

## II

(Information)

INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES  
AND AGENCIES

## EUROPEAN COMMISSION

## COMMUNICATION FROM THE COMMISSION

## Commission Notice on the enforcement of State aid rules by national courts

(2021/C 305/01)

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## 1. INTRODUCTION

- (1) Since 2012, the Commission has implemented the State aid modernisation agenda <sup>(1)</sup>. Under this agenda, the Commission has adopted a package of legislation, guidelines and notices for assessing State aid measures. This package has allowed the Commission to focus its *ex ante* scrutiny on cases with the biggest impact on the internal market, while developing closer cooperation with the Member States in State aid enforcement. To that end, the Commission has introduced more possibilities for the Member States to grant aid without prior Commission scrutiny by providing additional exemptions from the obligation to notify the Commission of any planned State aid measure. As a result, the amount of aid granted on the basis of block exemptions has increased <sup>(2)</sup>. In this context, the role of national courts in ensuring compliance with State aid rules has become even more prominent.
- (2) In 2019, the Commission published a study on the enforcement of State aid rules and decisions by national courts in 28 Member States <sup>(3)</sup> (the 'Enforcement Study') <sup>(4)</sup>. The Enforcement Study reviewed over 750 national judgements falling into two categories: 1) cases where national courts are involved in drawing the consequences of the unlawful implementation of aid ('private enforcement') and 2) cases where national courts are involved in implementing Commission decisions ordering recovery ('public enforcement').
- (3) The Enforcement Study revealed that the number of State aid cases addressed to national courts increased between 2007 and 2017. Despite this increase, national courts only awarded remedies on rare occasions, and claims for damages represent a small minority of cases. In addition, the means of cooperation between the Commission and national courts, which were introduced in 2009 by the Commission Notice on the enforcement of State aid law by national courts (the '2009 Enforcement Notice') <sup>(5)</sup> and in 2015 by Council Regulation (EU) 2015/1589 (the 'Procedural Regulation') <sup>(6)</sup> have not been widely used.
- (4) This notice provides national courts and other interested parties with practical information on the enforcement of State aid rules at national level. It takes into account the questions raised by these courts in the context of the Enforcement Study or in cases referred for preliminary rulings to the Court of Justice of the European Union ('Court of Justice'). Some examples are the coherence between the procedures before the Commission and national court proceedings, or the questions raised by the incorrect application of block exemption regulations.
- (5) This notice is intended to provide guidance to courts and tribunals of the Member States within the meaning of Article 267 of the Treaty on the Functioning of the European Union ('TFEU') <sup>(7)</sup> and to encourage closer cooperation between the Commission and national courts by laying down all the available tools of cooperation.

<sup>(1)</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU State Aid Modernisation (SAM), COM/2012/0209 final.

<sup>(2)</sup> Since 2015, more than 96 % of new aid measures for which expenditure was reported for the first time was covered by a block exemption regulation. See [http://ec.europa.eu/competition/state\\_aid/scoreboard/index\\_en.html](http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html)

<sup>(3)</sup> The Enforcement Study was conducted before the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community was signed (24 January 2020) and before it entered into force (1 February 2020). All reference to Member States in the Enforcement Study is to be intended as also referring to the United Kingdom.

<sup>(4)</sup> See 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019.

<sup>(5)</sup> Commission Notice on the enforcement of State aid law by national courts (OJ C 85, 9.4.2009, p. 1).

<sup>(6)</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) (OJ L 248, 24.9.2015, p. 9).

