*, EU:C:2006:644, para 41; Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others*, EU:C:2011:550, para 25; Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium*, EU:C:2006:403, para 41.

[2] Commission Notice on the enforcement of State aid law by national courts (Enforcement Notice) [2009] OJ C85/1, para 5.

[3] See the 2006 'Study on the Enforcement of State Aid Law at National Level' (2006 Enforcement Study) coordinated by T Jestaedt, J Derenne and TR Ottervanger (Luxembourg, Office for Official Publications of the European Communities, 2006) and the 2009 update of the 2006 study (2009 Update) coordinated

level competitive playing field. Rather, many of the cases involve beneficiaries of aid seeking to resist a State aid recovery order[4] or companies hoping to avoid a particular tax liability, which they claim is discriminatory.[5]

There are several reasons, all of which are explored further in this chapter, that might explain why true private enforcement actions are not ubiquitous. First, the likelihood of receiving financial compensation in the form of damages is low. Second, claimants must overcome procedural hurdles, such as establishing legal standing and satisfying applicable burdens of proof, all of which can vary from one Member State to the next. Third, claimants often have difficulty obtaining information that is key to their case. Fourth, the length of national court proceedings can be off-putting for claimants, especially considering the possibility that the national court will make a preliminary reference to the CJEU and/or seek assistance from the Commission. Finally, national judges sometimes lack the necessary expertise or experience to navigate the complexities of EU State aid jurisprudence.

This chapter addresses the challenges associated with private enforcement of the State aid regime. We describe the respective roles of the Commission and the national courts in enforcing the Treaty provisions on State aid; the parties to national court cases; the types of remedy that might be available; and the obligations of national courts in cases of concurrent proceedings before the Commission or the EU Courts.

As noted above, many State aid cases before national courts concern the enforcement of Commission decisions ordering the Member State to recover unlawful and incompatible aid. Such cases arise when a beneficiary challenges a recovery decision by a national authority before a national court or when the national authority must resort to litigation in order to recover the aid. These cases are outside the scope of this chapter, but are discussed in chapter eleven.

II. THE ROLE OF THE COMMISSION AND THE NATIONAL COURTS IN THE ENFORCEMENT OF ARTICLES 107 AND 108 TFEU

The CJEU has described the Commission and the national courts as fulfilling 'complementary' and 'separate' roles as regards their supervision of Member States' compliance with Articles 107 and 108 TFEU.[6] The roles are considered

by J Derenne, C Kaczmarek and J Clovin (Brussels, Lovells, 2009). Both are also available at: ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html [2006] and ec.europa.eu/competition/state_aid/studies_reports/enforcement_study_2009.pdf [2009].

[4] See, eg, Case C-148/04 *Unicredito Italiano*, EU:C:2005:774; Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava v Commission*, EU:C:2004:701; Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission*, EU:C:2006:416. See also: Enforcement Notice (n 2) para 4.

[5] See, eg, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, EU:C:2001:598, which was a reference by the Verfassungsgerichtshof Austria (Constitutional Court Austria) for a preliminary ruling in proceedings concerning the rejection of applications from undertakings who applied for energy tax rebates. See also: 2006 Enforcement Study (n 3) 68 and Enforcement Notice (n 2) para 4.

[6] Joined Cases C-352/14 and C-353/14 *Iglesias Gutiérrez and Elisabet Rion Bea v Bankia SA and Others*, EU:C:2015:691, para 26; *Transalpine Ölleitung in Österreich* (n 1) para 37; Joined Cases C-261/01 and C-262/01 *van Calster and Cleeren*, EU:C:2003:571, para 74; Case C-39/94 *SFEI and Others*, EU:C:1996:285, para 41.

'complementary' because national courts help contribute to the Commission's effective enforcement of EU State aid law in two important ways: first, by helping to safeguard the rights of parties affected by an unlawful implementation of an aid measure;[7] and second, by playing an important role in the enforcement of recovery decisions adopted by the Commission.[8] The roles are 'separate' in the sense that their respective competences are not aligned: national courts are not competent to assess the compatibility of an aid measure, as this falls within the exclusive competence of the Commission, subject to judicial review by the EU Courts.[9]

As regards the complementary nature of the relationship, the Commission has published two notices that help clarify the respective roles of the Commission and the national courts concerning State aid enforcement. The 'Notice on the enforcement of State aid law by national courts' (Enforcement Notice),[10] provides guidance on a broad range of issues likely to arise in State aid litigation before national courts. The 'Notice towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid' (Recovery Notice),[11] focuses specifically on the recovery of aid.[12] Several elements of both the Enforcement Notice and the Recovery Notice have since been codified by Council Regulation (EU) 2017/1589 laying down detailed rules for the application of Article 108 TFEU (Procedural Regulation).[13]

A. The Commission

The Commission has several responsibilities with respect to State aid enforcement. Its main role is to examine whether a proposed measure constitutes 'aid' and, if so, to determine whether that aid is compatible with the common market.[14] Such determinations may be made either in the context of notified aid, or non-notified 'unlawful' aid, following a formal investigation.[15] As noted, deciding on whether

[7] Case C-574/14 *PGE*, EU:C:2016:686, para 31; *Deutsche Lufthansa* (n 1) para 28; *Transalpine Ölleitung in Österreich* (n 1) para 38; *van Calster and Cleeren* (n 6) para 75. See also: Enforcement Notice (n 2) para 21(a).

[8] Enforcement Notice (n 2) para 21(b).

[9] Case C-590/14 P *DEI and Commission v Alouminion tis Ellados*, EU:C:2016:797, para 96; *PGE* (n 7) para 32; *Iglesias Gutiérrez and Elisabet Rion Bea* (n 6) para 26; *OTP Bank* (n 1) para 37; *Deutsche Lufthansa* (n 1) para 28; Case C-6/12 *P Oy*, EU:C:2013:525, paras 38–39; Case C-275/10 *Residex Capital IV*, EU:C:2011:814, para 27; *SFEI and Others* (n 6) para 42; *FNCE and Others* (n 1) para 14.

[10] Enforcement Notice (n 2).

[11] Notice from the Commission Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid (Recovery Notice) [2007] OJ C272/4.

[12] The Recovery Notice is primarily a guidance tool for the Member State itself, as opposed to the national courts; however, because recovery often necessitates litigation, the Recovery Notice also addresses the interplay between national courts and the Commission.

[13] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Art 108 of the Treaty on the Functioning of the European Union (codification) [2015] OJ L248/9 (Procedural Regulation), eg, Art 29 regarding the cooperation between the Commission and national courts; and Art 16 regarding the recovery of aid.

[14] Enforcement Notice (n 2) para 20.

[15] Procedural Regulation (n 13) Arts 4 and 9 regarding 'notified aid', Arts 1(f), 12, 15 regarding 'unlawful aid'.

aid is compatible with the common market is the exclusive competence of the Commission.[16]

Further, as discussed below in relation to the principle of sincere cooperation,[17] the Commission is tasked with assisting the national courts when they are confronted with litigation founded on EU State aid law. Specifically, the Commission is obliged, upon request by the national courts, to transmit relevant information in its possession and/or issue a written opinion concerning the application of the State aid rules.[18] The Commission also has the possibility of submitting written observations to the national court and, if the national court permits, to submit oral observations.[19]

B. The National Courts

National courts have two principal roles with respect to the enforcement of EU State aid law. First, they are obliged to safeguard the rights of individuals that might be affected by the unlawful implementation of aid.[20] Second, they may be called upon to enforce recovery decisions adopted by the Commission. As noted above, the present chapter deals only with the former task.

As noted earlier, the notification and standstill obligation gives rise to directly effective rights for 'individuals faced with a possible breach … of the prohibition laid down by Article [108(3) TFEU]'.[21] According to the CJEU, 'national courts do no more than preserve [those rights] until the final decision of the Commission'.[22] Consequently, even if the Commission is examining the same purported aid measure that is the subject of the national court proceedings, the national court is not entitled to stay proceedings pending the outcome of the Commission's compatibility assessment. As the CJEU has neatly summarised, '[u]ltimately, the first obligation of the national court is to make a ruling, whether positive or negative'.[23]

In order to safeguard or 'uphold'[24] these individual rights, the national courts must assess whether the disputed measure can be classified as 'aid' within the

[16] *DEI and Commission* (n 9) para 96; *PGE* (n 7) para 32; *Iglesias Gutiérrez and Elisabet Rion Bea* (n 6) para 26; *OTP Bank* (n 1) para 37; *Deutsche Lufthansa* (n 1) para 28; *P Oy* (n 9) paras 38–39; *Residex Capital IV* (n 9) para 27; *SFEI and Others* (n 6) para 42; *FNCE and Others* (n 1) para 14.

[17] This will be discussed in greater detail in section II.C.iii below.

[18] Procedural Regulation (n 13) Art 29(1); Enforcement Notice (n 2) paras 77–96. See also: *SFEI and Others* (n 6) para 50; Case C-2/88-Imm, *Zwartveld and Others*, EU:C:1990:440, paras 17–18.

[19] Procedural Regulation (n 13) Art 29(2).

[20] *PGE* (n 7) para 31; *Deutsche Lufthansa* (n 1) para 28; *Transalpine Ölleitung in Österreich* (n 1) para 38; *van Calster and Cleeren* (n 6) para 75.

[21] *P Oy* (n 9) para 39; Case C-199/06 *CELF and ministre de la Culture and de la Communication (CELF I)*, EU:C:2008:79, para 38; See also: *P Oy* (n 9) para 39; and *FNCE and Others* (n 1) para 14.

[22] *FNCE and Others* (n 1) para 14. See also: Enforcement Notice (n 2) para 46.

[23] Case C-1/09 *CELF and ministre de la Culture and de la Communication (CELF II)*, EU:C:2010:136, para 39. This will be discussed in greater detail in section IV below.

[24] See Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* (n 1) para 41; Case C-345/02 *Pearle and Others*, EU:C:2004:448, para 31; *van Calster and Cleeren* (n 6) paras 53 and 64; Case C-17/91 *Lornoy and Others*, EU:C:1992:514, para 30.

meaning of Article 107(1) TFEU.[25] Absent such an assessment, it is impossible for the national court to conclude whether there may have been a violation of Article 108(3) TFEU (as the notification and standstill obligation only applies to 'aid' measures).[26] Thus, the national courts and the Commission have overlapping powers to interpret the notion of State aid.[27] This overlap poses specific challenges in cases of concurrent proceedings, as discussed further in section IV below. Indeed, in certain cases, depending on the stage of the Commission's proceedings, the national court's hands might be tied as regards its assessment of whether the measure at issue constitutes 'aid'.

Determining the existence of State aid is often a complex exercise, even more so for national courts that might lack the necessary experience or familiarity with EU State aid rules. To help alleviate this burden, national courts have the option of requesting an 'opinion' from the Commission which 'may, in principle, cover all economic, factual, or legal matters which arise in the context of the national proceedings'.[28] Such opinions can address, for example, whether a measure qualifies as State aid; whether a measure might meet a requirement under the Block Exemption Regulation[29] (such that Article 108(3) TFEU is not applicable); or whether a measure has already been notified and approved.[30] National courts may also request that the Commission transmit relevant information in its possession, including factual data and economic analysis.[31] The mechanisms for national courts to request a Commission opinion, and/or information in the Commission's possession, are discussed further below in relation to the principle of sincere cooperation.

As an alternative to seeking guidance from the Commission, national courts may avail of the procedure under Article 267 TFEU when confronted with a question concerning the interpretation of EU State aid law and seek a preliminary ruling from the CJEU.[32]

The ruling to be made by the national court 'goes beyond that of a judge ruling on an application for interim relief'.[33] Rather, if the national court determines that

[25] *Deutsche Lufthansa* (n 1) para 35; *P Oy* (n 9) para 38; *Transalpine Ölleitung in Österreich* (n 1) para 39; *Pearle* (n 24) para 31; *SFEI and Others* (n 6) paras 49 and 53; *FNCE and Others* (n 1) para 10; Case C-78/76 *Steinike & Weinlig v Germany*, EU:C:1977:52, para 14.

[26] Procedural Regulation (n 13) Art 29(1). *Transalpine Ölleitung in Österreich* (n 1); *SFEI and Others* (n 6) paras 49 and 53; Case C-189/91 *Kirsammer- v Sidal*, EU:C:1993:907, para 14; *FNCE and Others* (n 1) para 10; *Steinike & Weinlig* (n 25) para 14.

[27] Enforcement Notice (n 2) para 10, with reference to: *Transalpine Ölleitung in Österreich* (n 1) para 39; *SFEI and Others* (n 6) para 49; *FNCE and Others* (n 1) para 10; and *Steinike & Weinlig* (n 25) para 14.

[28] Enforcement Notice (n 2) para 90.

[29] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (Block Exemption Regulation) [2014] OJ L187/1.

[30] Enforcement Notice (n 2) para 91(c).

[31] Procedural Regulation (n 13) Art 29(1); Enforcement Notice (n 2) paras 82–88.

[32] Because the assessment of the compatibility of aid with the common market falls within the exclusive competence of the Commission, national courts may not, when referring questions to the CJEU, seek guidance on whether the disputed measure is compatible with the common market. Case C-237/04 *Enirisorse*, EU:C:2006:197, para 23; Case C-297/01 *Sicilcassa and Others*, EU:C:2003:416, para 47.

[33] *SFEI and Others* (n 6) para 67.

the Member State has violated Article 108(3) TFEU, it must 'draw the necessary consequences', in accordance with its national law, with regard to both the validity of the acts giving effect to the aid and the recovery of the aid granted in violation of Article 108(3) TFEU.[34] In principle, the national court must order termination of the measure at issue and repayment of the aid that was granted in violation of Article 108(3) TFEU, in accordance with its domestic procedural law.[35] If, however, the Commission subsequently determines that the measure constitutes compatible aid, the national authority that granted the aid can 're-grant' it, notwithstanding that the national court ordered recovery.

The ability of, and indeed the obligation on, national courts to order the recovery of aid, merely because it was granted in violation of Article 108(3) TFEU, is a point of distinction between the respective powers of the national courts and the Commission. The CJEU has held that, unlike the national courts, the Commission cannot order the recovery of aid solely on the ground that it was not notified in accordance with Article 108(3) TFEU.[36] Instead, the Commission must first carry out a full compatibility assessment.[37] While the Procedural Regulation provides the Commission with the possibility of ordering the provisional recovery of unlawful aid, pending the outcome of the Commission's compatibility assessment, the legal threshold is extremely high. The Commission must have 'no doubts about the aid character of the measure'; there must be an 'urgency to act'; and 'a serious risk of substantial and irreparable damage to a competitor'.[38] In practice, it is very rare for the Commission to order the provisional recovery of aid.

C. General Principles Governing the Respective Roles of the Commission and National Courts in the Enforcement of Articles 107 and 108 TFEU

Four general EU law principles are of particular importance in the context of the private enforcement of State aid law: the principle of procedural autonomy; the principle of equivalence; the principle of effectiveness; and the principle of sincere cooperation. Each of these principles imposes obligations on national courts and/or impacts on the nature of the relationship between the national courts and the

[34] Case C-71/04 *Xunta de Galicia*, EU:C:2005:493, para 50. See also: *CELF I* (n 21) para 41; *Transalpine Ölleitung in Österreich* (n 1) para 47; *van Calster and Cleeren* (n 6) para 64; *SFEI and Others* (n 6) para 40; Joined Cases C-144/91 and C-145/91 *Demoor and Others v Belgian State*, EU:C:1992:518, para 26; *FNCE and Others* (n 1) para 12.

[35] *Deutsche Lufthansa* (n 1) para 30; *Residex Capital IV* (n 9) para 29; *CELF I* (n 21) para 41; Joined Cases C-393/04 and C-41/05 *Air Liquide Industries Belgium* (n 1) para 42; *Xunta de Galicia* (n 34) para 49; *van Calster and Cleeren* (n 6) para 64; *SFEI and Others* (n 6) paras 40 and 68; *FNCE and Others* (n 1) para 12.

[36] *SFEI and Others* (n 6) para 43; *FNCE and Others* (n 1) para 12; Case C-301/87 *France v Commission (Boussac)*, EU:C:1990:67, paras 9–24; and Case C-142/87 *Belgium v Commission (Tubemeuse)*, EU:C:1990:125, para 20.

[37] Enforcement Notice (n 2) para 25, with reference to: *CELF I* (n 21) para 38; *FNCE and Others* (n 1) para 14; *Boussac* (n 36) paras 17–23; and *Tubemeuse* (n 36) paras 15–19.

[38] Procedural Regulation (n 13) Art 13(2).

Commission. As such, the application of these principles can be key to a private claimant's chances of success in national court proceedings.

i. Procedural Autonomy

As noted above, the primary role of the national courts with respect to State aid enforcement is to safeguard the directly effective individual rights associated with the notification and standstill obligation imposed by Article 108(3) TFEU. In carrying out this role, national courts enjoy the principle of procedural autonomy, which provides that

> in the absence of [EU] legislation, it is for the internal legal order of each Member State *to designate the competent courts* and lay down the *detailed procedural rules* for legal proceedings intended fully to safeguard the rights which individuals derive from [EU] law (emphasis added).[39]

Therefore, the options available to a private claimant, when seeking to initiate an action alleging a violation of the notification and standstill obligation in Article 108(3) TFEU, will depend on the domestic procedural laws of the Member State in question. These laws will not only determine the court(s) entitled to hear the case, but will, in principle, also determine critical procedural issues that may be fundamental to a claimant's chances of success. Such issues include the assessment of whether the claimant has legal standing to bring the case and the applicable standard of proof that the claimant must satisfy.

Naturally, the principle of procedural autonomy has the potential to cause disharmony and inconsistencies across the EU with respect to private litigation based on EU State aid law. Furthermore, this principle gives rise to a number of practical challenges, especially for the national court itself. On the one hand, the national court is obliged to apply substantive provisions of EU law to determine, for example, whether the disputed measure constitutes 'aid' within the meaning of Article 107(1) TFEU. On the other hand, the national court is bound by its own domestic procedural rules which may critically affect the outcome of the case. These practical challenges are discussed further in section III, in particular certain issues that have arisen with respect to legal standing.

ii. Principles of Equivalence and Effectiveness

The procedural autonomy afforded to national courts is not unfettered. Two important principles of EU law curtail the independence of the national courts: namely the principle of equivalence, and the principle of effectiveness.

[39] Case C-224/01 *Köbler*, EU:C:2003:513, para 46. See also: Case C-505/14 *Klausner Holz Niedersachsen*, EU:C:2015:742, para 40; *Transalpine Ölleitung in Österreich* (n 1) para 45; Joined Cases C-392/04 and C-422/04 *i-21 Germany*, EU:C:2006:586, para 57; Case C-526/04 *Laboratoires Boiron*, EU:C:2006:528, para 51; Case C-382/99 *Netherlands v Commission*, EU:C:2002:368, para 90; and Case C-33/76 *Rewe*, EU:C:1976:188, para 5.

The principle of equivalence provides that national procedural rules governing legal actions for safeguarding rights which individuals derive from EU law must not be less favourable than those governing individual rights which originate in the Member State's domestic law.[40]

The principle of effectiveness provides that national procedural rules must not render it 'practically impossible' or 'excessively difficult' to exercise rights conferred by EU law.[41] This principle has immense practical significance for private claimants relying on an alleged breach of Article 108(3) TFEU.