<sup>(7)</sup> To determine whether a body is a court or tribunal for the purposes of Article 267 TFEU, the Court of Justice takes into account a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. In that sense, see Judgment of the Court of Justice of 21 January 2020, *Banco de Santander*, C-274/14, ECLI:EU:C:2020:17, paragraph 51. Arbitral tribunals may not be considered as courts or tribunals within the meaning of Article 267 TFEU where the parties are under no obligation, in law or in fact, to refer their disputes to arbitration and where the public authorities of the Member State concerned are not involved in the decision to opt for arbitration nor required to intervene in the proceedings before the arbitrator. However, the Court has held admissible preliminary questions referred to it by an arbitral tribunal, where that tribunal had been established by law, its decisions were binding on the parties and its jurisdiction did not depend on their agreement. See order of the Court of Justice of 13 February 2014, *Merck Canada*, C-555/13, paragraphs 17 and 18 and the case-law cited therein.

It does not bind the national courts or affect their independence <sup>(8)</sup>. The main focus of this notice is private enforcement. The Commission Notice on the Recovery of unlawful and incompatible State aid <sup>(9)</sup> ('Recovery Notice') addresses the aspects related to public enforcement.

- (6) Since the 2009 Enforcement Notice, the case-law of the General Court and the Court of Justice (together, the 'Union Courts') has evolved. This notice incorporates those developments and replaces the 2009 Enforcement Notice.

### 1.1. The system of State aid control

- (7) State aid is a legal concept defined directly by the TFEU, which must be interpreted on the basis of objective factors <sup>(10)</sup>. According to Article 107(1) TFEU, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'. The Commission has provided guidance on how to interpret the notion of State aid <sup>(11)</sup>.
- (8) The general prohibition of State aid relies on a double system of *ex ante* and *ex post* control of interventions involving State aid. Pursuant to Article 108 TFEU, the Commission must keep under constant review all systems of existing aid and assess any plans by a Member State to grant new aid or alter existing aid. For the Commission to perform this review effectively, Member States must cooperate by providing any relevant information and by notifying State aid measures.
- (9) Member States are under an obligation, first, to notify the Commission of any measure intended to grant new aid or alter existing aid and, second, not to put into effect such measure until the Commission has assessed its compatibility with the internal market ('standstill obligation') <sup>(12)</sup>. The standstill obligation stemming from Article 108(3) TFEU has direct effect <sup>(13)</sup>: it confers rights on individuals, which they can rely on before national courts.
- (10) It follows that the implementation of the system of State aid control, of which the provision of Article 108(3) TFEU constitutes a fundamental feature, is a matter for both the Commission and the national courts, their respective roles being complementary but separate. While the Commission has exclusive competence for assessing the compatibility of aid measures with the internal market, it is for the national courts to safeguard the rights of individuals faced with a possible breach of Article 108(3) TFEU <sup>(14)</sup>.

<sup>(8)</sup> However, even if those guidelines are not intended to produce binding effects, the national courts are required to take them into consideration in order to decide disputes submitted to them. See Judgment of the Court of Justice of 3 September 2014, *Baltlanta*, C-410/13, EU:C:2014:2134, paragraph 64 and Judgment of the Court of Justice of 13 December 1989, *Grimaldi*, C-322/88, ECLI:EU:C:1989:646, paragraph 18; Judgment of the Court of Justice of 13 February 2014, *Mediaset*, C-69/13, ECLI:EU:C:2014:71, paragraph 31.

<sup>(9)</sup> OJ C 247, 23.7.2019, p. 1.

<sup>(10)</sup> Judgment of the Court of Justice of 22 December 2008, *British Aggregates v Commission*, C-487/06 P, ECLI:EU:C:2008:757, paragraph 111; Judgment of the Court of Justice of 16 May 2000, *France v Ladbrooke Racing and Commission*, C-83/98 P, ECLI:EU:C:2000:248, paragraph 25.

<sup>(11)</sup> See, for instance, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1); Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4); Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.6.2008, p. 10); Communication from the Commission — Framework for State aid for research and development and innovation (OJ C 198, 27.6.2014, p. 1).

<sup>(12)</sup> Judgment of the Court of Justice of 14 November 2019, *Dilly's Wellnesshotel*, C-585/17, ECLI:EU:C:2019:969, paragraph 54.

<sup>(13)</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 88; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 22; Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 29.