For instance, with respect to the applicable burden of proof, the CJEU has held that if it would be impossible or excessively difficult for a claimant to produce the evidence necessary to show that a particular measure constitutes State aid, the national court has an obligation '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'.[42] Considering that one of the key challenges facing private claimants is the information asymmetry that exists between the claimant, on the one hand, and the Member State and/or beneficiary on the other, the obligation imposed on national courts by virtue of the principle of effectiveness may be critical to a private claimant's ability to secure supporting evidence.[43]

Another example of the practical implications of the principle of effectiveness concerns actions for damages (discussed further in section III.B.iv below). National law cannot exclude the possibility that a Member State, found to have infringed Article 108(3) TFEU, can be held liable for the claimant's loss of profit; in the event that national law contains such an exclusion, the national court would need to leave that provision unapplied.[44]

The principle of effectiveness is also capable of trumping well-known legal principles that are common to many Member States. For instance, in the *Klausner Holz Niedersachsen* case,[45] which concerned the principle of *res judicata*, a German court had ruled that certain contracts between a German regional authority ('Land') and a private company, Klausner, for the supply of wood were enforceable. Under the contracts, the Land had committed itself to sell fixed amounts of wood for a period of seven years to Klausner at predetermined prices, and to refrain from making other sales at prices below those agreed in the contracts. Following the judgment

[40] *Transalpine Ölleitung in Österreich* (n 1) para 45; *i-21 Germany* (n 39) para 57; *Laboratoires Boiron* (n 39) para 51; *Netherlands* (n 39) para 90; *Rewe* (n 39) para 5.

[41] *Transalpine Ölleitung in Österreich* (n 1) para 45; i-21 *Germany* (n 39) para 57; *Laboratoires Boiron* (n 39) para 51; *Netherlands* (n 39) para 90. See also: *CELF II* (n 23) para 31; Case C-232/05 *Commission v France (Scott)*, EU:C:2006:651, para 49; Case C-174/02 *Streekgewest*, EU:C:2005:10, para 18; and *Rewe* (n 39) para 5.

[42] *Laboratoires Boiron* (n 39) paras 55 and 57.

[43] Enforcement Notice (n 2) para 76; ibid, paras 55 and 57.

[44] Enforcement Notice (n 2) para 49(a) with reference to: Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame*, EU:C:1996:79, paras 87 and 90. See also: Case T-239/94 *Association des Aciéries Européennes Indépendantes (EISA) v Commission*, EU:T:1997:158, para 109; Joined Cases C-295/04 to C-298/04 *Manfredi*, EU:C:2006:461, para 93.

[45] *Klausner Holz* (n 39).

declaring that the contracts were enforceable, Klausner brought another action against the Land demanding performance, and payment of damages and the supply of information on prices applied in the sector. In an attempt to resist these claims, the Land argued that, despite the prior judgment declaring the contracts enforceable, the contracts could not be executed because it would involve a grant of aid in violation of Article 108(3) TFEU. The German court referred a question to the CJEU asking whether the national law principle of *res judicata* precluded the Land's Article 108(3) argument (as the German court had already ruled that the contract was enforceable). The CJEU noted that the issue of State aid had not been argued in the case that gave rise to the binding national court judgment and stated that:

> [A] national rule which prevents the national court from drawing all the consequences of a breach of the third sentence of Article 108(3) TFEU because of a decision of a national court, which is *res judicata*, given in a dispute which does not have the same subject-matter and which did not concern the State aid characteristics of the contracts at issue must be regarded as being incompatible with the principle of effectiveness. A significant obstacle to the effective application of EU law and, in particular, a principle as fundamental as that of the control of State aid cannot be justified either by the principle of *res judicata* or by the principle of legal certainty.[46]

While the principle of effectiveness is indeed a valuable tool from the perspective of a private claimant, convincing a national court to set aside the rules of domestic law will not necessarily be easy. The CJEU has emphasised the need for the national court to undertake a case-by-case analysis, and its guidance in this regard is ripe with nuances:

> [E]ach case … must be analysed by reference to the role of [the national] provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.[47]

iii. Principle of Sincere Cooperation

As noted above, in the sphere of State aid enforcement, the responsibility of the national courts overlaps with that of the Commission insofar as both are competent to assess the existence of 'aid' within the meaning of Article 107(1) TFEU. For that reason, among others, the principle of loyal/sincere cooperation is of particular importance, especially in cases of concurrent proceedings (discussed further in section IV below).

The principle of sincere cooperation is enshrined in Article 4(3) of the Treaty on European Union (TEU) which provides:

> 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 Treaties.

[46] ibid, para 45.
[47] Case C-426/05 *Tele2 Telecommunication*, EU:C:2008:103, para 55.

> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and *refrain from any measure which could jeopardise the attainment of the Union's objectives* (emphasis added).

The principle of sincere cooperation is reciprocal in nature.[48] This is clear both from the wording of Article 4(3) TEU and from the case law of the CJEU. Thus, it is not only Member States that are obliged to 'facilitate the achievement of the Commission's tasks, which consist in particular … in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied',[49] but there is also an obligation on the Commission to provide assistance to the Member States. For instance, in the State aid context, the CJEU has held that 'the Commission must respond as quickly as possible to requests from national courts' for clarification concerning the application of Article 108(3) TFEU.[50]

The principle of sincere cooperation, including the Commission's responsibility to support and assist national courts, is also embodied in the Procedural Regulation[51] and the Enforcement Notice, which set out two different support mechanisms that are intended to be 'practical and user-friendly'.[52]

The first support mechanism is the ability of the national court to request that the Commission transmit relevant information in its possession.[53] Such information might include, for example: information concerning a pending Commission procedure, in particular whether the measure at issue before the national court is being considered concurrently by the Commission (and if so, the status of the Commission's assessment); or factual data, statistics, market studies and economic analysis.[54] These examples are merely illustrative, as the Commission considers that it has a duty to provide 'whatever information the [national court] may seek'.[55]

The second support mechanism is the ability of the national court to request an 'opinion' from the Commission concerning the application of State aid rules.[56] Such opinions are not legally binding on the national court but are intended to provide guidance on particular factual, economic or legal issues.[57] For instance, the Enforcement Notice lists the following examples of the subject matter that an opinion might address: whether a particular measure qualifies as 'aid' within the meaning of

[48] Case C-214/07 *Commission v France*, EU:C:2008:619, para 45; Case C-415/03 *Commission v Greece*, EU:C:2005:287, para 42; Case C-348/93 *Commission v Italy*, EU:C:1995:95, para 17.

[49] Case C-33/90 *Commission v Italy*, EU:C:1991:476, para 18. See also: *DEI and Commission* (n 9) para 105; *PGE* (n 7) para 33; *Deutsche Lufthansa* (n 1) para 41.

[50] *SFEI and Others* (n 6) para 50, with reference to *Zwartveld* (n 18) paras 17–18. See also: Case C-334/99 *Germany v Commission*, EU:C:2003:55, para 49; Case C-234/89 *Delmitis*, EU:C:1991:91, para 53; and Case T-353/94 *Postbank v Commission*, EU:T:1996:119, para 65.

[51] Procedural Regulation (n 13) Art 29(1).

[52] ibid. See also: Enforcement Notice (n 2) para 78.

[53] See also: Enforcement Notice (n 2) paras 82–88.

[54] ibid, para 83.

[55] ibid, para 86, with reference to: *Postbank* (n 50) para 64; and *Zwartveld* (n 18) paras 16–22.

[56] Procedural Regulation (n 13) Art 29(1). See also: Enforcement Notice (n 2) paras 89–96; *SFEI and Others* (n 6) para 50; *Zwartveld* (n 18) paras 17 and 18.

[57] Enforcement Notice (n 2) para 93.

Article 107(1) TFEU; whether the requirements of the Block Exemption Regulation are met; whether a certain aid measure falls under a specific aid scheme that has been notified and approved by the Commission; whether 'exceptional circumstances'[58] exist such that the national court is prevented from ordering the full recovery of aid granted to a beneficiary; assistance as regards the calculation of interest; and assistance in the context of a claim for damages.[59]

The Procedural Regulation also provides the possibility for the Commission to submit, on its own initiative, written observations to national courts in cases where 'the coherent application of Article 107(1) or Article 108 TFEU so requires'.[60] The Commission can also make oral observations, provided the national court grants permission.[61] For the purpose of preparing observations in national court proceedings, the Commission may request that the national court transmit documents at the court's disposal that are 'necessary for the Commission's assessment'.[62]

III. PRIVATE ENFORCEMENT OF EU STATE AID LAW IN PROCEEDINGS BEFORE NATIONAL COURTS

As noted in the introduction to this chapter, true private enforcement of State aid, ie, actions brought before national courts, initiated by one competitor against another, is not commonplace. To the extent that such actions are brought, the nature of the proceedings will vary significantly from one Member State to the next, due to the principle of procedural autonomy discussed above. Nonetheless, certain commonalities are readily identifiable. Below, we consider the parties typically involved in such actions, and the type of relief that is often sought.

A. Parties

i. Plaintiffs

The plaintiff in a private State aid enforcement action is typically a competitor of the alleged aid beneficiary or other third party affected by the aid measure. The larger the body of prospective plaintiffs entitled to initiate a case before national courts, the higher the effectiveness, and prevalence, of private enforcement of State aid rules. In this regard, it is essential to address two interrelated questions. First, who supposedly benefits from the directly effective rights enshrined in Article 108(3) TFEU? Second, to what extent do the national laws of the Member States, concerning legal standing, facilitate or impede such parties from bringing their case?

[58] This is discussed further in section III.B.ii below.
[59] Enforcement Notice (n 2) para 91(a)–(f).
[60] Procedural Regulation (n 13) Art 29(2).
[61] ibid, Art 29(2).
[62] ibid.