<sup>(14)</sup> Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 38; Judgment of the Court of Justice of 11 March 2010, *CELF et ministre de la Culture et de la Communication*, C-1/09, ECLI:EU:C:2010:136, paragraph 26; Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraph 21; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 21.

## 1.2. The standstill obligation

- (11) The immediate enforceability of Article 108(3) TFEU implies that national courts must take all appropriate actions, in accordance with their national law, to address the consequences of an infringement of that provision <sup>(15)</sup>.
- (12) For a measure to be subject to the standstill requirement of Article 108(3) TFEU, two conditions need to be satisfied: first, the measure qualifies as new aid, including alterations of an existing aid <sup>(16)</sup>; and second, the measure must be subject to the prior notification obligation of Article 108(3) TFEU.
- (13) Therefore, where a measure does not constitute new aid, Member States can implement it without prior notification to the Commission. Moreover, Member States may implement aid measures that fulfil all the conditions to benefit from an exemption from the notification obligation.
- (14) By *de minimis* regulations <sup>(17)</sup>, the Commission set the conditions according to which aid is deemed not to affect trade between Member States and not to distort or threaten to distort competition <sup>(18)</sup>.
- (15) The Commission has also adopted block exemption regulations – such as the General Block Exemption Regulation <sup>(19)</sup> – setting out the conditions according to which aid measures must or can be considered compatible with the internal market under Article 107(2) or (3) <sup>(20)</sup>. If an aid measure fulfils all the relevant conditions provided for in these regulations, the Member State concerned is exempted from its obligation to notify the Commission of the aid.

<sup>(15)</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraphs 88 to 89; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraphs 22 to 23.

<sup>(16)</sup> By virtue of Article 1(c) of the Procedural Regulation, 'new aid' is defined as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. Since that provision is established in broad terms, it is capable of covering not only the alteration itself, but also the aid concerned by that alteration. In addition, according to Article 1(b)(ii) of the Procedural Regulation, 'existing aid' is understood as being, *inter alia*, 'authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council'. Thus, aid which was the subject of an authorisation decision and which, as a result of an alteration that did not satisfy a condition laid down by that decision in order to ensure the compatibility of that aid with the internal market, is no longer covered by the decision which authorised it, may constitute new aid. See Judgment of the Court of Justice of 25 October 2017, C-467/15 P, *Commission v Italy*, ECLI:EU:C:2017:799, paragraphs 46 and 47. See also Section 4.2.2.2. of this notice.

<sup>(17)</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1); Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest (OJ L 114, 26.4.2012, p. 8); Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the agriculture sector (OJ L 352, 24.12.2013, p. 9); Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector (OJ L 190, 28.6.2014, p. 45).

<sup>(18)</sup> Such regulations are adopted on the basis of the enabling Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid (OJ L 248, 24.9.2015, p. 1).

<sup>(19)</sup> 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 (OJ L 187, 26.6.2014, p. 1).

<sup>(20)</sup> Pursuant to Article 109 TFEU, the Council of the European Union may adopt regulations for the application of Articles 107 and 108 TFEU and determine categories of aid that are exempted from the notification obligation. As provided for in Article 108(4) TFEU, the Commission may then adopt regulations relating to the categories of State aid that the Council has determined, pursuant to Article 109 TFEU.

- (16) Moreover, Commission Decision 2012/21/EU <sup>(21)</sup>, with regard to State aid for Services of General Economic Interest in general, and the Regulation (EC) No 1370/2007 of the European Parliament and of the Council, <sup>(22)</sup> with particular regard to public passenger transport services by rail and by road, set conditions according to which the compensations for public service obligations are considered compatible with the internal market pursuant to Articles 106(2) and 93 TFEU. Also in these cases, the measures concerned are not subject to the standstill obligation.

## 2. GENERAL PRINCIPLES OF THE ENFORCEMENT OF STATE AID RULES

### 2.1. The principle of sincere cooperation

- (17) Article 4(3) of the Treaty on European Union <sup>(23)</sup> ('TEU') requires Member States to facilitate the achievement of the Union's tasks. Pursuant to the principle of sincere cooperation enshrined in this Article, the Union and Member States, acting within the scope of their jurisdiction, must assist each other in carrying out those tasks.
- (18) The obligation of mutual assistance stemming from Article 4(3) TEU also applies to national courts <sup>(24)</sup>. This means that the Commission assists national courts when they apply Union law <sup>(25)</sup>, and that, conversely, national courts assist the Commission in the fulfillment of its tasks. National courts must, therefore, take all the necessary measures to ensure fulfillment of their obligations under Union law and refrain from taking decisions which may jeopardise the attainment of the objectives of the TEU and the TFEU (together, the 'Treaties') <sup>(26)</sup>.

### 2.2. The principles of equivalence and effectiveness applied to national procedures

- (19) The Court of Justice has consistently recognised the principle of procedural autonomy in the enforcement of State aid rules <sup>(27)</sup>. According to this principle, in the absence of Union legislation on the subject, Member States are free to choose how they fulfil their obligations stemming from the Treaties, provided that the means they use do not adversely affect the scope and effectiveness of Union law.
- (20) In accordance with the Union Courts' case-law, the applicable national legislation must not be less favorable when applying Article 108(3) TFEU than the one governing similar domestic situations ('principle of equivalence') and must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by the Union law ('principle of effectiveness') <sup>(28)</sup>. Sections 2.2.1., 2.2.2. and 2.2.3. explain the interplay between the principle of procedural autonomy on the one hand, and the principles of equivalence and effectiveness, on the other, in relation to legal standing, the national courts' jurisdiction and the principle of *res judicata* <sup>(29)</sup>.

<sup>(21)</sup> Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document C(2011) 9380) (OJ L 7, 11.1.2012, p. 3).

<sup>(22)</sup> Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road (OJ L 315, 3.12.2007, p. 1).

<sup>(23)</sup> OJ C 202, 7.6.2016, p. 13.

<sup>(24)</sup> Judgment of the Court of Justice of 22 October 2002, *Roquette Frères*, C-94/00, ECLI:EU:C:2002:603, paragraph 31.

<sup>(25)</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 50; Judgment of the Court of Justice of 28 February 1991, *Delimitis v Henninger Bräu*, C-234/89, ECLI:EU:C:1991:91, paragraph 53.

<sup>(26)</sup> Judgment of the Court of Justice of 11 September 2014, *Commission v Germany*, C-527/12, ECLI:EU:C:2014:2193, paragraph 56; Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 41.

<sup>(27)</sup> Judgment of the Court of Justice of 21 September 1983, *Deutsche Milchkontor GmbH*, C-205/82, ECLI:EU:C:1983:233, paragraphs 22 to 23; Judgment of the Court of Justice of 13 June 2002, *Netherlands v Commission*, C-382/99, ECLI:EU:C:2002:363, paragraph 90; Judgment of the Court of Justice of 11 September 2014, *Commission v Germany*, C-527/12, ECLI:EU:C:2014:2193, paragraphs 39 to 42; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 72; Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraphs 40 to 41; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 135.

<sup>(28)</sup> Compliance with the principle of effectiveness must be addressed by analysing the particular features of that provision and its role in the relevant procedure. In that sense, see Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraph 40; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraphs 138 to 140.

<sup>(29)</sup> The compliance of applicable domestic procedural rules with the principles of equivalence and effectiveness can, however, relate to any other aspects of the national legislation, including, for instance, the level of costs associated with the private enforcement of State aid before national courts.