As regards the first question, the case law of the CJEU provides guidance. According to the Court, it is 'important to protect parties *affected by the distortion of competition* caused by the grant of the unlawful aid' (emphasis added).[63] Therefore, it seems uncontroversial to conclude that direct competitors of the beneficiary are, at least as a matter of EU law, entitled to benefit from the direct effect of Article 108(3) TFEU.[64] However, the extent of the protection is not limited to competitors.[65] In the *Streekgewest* case, the Court stated that:

> [A]n individual may have an interest in relying … on the direct effect of … Article [108(3) TFEU] 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. *In the latter case, the question 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 (emphasis added).[66]

Strictly speaking, the Court's statement in *Streekgewest* would appear to benefit only claimants subject to a tax which is an integral part of a State aid measure; in other words, a tax the proceeds of which are earmarked specifically to finance the alleged aid (referred to as a 'hypothecated' tax). However, it is foreseeable that eager plaintiffs, who are neither competitors, nor payers of a hypothecated tax, would seek to rely on *Streekgewest* to argue that the extent of the protection afforded by Article 108(3) TFEU is much broader.

In any event, it is clear that the clarity afforded by EU case law, as regards who precisely can rely on Article 108(3) TFEU, is limited. Therefore, in light of the principle of procedural autonomy, national rules on legal standing are critical. Hence, it is necessary to address the second question referred to above, ie, the extent to which national law rules facilitate or hamper private enforcement actions.

Domestic procedural laws concerning legal standing vary across the EU, as do their interpretation and application by national courts. In the context of private State aid enforcement, this has led to significant inconsistencies in the case law of different Member States, but also within the same Member State.[67] If the applicable

[63] *CELF I* (n 21) para 38.

[64] eg, in Belgium, competitors of the aid recipient have brought admissible claims based on Art 108(3) TFEU (see Commercial Court of Brussels, *Ryanair v Brussels Airlines* [29 April 2015] A 2014/52.655 and President of the Commercial Court of Brussels, *Breda Fucine Meridionali v Manoir Industries* [13 February 1995] (1995) *Journal des tribunaux—Droit européen* 72). (For more details on the *Breda* case, see also, 2006 Enforcement Study (n 3) 87.)

[65] eg, the 2006 Enforcement Study (n 3) 268, refers to Greece, where creditors of the recipient of unlawful State aid may also challenge a relevant administrative act, since it may affect their legal interests, for example, by creating a false image of the creditworthiness of the beneficiary (see Decision 3910/1988 of the 4th Chamber of the Hellenic Council of State).

[66] *Streekgewest* (n 41) para 19.

[67] The 2006 Enforcement Study (n 3) 323, refers, for example, to Italy, where a court of appeal stated that a claimant does not have standing in national proceedings concerning the implementation of a negative Commission decision if it is not directly affected by the decision, even if it had a material interest which coincided with the interest underlying the Commission decision (case of the Court of Appeal of Cagliari *Exol SpA v Nuova Cartiera di Arbatax SpA* [21 July 1999]). Another Italian court, however, had

thresholds to establish legal standing are set too high, the private enforcement of State aid will be inhibited. Indeed, the Commission has identified legal standing as a hurdle contributing to a low level of private State aid actions overall.[68] Moreover, overly burdensome standing rules might violate the right to effective judicial protection under EU law[69] and/or the principle of effectiveness (discussed above in section II.C.ii).[70]

ii. Defendants

In general terms, State aid litigation before national courts can feature two different categories of defendant:

— ***The entity that adopted the measure at issue***: The notification and standstill obligation pursuant to Article 108(3) TFEU lies with the Member State, which includes not only the central government but also any entity that adopts measures that can qualify as aid. This can include private entities if their actions can be imputed to the State. Therefore, actions by a competitor of the alleged aid beneficiary, or another third party which has been affected by the measure, alleging a violation of Article 108(3) TFEU, will be brought against the Member State, ie, the entity that adopted the alleged aid measure. These cases may also involve claims for damages.
— ***Beneficiary***: As a matter of EU law—Article 108(3) TFEU does not impose any specific obligations on a recipient of aid.[71] Therefore, if the action by a competitor, or other third party affected by an alleged aid measure is based solely on a violation of Article 108(3) TFEU, it cannot be brought against the beneficiary

previously taken the opposite position on the same question when hearing an action for unfair competition brought by the competitor of a cargo ferry service that had received State aid (case of the Court of Appeal of Cagliari *Exol SpA v Nuova Cartiera di Arbatax SpA* [21 July 1999] and case of the Court of First Instance of Genova *Grandi traghetti di navigazione SpA v Viamare di navigazione Spa and Finmare SpA* [26 April 1993], see the 2006 Enforcement Study (n 3) 326).

[68] 2006 Enforcement Study (n 3) 44.

[69] *Streekgewest* (n 41) para 18.

[70] For a detailed discussion of the interaction between legal standing requirements and the principle of effectiveness, in the context of Dutch case law, see A Metselaar, 'Who Can Invoke State Aid Law before National Judges? That Floating Question of Legal Interest in the Case Law of Dutch Courts' (2014) 13 *European State Aid Law Quarterly* 250. Metselaar refers to two particular cases of interest. In one case, a Dutch court ruled that certain housing corporations had no standing to challenge subsidies granted to other housing corporations, because they did not qualify as 'competitors' and consequently, according to the court, lacked the requisite interest (see decision of the Administrative Jurisdiction Division of the Council of State *Vogelaarwijken* [6 February 2013] NL:RVS:2013:BZ0794). In the other case, a Dutch court ruled that a squatters' organisation confronted with an eviction notice, after the property it was occupying was sold below market price following a tender procedure, could invoke Art 108(3) TFEU, since it participated in the tender procedure by offering to buy the property in question for the price of €1.25 and was therefore considered a competitor of the purchaser (see decision of the Appellate Court of The Hague *Gemeente Leiden v Koppenhinksteeg* [18 February January 2010] NL:GHSGR:2010:BL7630).

[71] Joined Cases C-442/03 P and C-471/03 P *P&O European Ferries (Vizcaya) v Commission*, EU:C:2006:356, para 103; *SFEI and Others* (n 6) paras 73–74; Case T-308/00 *Salzgitter v Commission*, EU:T:2013:30, para 163.

of the alleged aid.[72] However, that does not exclude the possibility that such actions are brought on the basis of provisions of national law, such as non-contractual liability.[73]

iii. Interveners

In addition to the main parties (ie, plaintiff and defendant), national court procedures in a particular Member State might allow other interested parties to participate by way of an intervention. For instance, in a case where a competitor has brought an action against the Member State for a violation of Article 108(3) TFEU, it might be possible for: (i) the beneficiary to intervene in support of the Member State; and/or (ii) another competitor to intervene in support of the plaintiff competitor.

For the beneficiary, in particular, such an intervention may have advantages and disadvantages, depending on the applicable national law provisions. A typical benefit is the ability to influence the outcome of the proceedings and to ensure the best possible defence, in particular in cases where the aid character of the measure is disputable. A possible downside is that, through the intervention, the ruling in the dispute between the competitor and the State will be binding on the beneficiary as well. For example, under German law in a case between a competitor of the alleged aid beneficiary and the Member State, if the court concludes that the measure constituted unlawful aid and orders the Member State to recover the aid from the beneficiary, the finding as regards the aid character of the measure would be binding on the beneficiary if it intervened in the court proceedings. Thus, if the Member State, in compliance with the court judgment, seeks to recover the aid, the beneficiary would be precluded from contesting the aid character of the measure. If, however, the beneficiary had not intervened in the case, the findings concerning the aid character of the measure would not be binding on it.[74]

B. Remedies

As noted throughout this chapter, national courts are obliged under EU law to safeguard the rights of individuals against the possibility that Member State authorities will disregard Article 108(3) TFEU.[75] However, because national courts

[72] See, eg, Commercial Court of Brussels *Ryanair v Brussels Airlines* [29 April 2015] AR 2014/52.655, in which the Court rejected Ryanair's application for a cease and desist order against Brussels Airlines stating that only Member States can violate the State aid provisions and, as a consequence, a cease and desist order which is addressed to undertakings cannot, in itself, be granted on the basis of those provisions.

[73] See Enforcement Notice (n 2) para 55. See also: 2006 Enforcement Study (n 3) respectively 66 and 87, which refer to the following examples: Supreme Court of Austria *Spa Gardens*, judgments of [16 July 2002] and [4 May 2004]; and President of the Commercial Court of Brussels *Breda Fucine Meridionali v Manoir Industries* [13 February 1995] (1995) *Journal des tribunaux—Droit européen* 72 (For more details on the *Breda* case, see also 2006 Enforcement Study (n 3) 87.) In the *Breda* case, the Court decided that the recipient of unlawful aid commits an act of unfair competition and granted a cease and desist order requested by the claimant.

[74] See ss 66–71 ('Nebenintervention') of the German Code of Civil Procedure (ZPO).

[75] *PGE* (n 7) para 31; *Deutsche Lufthansa* (n 1) para 28; *Transalpine Ölleitung in Österreich* (n 1) para 38; *van Calster and Cleeren* (n 6) para 75.

enjoy procedural autonomy in discharging that obligation, the specific nature of the relief available to claimants, and/or the ability of claimants to avail of a particular type of relief, 'depend[s…] on the legal remedies provided for under *domestic law*' (emphasis added).[76]

Therefore, the potential remedies available to private claimants before national courts vary, depending on the particular Member State. Nonetheless, four prominent remedy categories are identifiable and merit further consideration: the suspension of ongoing aid; the recovery of aid that has already been granted; interim measures regarding suspension and recovery; and damages.