### 2.2.1. Legal standing

- (21) In application of the principle of procedural autonomy, Member States apply their national rules on legal standing to national litigation concerning State aid, provided that they respect the principles of equivalence and effectiveness.
- (22) Pursuant to the principle of effectiveness, national rules on individuals' legal standing and interest in bringing proceedings should not undermine their right to effective judicial protection of the rights conferred on them by Union law <sup>(30)</sup>.
- (23) The Enforcement Study showed that national courts rule mostly on cases brought by competitors of the aid beneficiary, which are directly affected by the distortion of competition arising from the implementation of the unlawful aid <sup>(31)</sup>.
- (24) However, when applying the national rules on standing, national courts have to take into account their duty to protect the interest of any parties having a sufficient legal interest in initiating proceedings ('third parties'), irrespective of whether they have been directly affected by the distortion of competition arising from the unlawful implementation of the aid measure.
- (25) National courts have to consider further elements when assessing third parties' legal standing in cases concerning State aid granted through fiscal measures. Third party taxpayers may be regarded as having an interest in bringing an action to obtain the refund of the amount levied in breach of the standstill obligation only where the tax or levy to which they are subject forms part of the financing of the unlawful State aid <sup>(32)</sup>. Their legal standing does not rely on the existence of a competitive relationship with the aid beneficiary <sup>(33)</sup>.
- (26) Conversely, third party taxpayers cannot rely on the unlawfulness of an aid measure exempting from taxation certain undertakings or sectors to avoid payment of that tax or levy or to obtain its reimbursement, unless the tax revenue is reserved exclusively for funding the unlawful State aid as indicated in paragraph (25). This is also the case where they operate in competition with the beneficiaries <sup>(34)</sup>. Such a solution would result in increasing the anticompetitive effects of the State aid as it would enlarge the number of undertakings benefitting from a tax exemption constituting unlawful State aid <sup>(35)</sup>.
- (27) Finally, the requirement for national court to ensure effective judicial protection can go beyond the strict enforcement of Article 108(3) TFEU. In light of Article 47 of the Charter of Fundamental Rights of the European Union, individuals and organisations with no standing to request the annulment of a State aid decision under

<sup>(30)</sup> Judgment of the Court of Justice of 13 January 2005, *Streekgewest*, C-174/02, ECLI:EU:C:2005:10, paragraph 18.

<sup>(31)</sup> For example, in Romania, any person who is affected by an unlawful State aid measure has legal standing in court. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 404. Also, in Latvia, legal standing is directly based on Article 108(3) TFEU and thus national courts may rely on the definition of 'interested party' of the Procedural Regulation to determine whether a person has legal standing in a case. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 300.

<sup>(32)</sup> Reference is made, for instance, to cases where the unlawful aid is financed by a levy to which the plaintiff is subject. The position is, however, different where the dispute concerns not an application to be exempted from the contested tax, but the legality of the rules relating to that tax. See in that sense Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 25 and Judgment of the Court of Justice of 26 April 2018, *ANGED*, C-233/16, ECLI:EU:C:2018:280, paragraph 26.

<sup>(33)</sup> Judgment of the Court of Justice of 13 January 2005, *Streekgewest*, C-174/02, ECLI:EU:C:2005:10, paragraph 19.

<sup>(34)</sup> Judgment of the Court of Justice of 10 November 2016, *DTS Distribuidora de Televisión Digital v Commission*, C-449/14 P, ECLI:EU:C:2016:848, paragraphs 81 to 82; Judgment of the Court of Justice of 21 December 2016, *Commission v Aer Lingus*, C-164/15 P, ECLI:EU:C:2016:990, paragraph 121; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraphs 24 to 28.

<sup>(35)</sup> Judgment of the Court of Justice of 15 June 2006, *Air Liquide Industries Belgium*, C-393/04, ECLI:EU:C:2006:403, paragraph 45.

Article 263 TFEU should be given the opportunity to challenge the aid or measures implementing the aid before national courts and trigger a reference under Article 267 TFEU to the Court of Justice for a preliminary ruling on the interpretation or validity of the Commission decision authorising that aid<sup>(36)</sup>. In that situation, not only economic interests, but also other interests of individuals and organisations can be relevant to establish their standing in proceedings relating to the national measures implementing the aid, depending on the measures and national procedures in question<sup>(37)</sup>.

### 2.2.2. Jurisdiction

- (28) The principle of procedural autonomy implies that it is for the national legal system of each Member State to designate the courts that have jurisdiction in proceedings concerning the granting of unlawful aid. It also implies that Member States determine the detailed procedural rules governing these legal actions, provided that the principles of equivalence and effectiveness are complied with<sup>(38)</sup>.
- (29) In the absence of specific rules under Union law, the structure of the Member States' judicial systems varies widely. While a few Member States have set up specialised courts for State aid matters, others have assigned exclusive jurisdiction to chambers of existing courts or adopted procedural rules clarifying the courts' jurisdiction in public and private enforcement cases<sup>(39)</sup>. In the majority of the Member States, civil and administrative courts are competent in the application of State aid rules<sup>(40)</sup>.

### 2.2.3. The principle of *res judicata*

- (30) The principle of *res judicata* states that judgements that have become definitive cannot be called into question anymore. This is the case where all rights of appeal have been exhausted or where the time limits to exercise those rights have expired. The principle of *res judicata* aims to guarantee the stability of law and legal relations, as well as the sound administration of justice, and it is enshrined both in the legal order of the Union and in national legal systems<sup>(41)</sup>. According to case-law, in the absence of EU legislation in this area, the rules implementing the principle of *res judicata* are a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States. However, such procedural rules must abide by the principles of equivalence and effectiveness<sup>(42)</sup>.

<sup>(36)</sup> See, to this effect, order of the Court of Justice of 10 October 2017, *Greenpeace energy v Commission*, C-640/16 P, ECLI:EU:C:2017:752, paragraphs 61 to 63.

<sup>(37)</sup> This may be the case, for instance, for environmental protection. See, to that effect, Judgment of the Court of Justice of 22 September 2020, *Austria v Commission*, C-594/18, ECLI:EU:C:2020:742, paragraph 100, in respect of aid approved under Article 107(3)(c) TFEU in the nuclear sector. See also paragraphs 38 to 42 of Commission Notice on access to justice in environmental matters (OJ C 275, 18.8.2017, p. 1) with regard to recognition of the standing of environmental organisations promoting environmental protection in the context of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

<sup>(38)</sup> Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 72.

<sup>(39)</sup> For example, Ireland has attributed exclusive jurisdiction to the Competition List of the High Court to hear competition law disputes, including State aid cases. Also, in Italy, the administrative courts of the country have been attributed nearly exclusive competence to hear cases concerning public and private enforcement of State aid rules from 19 January 2013. Civil courts have kept their competence regarding certain types of proceedings and actions. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, pp. 253 and 263 to 264. See, also, 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', pp. 103 to 104.

<sup>(40)</sup> In particular, in most Member States, administrative courts are competent when the plaintiff challenges an act of the public authority, such as the order implementing the recovery or awarding the aid, while civil courts are competent for issues related to the recovery of State aid in the context of insolvency proceedings or to the award of damages. See 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 64.

<sup>(41)</sup> Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraph 38.

<sup>(42)</sup> Judgment of the Court of Justice of 3 September 2009, *Fallimento Olimpclub*, C-2/08, EU:C:2009:506, paragraph 24. Judgment of the Court of Justice of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 54; Judgment of the Court of Justice of 4 May 2020, *Telecom Italia*, C-34/19; ECLI:EU:C:2020:148, paragraph 58.