Irrespective of the domestic law of the Member State and the particular remedies sought, all private claimants are confronted with the same task, namely to demonstrate to the national court that: (i) the disputed measure constitutes 'aid' within the meaning of Article 107(1) TFEU; and (ii) the Member State did not notify that measure to the Commission.[77]

i. Suspension of Ongoing Aid Measures

The notion of an 'ongoing aid measure' can take many forms. It could be, for instance: a contract between a public authority and a private company, the terms of which allegedly constitute aid; or a selectively beneficial tax regime. In such cases, the first interest that a private claimant will have is to ensure that the disbursement of the aid is suspended. The claimant will therefore request that the national court orders the discontinuation of the measure. Depending on the Member State, the suspension might take the form of a 'cease and desist' order, as national legislation in several Member States allows claimants to bring specific actions seeking such orders on the basis of unfair competition law principles.[78]

If the national court accedes to a claimant's request for suspension, the Member State must terminate the implementation of the measure until such time (if ever) that the Commission approves the measure following notification by the Member State.[79] A 'suspension' of ongoing aid in this context is ordered in the final judgment of the national court. This remedy should not be confused with interim measures, discussed below, which might be adopted by the national court to suspend the disbursement of alleged aid, pending the outcome of the national court proceedings.

[76] *Transalpine Ölleitung in Österreich* (n 1) para 46. See also: *DEI and Commission* (n 9) para 100; *Klausner Holz* (n 39) para 35; *i-21 Germany* (n 39) para 57; *Köbler* (n 39) para 46.

[77] As noted earlier, national courts are competent only to determine whether 'aid' has been granted in violation of Art 108(3) TFEU, not to determine whether that aid is compatible with the common market.

[78] See, eg, s 1 of the Austrian Act Against Unfair Competition (UWG), on the basis of which the Supreme Court granted a cease and desist order in the *Spa Gardens* case (Supreme Court *Spa Gardens* judgments of [16 July 2002] and [4 May 2004], see above n 73). Belgium also allows for a specific action under which the President of the Commercial Court can grant a cease and desist order (see s XVII of the Code of Economic Law).

[79] See, eg, President of the District Court of Groningen *Essent Kabelcom BV v Gemeente Appingedam* [3 September 2004] NL:RBGRO:2004:AQ8920, which was a case brought by a competitor of the beneficiary of aid granted by the municipality of Appingedam. The municipality, which was funding a project for the provision of internet access, was ordered by the Court to cease all activities relating to the project until the European Commission declared that the measure did not constitute State aid or that the aid was compatible (see the 2006 Enforcement Study (n 3) 375).

ii. Recovery of Aid Already Granted

If the claimant successfully establishes that the Member State violated Article 108(3) TFEU, the national court is, in principle, obliged to order the recovery of any aid already paid. According to the CJEU, the reason for this somewhat automatic obligation to recover the aid is that Member States would otherwise be encouraged to disregard the prohibition laid down in Article 108(3) TFEU.[80]

The recovery will be ordered at the conclusion of the national court proceedings.[81] The national court might order that the beneficiary repay the aid directly to the granting authority or, alternatively, into an escrow account pending the Member State's satisfaction of the notification and standstill obligation under Article 108(3) TFEU.

In 'exceptional circumstances'[82] the national court can refrain from ordering the recovery of non-notified aid; however, the threshold is high.[83] To determine whether such 'exceptional circumstances' exist, national courts should assess 'whether a diligent businessman ought to have realised that the measures in question constituted aid which could be granted only in accordance with the procedure laid down in Article [108(3) TFEU]'.[84] Factors weighing against a recovery order (ie, factors suggesting that even a diligent businessman would not have realised the measure was unlawful aid) might include: (i) difficulty in identifying/verifying that a measure is aid; (ii) indications from the Commission that the measure is not problematic (eg, declining to open a formal investigation); and (iii) excessive delays in the Commission reaching a decision about a particular measure.[85] A precise assurance from the Commission regarding the lawfulness of the disputed measure would also likely amount to an 'exceptional circumstance' justifying non-recovery of the aid.[86]

[80] *OTP Bank* (n 1) para 76; *CELF I* (n 21) para 40; *Xunta de Galicia* (n 34) para 63; *SFEI and Others* (n 6) para 69; *FNCE and Others* (n 1) para 16.

[81] Therefore, this remedy should not be confused with 'interim recovery orders' discussed below (see section III.B.iii below).

[82] *OTP Bank* (n 1) para 72; *Residex Capital IV* (n 9) para 35; *CELF II* (n 23) para 36; *CELF I* (n 21) para 42; *SFEI and Others* (n 6) para 70; Case C-5/89 *Commission v Germany*, EU:C:1990:320, para 16. See also: Procedural Regulation (n 13) Art 16(3).

[83] *OTP Bank* (n 1) para 77; *Unicredito Italiano* (n 4) para 104; *Demesa and Territorio Histórico de Álava* (n 4) para 45; *Germany v Commission* (n 50) para 42; Case C-24/95 *Alcan Deutschland*, EU:C:1997:163, para 25; *Commission v Germany* (n 82) para 14. See also: Enforcement Notice (n 2) para 32.

[84] See Advocate General Opinion in Case C-39/94 *SFEI and Others*, EU:C:1995:445, para 75. See also: *Unicredito Italiano* (n 4) para 104; *Demesa and Territorio Histórico de Álava* (n 4) para 44; *Germany v Commission* (n 50) para 41; *Alcan Deutschland* (n 83) para 25; and *Commission v Germany* (n 82) para 14. For example, the 2006 Enforcement Study (n 3) 102, refers to the Belgian *Idealspun* case in which the Commercial Court rejected Idealspun's claim that it had legitimate expectations regarding its entitlement to retain the aid since, according to the Court, a diligent businessman would have known that the Belgian State had not complied with the standstill obligation under Art 108(3) TFEU. (Commercial Court of Kortrijk, *Gimvindus and Flemish Region v Idealspun, De Clerck and Others* [20 September 1994] Case No 1310/90.)

[85] See AG Opinion in Case C-39/94 *SFEI and Others* (n 84) para 76.

[86] Enforcement Notice (n 2) para 33 with reference to *Belgium and Forum 187* (n 4) para 147. See also: Case C-369/09 P *ISD Polska and Others v Comission*, EU:C:2011:175, para 123; Case C-82/98 P *Kögler v Court of Justice*, EU:C:2000:282, para 33; and Case C-111/86 *Delauche v Commission*, EU:C:1987:562, para 24.

iii. Interim Measures

Considering that national court proceedings might be lengthy, private claimants must have the ability to seek interim measures from the national court to safeguard their interests pending the national court's final ruling.[87] For instance, the national court's final ruling might be deferred to allow for: (i) a response from the CJEU following a request for a preliminary ruling; (ii) a Commission opinion; or (iii) further information from the Commission.

The Commission considers that national courts are 'very well placed' to adopt interim measures due to their ability to act quickly and their proximity to the facts.[88] Indeed, the nature and suitability of interim measures will depend on the facts of a particular case. In its Enforcement Notice, the Commission envisages, in broad terms, two different scenarios that the national courts might encounter. In this first scenario, described by the Commission as 'straightforward', 'unlawful aid has not yet been disbursed, but … there is a risk that such payments will be made during the course of national court proceedings'.[89] In that case, the logical interim measure would be an order preventing the disbursement pending the outcome of the national court proceedings.[90]

In the second scenario, which is more complex, the alleged aid measure has already been disbursed. According to the Commission, the national court should consider in such cases whether an 'interim recovery' order is required to 'at least terminate the anti-competitive effects of the aid on a provisional basis' pending the national court's final judgment.[91] The Enforcement Notice provides the following guidance for national courts, as regards the appropriate test and procedure for interim recovery orders:

> Where, based on the case law of the [EU] courts and the practice of the Commission, the national judge has reached a reasonable *prima facie* conviction that the measure at stake involves unlawful State aid, the most expedient remedy will, in the Commission's view and subject to national procedural law, be to order the unlawful aid and the illegality interest to be put on a blocked account until the substance of the matter is resolved. In its final judgment, the national court would then either order the funds on the blocked account to be returned to the State aid granting authority, if the unlawfulness is confirmed, or order the funds to be released to the beneficiary.[92]

The Commission also considers that interim recovery orders are effective in cases involving concurrent proceedings before the national court and the Commission,[93] a topic discussed further in section IV below.

iv. Actions for Damages

With an action seeking suspension of an alleged aid measure and an order obliging the Member State to recover sums already paid, the claimant can achieve a result

[87] *SFEI and Others* (n 6) para 52.
[88] Enforcement Notice (n 2) para 57.
[89] ibid, para 58.
[90] ibid.
[91] ibid, para 60.
[92] ibid, para 61.
[93] ibid, para 62.

whereby its competitor, the beneficiary of the aid, no longer enjoys the benefit of the aid. An action for damages offers the plaintiff the prospect of financial compensation beyond the removal of the advantage that the beneficiary of the aid enjoyed. Therefore, the ability to obtain damages incentivises private enforcement, arguably contributing to a more robust State aid regime overall. In the antitrust sphere, for example, the growing prevalence of private damages claims against cartel participants has undoubtedly increased deterrence. Therefore, by analogy, the possibility that the Member State and/or the beneficiary might be liable to pay damages following a violation of Article 108(3) TFEU should encourage Member States to notify, and/or beneficiaries to insist on the notification of, potential aid measures to the Commission.

In practice, however, private claimants face significant challenges when seeking to obtain damages following a violation of State aid law. Below, we consider: (i) the legal framework for bringing an action for damages against the Member State; (ii) the extent to which a claimant might be able to seek damages from the beneficiary; and (iii) the specific practical difficulties that private claimants must overcome.

a. Member State Liability

It is a well-established principle of EU law that Member States will, in certain circumstances, be obliged to compensate private parties for loss and damage caused as a result of violating EU law.[94] According to the CJEU, this principle is 'inherent in the system of the Treaty'.[95] In the *Brasserie du pêcheur and Factortame* judgment, the CJEU laid down the following three-part test to determine whether a private claimant has a right to damages from a Member State following an EU law infringement:[96] (i) the rule of law infringed must be intended to confer rights on individuals; (ii) the breach must be sufficiently serious; and (iii) there must be a direct causal link between the breach and the damages sustained by the claimant.