- (31) Under the principle of primacy of Union law <sup>(43)</sup>, national courts are under a duty to give full effect to the provisions of Union law, including, if needed, by refusing on their own motion to apply any conflicting provision of national legislation. This also applies to national rules enshrining the principle of *res judicata* <sup>(44)</sup>.
- (32) The case-law of the Union Courts has limited the force of the principle of *res judicata* in the field of State aid. The principle of the primacy of Union law prevents the application of the principle of *res judicata* from limiting the exclusive competence conferred on the Commission by the TFEU to assess State aid compatibility <sup>(45)</sup>. Further, the circumstance that a national court has ruled out the existence of State aid in relation to a measure cannot prevent the Commission from finding later that the measure at stake constitutes unlawful and incompatible State aid <sup>(46)</sup>. This holds even in case of a judgment by a national court adjudicating at last instance <sup>(47)</sup>. This applies also where national rules on *res judicata* extend to pleas in law that could have been, but were not, invoked in court proceedings <sup>(48)</sup>.

### 3. THE ROLE OF THE COMMISSION

- (33) The aim of the system of prior control established by Article 108(3) TFEU is to ensure that only compatible aid can be implemented <sup>(49)</sup>. In order to achieve that aim, the implementation of planned aid that is not block exempted is to be deferred until the Commission adopts a decision on its compatibility with the internal market <sup>(50)</sup>.

#### 3.1. The exclusive competence of the Commission

- (34) The Commission generally exercises its competence to assess the compatibility of an aid measure in two steps. First, the Commission assesses whether the measure qualifies as State aid under Article 107(1) TFEU <sup>(51)</sup>; second, it examines whether the measure is compatible with the internal market. The first step, consisting of the assessment of the existence of aid, is a competence exercised by both the Commission and national courts, as the latter may have to establish if a measure is subject to the standstill obligation <sup>(52)</sup> (see Sections 4.2.1 and 4.2.2). The second step, consisting of the compatibility assessment, falls within the Commission's exclusive responsibility. The compatibility assessment must be included in a decision <sup>(53)</sup>, which is subject to review by the Union Courts <sup>(54)</sup>.

<sup>(43)</sup> Judgment of the Court of Justice of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, C-26/62, ECLI:EU:C:1963:1; Judgment of the Court of Justice of 15 July 1964, *Costa v E.N.E.L.*, C-6/64, ECLI:EU:C:1964:66; Judgment of the Court of Justice of 9 March 1978, *Amministrazione delle finanze dello Stato v Simmenthal*, C-106/77, ECLI:EU:C:1978:49.

<sup>(44)</sup> Judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, ECLI:EU:C:2007:434, paragraphs 60 and 61.

<sup>(45)</sup> Judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, ECLI:EU:C:2007:434, paragraph 61 to 63; Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraph 44; Judgment of the Court of Justice of 4 March 2020, *Buonotourist v Commission*, C-586/18 P, ECLI:EU:C:2020:152, paragraphs 92 to 96; Judgment of the Court of Justice of 4 March 2020, *CSTP Azienda della Mobilità v Commission*, C-587/18 P, ECLI:EU:C:2020:150, paragraphs 92 to 96; Judgment of the Court of Justice of 3 September 2009, *Fallimento Olimpiclub*, C-2/08, EU:C:2009:506, paragraphs 22-25.

<sup>(46)</sup> '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', Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraph 45.

<sup>(47)</sup> Judgment of the Court of Justice of 4 March 2020, *Buonotourist v Commission*, C-586/18 P, ECLI:EU:C:2020:152, paragraphs 92 to 96.

<sup>(48)</sup> Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraphs 30 and 42 to 43.

<sup>(49)</sup> Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 19.

<sup>(50)</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraphs 25 to 26; Judgment of the Court of Justice of 18 May 2017, *Fondul Proprietatea*, C-150/16, ECLI:EU:C:2017:388, paragraph 40; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 84.

<sup>(51)</sup> Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1).

<sup>(52)</sup> Judgment of the Court of Justice of 4 March 2020, *Buonotourist v Commission*, C-586/18 P, ECLI:EU:C:2020:152, paragraph 90.

<sup>(53)</sup> See Articles 4 and 9 of the Procedural Regulation.