Applying this test in the State aid context, the first condition is relatively easy to satisfy, as there is no question that Article 108(3) TFEU confers rights on individuals (as discussed extensively in this chapter). As regards the second condition, relevant factors to determine whether the breach is sufficiently serious include, among others: the clarity and precision of the rule of EU law; the measure of discretion left to the Member State; and whether the infringement was intentional/voluntary.[97] Accordingly, the second condition is likely to be satisfied in most cases because Article 108(3) TFEU imposes a clear obligation that affords no discretion to the Member State. Thus, it is the third condition, namely the requirement to establish damages and a causal link between the damages and the violation of Article 108(3)

[94] *Brasserie du pêcheur and Factortame* (n 44) para 20; Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy*, EU:C:1991:428, para 33. See also: Case C-173/03 *Traghetti del Mediterraneo v Italy*, EU:C:2006:391, para 41; *EISA* (n 44) para 109; Case C-268/15 *Ullens de Schooten*, EU:C:2016:874, para 41; Case C-441/14 *DI*, EU:C:2016:278, para 42; Joined Cases C-501/12 to C-506/12, C-540/12 and C-541/12 *Specht and Others*, EU:C:2014:2005, para 98; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others v Germany*, EU:C:1996:375, para 20.

[95] *Brasserie du pêcheur and Factortame* (n 44) para 31; *Francovich and Bonifaci v Italy* (n 94) para 35.

[96] *Brasserie du pêcheur and Factortame* (n 44) para 51. See also: Enforcement Notice (n 2) para 45.

[97] *Brasserie du pêcheur and Factortame* (n 44) para 56.

TFEU, that is likely to prove the most problematic from the claimant's perspective, as discussed further below.

In addition to the possibility of bringing an action for damages against the Member State, on the basis of EU law (ie, the three-part test set out above), private claimants might also have the possibility to sue the Member State for damages on the basis of national law. This prospect has been recognised consistently by the CJEU in relation to violations of Article 108(3) TFEU.[98] However, whether or not damages are actually available in a particular case depends on the law of the Member State in question, which will also dictate the legal basis for the action.[99] The only example, of which the authors are aware, of a successful damages action under national law against a grantor of aid is the *Corsica Ferries* case.[100]

b. Liability of the Beneficiary

The CJEU has held that the notification and standstill obligation pursuant to Article 108(3) TFEU applies to Member States only; it does not impose a specific obligation on the recipient of aid.[101] Therefore, there is no basis under EU State aid law for the beneficiary to incur liability, vis-a-vis a third party, for failing to verify whether an aid measure it received had been duly notified to the Commission.[102]

Nevertheless, the CJEU has left the door open for a beneficiary to be sued for damages under provisions of national law concerning non-contractual liability. The CJEU articulated this prospect in the following terms:

> If, according to national law, the acceptance by an economic operator of unlawful assistance of a nature such as to occasion damage to other economic operators may in certain circumstances cause him to incur liability, the principle of non-discrimination may lead the national court to find the recipient of aid paid in breach of Article [108(3) TFEU] liable.[103]

It remains to be seen the extent to which this, somewhat theoretical, possibility of holding the beneficiary liable for damages can actually be exploited by private claimants in practice. The authors are not aware of any cases where a beneficiary has been ordered by a national court to pay damages to a third party because it received aid granted in violation of Article 108(3) TFEU.

c. Practical Difficulties Associated with Damages Claims

Private claimants seeking damages following a violation of Article 108(3) TFEU face some significant practical challenges. These challenges were highlighted in the 2009 Update of the 2006 Study on the enforcement of State aid rules at national level,[104]

[98] *CELF I* (n 21) paras 53 and 55; Case C-334/07 P *Commission v Freistaat Sachsen*, EU:C:2008:709, para 54; Case C-384/07 *Wienstrom*, EU:C:2008:747, para 29; *Transalpine Ölleitung in Österreich* (n 1) para 56; *SFEI and Others* (n 6) para 75.

[99] This leads to significant variations across the EU. See Enforcement Notice (n 2) para 44.

[100] In that case, a French court ordered the State entity that had implemented unlawful aid to a ferry company to pay over €84 million in damages to a competitor of the aid beneficiary. Administrative Tribunal of Bastia (TA Bastia), *Corsica Ferries* [23 February 2017], Case No 1500375.

[101] *Vizcaya* (n 71) para 103; *SFEI and Others* (n 6) paras 73–74; *Salzgitter* (n 71) para 163.

[102] *SFEI and Others* (n 6) para 74.

[103] ibid, para 75.

[104] 2009 Update (n 3).

which noted that 'national courts remain reluctant to award monetary damages to competitors of the beneficiary'.[105]

First, according to the 2009 Update, the 'main obstacle' facing private claimants is the 'lack of a clear legal basis under national law'[106] and the diverging approaches that Member States take when dealing with damages claims. A second obstacle facing claimants is the requirement to establish a causal link between the violation of Article 108(3) TFEU and economic harm suffered by the claimant. On this point, the 2009 Update refers to the need for the claimant 'to show how its market share would have developed had the aid not been granted to its competitor'.[107]

In its Enforcement Notice, the Commission also focuses on the requirement to establish a causal link between the unlawful grant of aid and economic harm. It refers to the 'easier' case of unlawful aid enabling the beneficiary to win a particular contract or business opportunity at the claimant's expense; in that instance, the national court should be able to calculate the revenue that the claimant was likely to generate under the particular contract.[108] More difficult questions arise, however, when the claimant asserts a loss of market share as a result of the unlawful aid. The guidance offered by the Commission is that the national court should 'compare the claimant's actual income situation (based on the profit and loss account) with the hypothetical income situation had the unlawful aid not been granted'.[109] Unfortunately, however, this guidance is of limited practical value because it offers no insight into how one would calculate the 'hypothetical income situation' to which the Commission refers.

IV. OBLIGATIONS OF NATIONAL COURTS IN CASES OF CONCURRENT PROCEEDINGS BEFORE THE COMMISSION OR THE EU COURTS

As noted earlier, the Commission and the national courts have overlapping responsibilities insofar as both are competent to assess the existence of 'aid'. However, their respective competences also differ in two key respects: only the Commission is competent to assess the compatibility of aid; and only the national courts are competent to order the recovery of aid on the sole ground that the aid was granted in violation of the notification and standstill obligation.

The combination of overlapping and distinct responsibilities/competences of the national courts and the Commission raises important and difficult questions in cases of concurrent proceedings, ie, cases where both the national court and the Commission are considering the same alleged aid measures at the same time. This happens, for example, where a competitor of the beneficiary brings a case before the national court and lodges a complaint with the Commission, prompting the Commission to investigate the measure at issue. Similar issues also arise where the subject matter of a national court case is also at issue in a case pending before the EU Courts.

[105] ibid, 2.
[106] ibid, 4.
[107] ibid, 4.
[108] Enforcement Notice (n 2) para 49(b).
[109] ibid, para 49(c).

A. Concurrent Proceedings before the Commission

In cases where an alleged aid measure is the subject of both a case pending before a national court and a Commission State aid investigation, the scope of the national courts' obligation to safeguard the directly effective rights afforded by Article 108(3) TFEU will vary, depending on the particular stage of the investigation.[110] Accordingly, we consider below three important milestones in Commission State investigations and how they impact the obligations imposed on the national courts, specifically: (i) the Commission's initiation of an informal investigation; (ii) the Commission's opening of a formal investigation; and (iii) the Commission's adoption of a decision at the conclusion of its investigation.

Importantly, as noted above, neither the initiation of the 'informal' nor 'formal' investigation phases release the national court from its duty to safeguard the individual rights associated with Article 108(3) TFEU.[111] According to the CJEU, national courts have a duty to ensure that unlawful aid 'does not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision'.[112] Therefore, national courts are not permitted to stay proceedings pending the outcome of the Commission's investigation because, according to the CJEU, a 'decision to stay proceedings would … amount to maintaining the benefit of aid during the period in which implementation is prohibited, which would be inconsistent with the very purpose of Article [108(3) TFEU] and would render that provision ineffective'.[113]

i. Informal Investigation Started

During the informal investigation stage, there is no specific obligation on the national court that would alter its duty to uphold the individual rights granted by Article 108(3) TFEU. In other words, the national court must, as discussed earlier in this chapter, carry out its own assessment of whether the measure can be classified as 'aid' within the meaning of Article 107(1) TFEU and, if so, it must draw the 'appropriate conclusions'.[114]

ii. Commission has Opened the Formal Investigation

Initially, the Commission took the position that decisions opening a formal investigation under Article 108(2) TFEU (so-called 'opening decisions') are mere procedural decisions and that, therefore, applications by the Member State concerned or beneficiaries of the measures at issue seeking the annulment of opening decisions are inadmissible. However, the CJEU ruled that the opening decision in relation to an alleged aid measure already implemented and classified by the Commission as

[110] *Deutsche Lufthansa* (n 1) para 33; *SFEI and Others* (n 6) para 53.
[111] *Deutsche Lufthansa* (n 1) para 32; *CELF II* (n 23) para 27; *SFEI and Others* (n 6) para 44.
[112] *Deutsche Lufthansa* (n 1) para 31; *CELF II* (n 23) para 30. See also: *Klausner Holz* (n 39) para 25.
[113] *CELF II* (n 23) para 31.
[114] *Deutsche Lufthansa* (n 1) paras 34–35.

'new aid' entails independent legal effects, because it produces an immediate, certain and sufficiently binding effect on the Member States to take all necessary measures to safeguard the rights of parties affected by an unlawful implementation of an aid measure. This necessarily alters the legal implications of the measure under consideration and the legal position of the beneficiaries, particularly as regards the suspension of the measure in question.[115]

The CJEU added that an opening decision might be invoked before a national court called upon to draw all the consequences arising from the infringement of the standstill obligation (eg, suspend further payments to beneficiaries and order the recovery of payments already made).[116] Should a national court grant such a remedy, it would, at a minimum, result in a delay of further payment. A delay in payment of alleged aid might have irreversible financial consequences on beneficiaries, who count on receiving the payments. According to the Court, these consequences could not be eradicated by a subsequent decision finding the aid compatible with the common market.[117]

The CJEU noted that, even without suspension of the measure and recovery of payments, the doubt of the lawfulness of the measure may lead beneficiaries to refuse new payments or to hold necessary sums as provision in case repayment of the alleged aid is ordered. Thus, in their relations with those beneficiaries other businesses may take account of the uncertainty of the beneficiaries' legal and financial situation.[118]

The CJEU also noted that this legal effect of opening decisions arises irrespective of the wording which the Commission uses in the opening decision. A decision of the Commission to open a formal investigation under Article 108(2) TFEU implies that in the Commission's view, even if this is only a preliminary assessment, the measure constitutes aid and was granted in violation of Article 108(3) TFEU.[119]

The numerous judgments by the CJEU and, subsequently, the General Court declaring actions against opening decisions admissible eventually prompted the Commission to change its position and to adopt the view that if the Commission has opened a formal investigation into measures that are the subject of parallel proceedings before a national court, the national court may no longer decide on the aid character of the measures but instead must assume that the measures constitute aid and, as the case may be, order the suspension of the measures and/or the recovery of moneys already paid. The Commission expressed this view in a response pursuant to point 3.2 of the Enforcement Notice[120] to questions from two German courts, the Higher Regional Court Koblenz (OLG Koblenz) and the Schleswig-Holstein Higher Regional Court (OLG Schleswig), which had to decide on cases brought by

[115] Case C-400/99 *Italy v Commission*, EU:C:2005:275, para 59.
[116] ibid.
[117] Case C-312/90 *Spain v Commission*, EU:C:1992:282, para 22; Case C- 47/91 *Italy v Commission* EU:C:1994:358, para 28.
[118] Case C-400/99 *Italy v Commission* (n 115) para 59; Case T-517/12 *Alro v Commission*, EU:T:2014:890, para 63.
[119] Case C-400/99 *Italy v Commission* (n 115) paras 54–58.
[120] See Enforcement Notice (n 2) paras 89–96.

Lufthansa and Air Berlin regarding alleged aid to Ryanair at Frankfurt-Hahn airport and Lübeck airport, respectively. Both courts then submitted a request for a preliminary ruling to the CJEU.[121]

The Commission's new position raised many concerns. First, the finding of a violation of the standstill obligation of Article 108(3) TFEU requires that the measure at issue constitutes aid as defined in Article 107(1) TFEU, because Member States are only obliged to notify aid and not measures that might constitute aid. However, in cases where the aid character of the measure is disputed, an opening decision often does not contain a definitive finding as to the aid character of the measure. In fact, in many cases it leaves certain aspects of the aid assessment open, stating that they require further investigation.[122] Second, there are no effective remedies against an opening decision. According to the General Court, an applicant seeking annulment of an opening decision must show that the Commission committed a manifest error when finding that it needed to investigate in further detail whether the measure at issue constitutes aid.[123] In practical terms, this is virtually impossible.[124] Third, it ran counter to Article 13(2) of the Procedural Regulation,[125] which provides that the Commission can, after having opened the formal investigation but before adopting a final decision, require the Member State to recover money already paid, provided the Commission concludes, and shows, that the measure clearly constitutes aid. Such a decision could also be subject to an appeal before the General Court.

The CJEU dealt with the Lufthansa case first. It essentially sided with the Commission, but its answer to the German court created some uncertainty. It was worded as follows:

> Where, in accordance with Article 108(3) TFEU, the European Commission has initiated the formal examination procedure under Article 108(2) TFEU with regard to a measure which has not been notified and is being implemented, a national court hearing an application for the cessation of the implementation of that measure and the recovery of payments already made is required to adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure.
>
> To that end, the national court may decide to suspend the implementation of the measure in question and order the recovery of payments already made. It may also decide to order provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the European Commission's decision to initiate the formal examination procedure.

[121] Case C-27/13 *Flughafen Lübeck*, EU:C:2014:240 and *Deutsche Lufthansa* (n 1).

[122] This was also the case with respect to the opening decisions at stake in the two cases before the German courts, where the Commission explicitly stated that it needed to further investigate whether the measure complied with the Market Economy Operator (MEO) principle.

[123] Case T-461/12 *Hansestadt Lübeck v Commission*, EU:T:2014:758, para 42; Joined Cases T-269/99, T-271/99 and T-272/99 *Diputación Foral de Guipúzcoa and Others v Commission*, EU:T:2002:258, para 49.

[124] Case C-524/14 P *Commission v Hansestadt Lübeck*, EU:C:2016:971, brought by the city of Lübeck against a subsequent opening decision, constitutes a rare example of a successful challenge. However, that case succeeded on the basis of a well-defined legal argument and not a challenge of the Commission's discretion, eg, in the application of the MEO principle.

[125] Procedural Regulation (n 13).

> Where the national court entertains doubts as to whether the measure at issue constitutes State aid within the meaning of Article 107(1) TFEU or as to the validity or interpretation of the decision to initiate the formal examination procedure, it may seek clarification from the European Commission and, in accordance with the second and third paragraphs of Article 267 TFEU, it may or must refer a question to the Court of Justice of the European Union for a preliminary ruling.[126]

First, the CJEU did not directly answer the question of the referring court as to whether a national court is bound by the Commission's legal view in an opening decision on the aid character of the measure.[127] While the first point of the CJEU's response may indeed suggest that the CJEU considers that the characterisation of a measure as aid in an opening decision binds the national court, and that the national court therefore does not, and cannot, rule on the aid character, the third point of the response speaks against such an interpretation. There, the CJEU explicitly states that the national court can seek a preliminary ruling from the CJEU if it has doubts as to the aid character of the measure. This strongly suggests that the national court can, and must, rule on the aid character of the measure, because according to established case law a national court may only seek a preliminary ruling on questions that are relevant for its ruling.[128] Second, the use of the word 'may' in the second point of the response suggests that in any event the national court has discretion as to whether and what measures it orders.

Further uncertainty was caused by the CJEU's reasoning in the judgment. For example, paragraph 40 of the judgment states:

> On the other hand, even if in its final decision the Commission were to conclude that there were no aid elements, the preventive aim of the State aid control system established by the TFEU … requires that, *following the doubt raised in the decision to initiate the formal examination procedure* as to the aid character of that measure and its compatibility with the internal market, *its implementation should be deferred until that doubt is resolved by the Commission's final decision* (emphasis added).[129]

Given that doubts cannot be created retroactively, this statement suggests that doubts created by an opening decision cannot be relied upon to order the recovery of money paid prior to the opening decision. This would imply that in order to order the recovery of such moneys, the national court would have to find that the measures constitute aid. This was an important issue in the two German cases because almost all measures at issue had been implemented prior to the adoption of the opening decision.

After issuing its judgment in the Lufthansa case, the CJEU asked the OLG Schleswig whether it wished to maintain its request for a preliminary ruling. Referring to some ambiguities in the Lufthansa ruling, the OLG Schleswig answered affirmatively. The CJEU, by an order of the Grand Chamber, confirmed its Lufthansa ruling,

[126] *Deutsche Lufthansa* (n 1) operative part.
[127] ibid, para 18.
[128] Case C-152/03 *Ritter-Coulais*, EU:C:2006:123, para 15; Case C-314/01 *Siemens and ARGE Telekom* [2004] ECR I-2549, para 35; Case C-167/01 *Inspire Art* [2003] ECR I-10155, para 45; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, para 19.
[129] *Deutsche Lufthansa* (n 1) para 40.

although its order in the Lübeck case only contained the first two points of the Lufthansa judgment.[130] These two rulings caused considerable unrest among beneficiaries of alleged aid measures with respect to which the Commission had opened a formal investigation, and resulted in an unprecedented number of appeals against opening decisions.[131]

Despite the doubts as to the precise meaning of the Lufthansa judgment and the order in the Lübeck case, and despite entertaining considerable doubts as to the merits of these rulings, the OLG Schleswig eventually held that it had to accept the judgment and ruled that it was bound by the characterisation of the measures as aid in the opening decision.[132] Its judgment was appealed to the German Supreme Court (BGH). In its ruling of 9 February 2017, the BGH set aside the judgment of the OLG Schleswig. It ruled that, while national courts must take into account the findings on the aid character of the measure in the opening decision, they are not obliged to blindly follow them. If they have doubts about the aid character of the measure, for example, because information was not considered in the opening decision, they can ask the Commission for clarification and, if the Commission's answer is unsatisfactory, request a preliminary ruling from the CJEU. Moreover, even if, following that, they must consider that the measure constitutes aid, they are not always obliged to order recovery. Instead, they must take into account the interests of all parties involved, as well as other circumstances, including the delay since the opening decision, and, in particular, pay due regard to the principle of proportionality.[133] This ruling has given more flexibility to the national courts. It allows for an effective enforcement of the State aid regime while at the same time safeguarding the rights of all parties involved.

The case has been referred back to the Regional Court Kiel (Landgericht Kiel), which is the court of first instance in Germany in these proceedings. However, it is unlikely that the Landgericht Kiel will apply the criteria set by the BGH because,

[130] *Flughafen Lübeck* (n 121).

[131] eg, approximately 60 cases were brought against the opening decision concerning the German Renewable Energy Act. See, eg, Case T-301/14 *Michelin Reifenwerke v Commission*, EU:T:2014:747; Case T-300/14 *Fricopan Back v Commission*, EU:T:2015:336; Case T-298/14 *Erbslöh Aluminium v Commission*, EU:T:2015:349; and Case T-172/14 *Stahlwerke Bous v Commission*, EU:T:2015:402, challenging Commission Decision C (2013) 4424 final of 18 December 2013 on the aid scheme SA.33995 (2013/C) (ex 2013/NN) (implemented by Germany for the support of renewable electricity and reduced EEG-surcharge for energy-intensive users) ([2014] OJ C37/73 and [2014] OJ C250/15). The overall number of new State aid cases brought before the General Court increased from 54 cases in 2013, to 148 cases in 2014. In 2015, the number of new State aid cases dropped down to 73, which is an upward trend compared with the period from 2010 to 2013. See the *Annual Report of the Court of Justice 2015—Judicial Activity* (Luxemburg, Publications Office of the European Union, 2016) 167–170. Also available at: curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/rapport_annuel_2015_activite_judiciaire_en_web.pdf.

[132] The procedure was a so-called 'action by stages' (*Stufenklage*) under German law and the OLG Schleswig therefore only ordered the airport to provide information allowing to determine the alleged benefit that Ryanair received under the contested measures. The OLG Koblenz never ruled on the Lufthansa case because, on 1 October 2014 the Commission decided that the measures at issue in this case did not constitute aid. See *Frankfurt-Hahn Airport* (Case SA.21121) Commission Decision (EU) 2016/789 [2014] OJ L134/46 implemented by Germany concerning the financing of Frankfurt Hahn airport and the financial relations between the airport and Ryanair.

[133] German Supreme Court (BGH) *Flughafen Lübeck* [9 February 2017] I ZR 91/15.

on 7 February 2017, the Commission finally issued its final decision in the Lübeck case finding, among others, that the various measures that were the subject of the litigation in Germany did not constitute aid.[134]

It is also interesting to note that in two recent cases, brought after the CJEU's Lufthansa judgment, where beneficiaries of alleged aid measures challenged an opening decision, the General Court, following the Commission's submissions, dismissed the actions as inadmissible.[135] It held that the applicants did not have a legal interest in the annulment of the opening decisions, because the measures had already been implemented. This seems to support the view that an opening decision cannot have the effect of obliging a national court to order the recovery of moneys already paid, because otherwise the beneficiary of the aid would have an interest in seeking the annulment of the opening decision. It is also interesting that the Commission's position in these cases contradicted its position in the Lufthansa and the Lübeck case, where the Commission argued that a national court, when deciding on a request for a recovery order, must allow the order if the Commission had adopted an opening decision in respect to the measures.

As a practical matter, one can note that the position of plaintiffs in private litigation is significantly strengthened once the Commission has opened a formal investigation, although the precise effect depends on the specific findings on the aid character of the measure in the opening decision. However, at least in Germany, national courts will not necessarily find in favour of the plaintiff if the Commission has adopted an opening decision. It also remains to be seen how the Commission will react to the latest judgment of the BGH and whether it will seek an opportunity to bring the matter again before the CJEU.

iii. Commission has Adopted a Final Decision

In cases of concurrent proceedings, it is possible that the Commission will adopt its final decision while the case is still pending before the national court. The consequences of the Commission's decision, for the national court proceedings, will vary depending on the nature of the decision itself. There are three distinct possibilities, each of which is considered below: (i) a decision finding that the measure does not constitute aid;[136] (ii) a decision finding that the measure constitutes aid compatible with the common market;[137] or (iii) a decision finding that the measure constitutes aid that is incompatible with the common market.[138]

a. No Aid

Once the Commission makes a determination as to the aid character of a particular measure, that determination is binding on national courts. Therefore, in the event

[134] Commission, 'Commission clears several public measures in favour of Lübeck airport and airlines' (Press Release of 7 February 2017) MEX/17/231.
[135] Case T-129/13 *Alpic v Commission*, EU:T:2014:895; *Alro* (n 118).
[136] Procedural Regulation (n 13) Art 9(2).
[137] ibid, Arts 9(3) and 9(4).
[138] ibid, Art 9(5).

that the Commission concludes that the disputed measure does not constitute 'aid' within the meaning of Article 107(1) TFEU, the national court is precluded from making a finding to the contrary, for example, the national court cannot issue a judgment declaring that the Member State violated Article 108(3) TFEU for failing to notify the measure.[139]

b. Compatible Aid

Following a Commission decision finding that the disputed measure constitutes compatible aid, the national court is not obliged, under EU law, to order full recovery of the aid.[140] It is obliged, however, to order the beneficiary to pay interest with respect to the period of unlawfulness.[141] The rationale for this obligation is that the implementation of the aid, without observing the notification and standstill obligation, violates Article 108(3) TFEU.[142] Thus, the aid is 'unlawful' and, during the period of unlawfulness, the beneficiary has an undue advantage in two forms: first, it avoids the payment of interest that would otherwise have been due if it borrowed the money from the market; second, the competitive position of the beneficiary improves vis-a-vis other market operators.[143]

Although EU law does not impose an obligation on the national court to order full recovery of the aid, the national court may nonetheless make such an order within the framework of its domestic law, without prejudice to the Member State's right to re-implement it subsequently.[144] It may also be required under national law to uphold claims for damages.[145]

c. Incompatible Aid

In the event that the Commission finds that the disputed measure constitutes incompatible aid, the decision adopted by the Commission will order recovery of the aid. That decision is binding on all organs of the Member State, including the national courts,[146] which have an obligation not to apply any rule of national law that would prevent the immediate and effective execution of the Commission's decision. Therefore, in the context of private enforcement and concurrent proceedings, the case pending before the national court typically becomes devoid of purpose on the basis

[139] *DEI and Commission* (n 9) para 105; *Deutsche Lufthansa* (n 1) paras 36 et seq.

[140] *Wienstrom* (n 98) para 28; *CELF I* (n 21) para 46.

[141] *Wienstrom* (n 98) para 29; *CELF I* (n 21) paras 52 and 55; *Alro* (n 118) para 41; Case T-674/11 *TV2/Danmark v Commission*, EU:T:2015:684, paras 83–84 (this case is currently under appeal before the CJEU); Procedural Regulation (n 13) Art 16(2); Enforcement Notice (n 2) para 40(b).

[142] *OTP Bank* (n 1) para 76; *CELF I* (n 21) para 40; *Xunta de Galicia* (n 34) para 31; *SFEI and Others* (n 6) paras 67 and 69; *FNCE and Others* (n 1) para 16.

[143] *CELF I* (n 21) para 51; Joined Cases T-115/09 and T-116/09 *Electrolux and Whirlpool v Commission*, EU:T:2012:76, para 67.

[144] *Wienstrom* (n 98) para 29; *CELF I* (n 21) para 53; *Transalpine Ölleitung in Österreich* (n 1) para 56. See also: Procedural Regulation (n 13) Art 16(3).

[145] *CELF I* (n 21) para 53; *Transalpine Ölleitung in Österreich* (n 1) para 56; *SFEI and Others* (n 6) para 75.

[146] Case C-69/13 *Mediaset*, EU:C:2014:71, para 23; *Köbler* (n 39) para 32; Case C-249/85 *Albako v BALM*, EU:C:1987:245, para 17. See also: Recovery Notice (n 11) paras 45 and 72.

that the Commission has stipulated the remedy and the Member State, including its national courts, are bound to ensure that the decision is implemented.[147]

B. Pending Appeals against Commission Decisions

Even if a beneficiary challenges a Commission State aid recovery decision before the EU courts, this does not postpone the Member State's obligation to recover the aid.[148] Therefore, the beneficiary may find itself fighting on two fronts simultaneously: one before the EU courts; and the other before the national authorities in the Member State tasked with securing the recovery. As noted earlier, the forum for the latter will often be the national courts. As a result, national courts might be asked to order recovery from a beneficiary that is concurrently challenging the legal basis for that recovery at the EU courts.

In such cases, the Commission 'may also accept, … a provisional implementation of the decision, … eg, the payment of the full amount of unlawful and incompatible aid into a blocked account pending the outcome of the EU Court proceedings'.[149] The Member State is required, however, to submit to the Commission, for its approval, 'a justification for the adoption of such provisional measures and a full description of the provisional measure envisaged'.[150]

[147] *Scott* (n 41) paras 59 and 60; Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, para 31; *Alcan Deutschland* (n 83) para 34; Case C-188/92 *TWD Textilwerke Deggendorf GmbH v Germany* [1994] ECR I-833, paras 17–18; Case C-465/93 *Atlanta Fruchthandelsgesellschaft and Others (I) v Bundesamt für Ernährung und Forstwirtschaft* [1995] ECR I-3761, para 51; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, EU:C:1991:65, para 33. See also: Procedural Regulation (n 13) Art 16(3); Recovery Notice (n 11) paras 44 et seq; Enforcement Notice (n 2) paras 63–69.

[148] According to Art 278 TFEU, actions for annulment brought under Art 263 TFEU before the EU courts do not have suspensory effect and it is only in exceptional circumstances that the EU courts may order suspension of the contested act. See also: Case C-63/14 *Commission v France*, EU:C:2015:458, para 47; Case C-213/85 *Commission v Netherlands*, EU:C:1988:39, para 21; Case T-812/14 R *BPC LUX 2 and Others v Commission*, EU:T:2015:119, para 17; Case T-468/08 R *AES-Tisza kft v Commission*, EU:T:2008:621, para 13; and Recovery Notice (n 11) para 25.

[149] Recovery Notice (n 11) para 70.

[150] ibid.