<sup>(54)</sup> Judgment of the Court of Justice of 19 July 2016, *Kotnik and Others*, C-526/14, ECLI:EU:C:2016:570, paragraph 37.

- (35) The Commission can conclude on a measure's compatibility with the internal market either following a preliminary examination (where it has no doubts as to the measure's compatibility with the internal market) <sup>(53)</sup> or following a formal investigation (where, in the context of the preliminary examination it had doubts as to the measure's compatibility with the internal market) <sup>(56)</sup>. When it initiates a formal investigation, the Commission adopts a decision in which it sets out its preliminary assessment as to the aid character of the measure and its doubts as to the measure's compatibility with the internal market ('opening decision') <sup>(57)</sup>.
- (36) The Commission's exclusive power to assess State aid compatibility can limit national courts in the exercise of their competence of applying Articles 107(1) and 108(3) TFEU (see Section 4.1) <sup>(58)</sup>. This is true of opening decisions, which, pending the assessment of the measure's compatibility, have certain legal consequences on the proceedings before national courts (see Section 4.1.3)
- (37) Prior final Commission decisions are binding on national courts, and national courts must follow the Commission's assessment on the existence of aid <sup>(59)</sup>. Conversely, if a national court rules prior to any Commission decision, this ruling, even if having the force of *res judicata*, cannot prevent the Commission from exercising at some point in time the exclusive competence conferred on it by the TFEU (see Section 2.2.3) <sup>(60)</sup>.

### 3.2. The Commission's powers to enforce State aid rules

- (38) As a general rule, in order to impose remedies for the violation of State aid rules, when it concludes that the measure examined constitutes unlawful and incompatible State aid, the Commission needs to adopt a final decision which concludes the formal investigation and orders the recovery of this aid ('recovery decision') <sup>(61)</sup>.
- (39) By adopting rules of procedure in the field of State aid, the Commission has codified its enforcement powers <sup>(62)</sup>. Pursuant to Article 16 of the Procedural Regulation, the Commission must order the recovery of unlawful and incompatible aid by adopting a decision. When it establishes in a decision that an aid measure is unlawful and incompatible with the internal market, the Commission has no discretion and must order its recovery <sup>(63)</sup>, unless that would be contrary to a general principle of Union law <sup>(64)</sup>. In addition, the Commission's powers to order recovery are subject to a limitation period of 10 years from the day on which the unlawful aid was awarded to the beneficiary <sup>(65)</sup>.

<sup>(53)</sup> Decision not to raise objection, Procedural Regulation, Article 4(3).

<sup>(56)</sup> See the notions of 'positive decision' and 'negative decision' respectively in Article 9(3) and (5) of the Procedural Regulation.

<sup>(57)</sup> See Article 4(3) and (4) of the Procedural Regulation.

<sup>(58)</sup> See Judgment of the Court of Justice of 4 March 2020, *Buonotourist v Commission*, C-586/18 P, ECLI:EU:C:2020:152, paragraphs 93 to 94 'the exercise of such a power implies that the Commission may examine, pursuant to Article 108 TFEU, whether a measure constitutes State aid which should have been notified to it, in accordance with paragraph 3 of that article, in a situation where the authorities of a Member State have taken the view that that measure did not satisfy the conditions laid down in Article 107(1) TFEU, including where those authorities have complied, in that regard, with the assessment of a national court. That conclusion cannot be invalidated by the fact that that court has adopted a decision having the force of *res judicata*. It should be emphasised that the rule of exclusive competence of the Commission is necessary in the internal legal order as a consequence of the principle of the primacy of Union law'.

<sup>(59)</sup> Judgment of the Court of Justice of 15 September 2016, *PGE*, C-574/14, ECLI:EU:C:2016:686, paragraphs 33 and 36 to 37.

<sup>(60)</sup> Judgment of the Court of Justice of 4 March 2020, *Buonotourist v Commission*, C-586/18 P, ECLI:EU:C:2020:152, paragraphs 92 to 96; Judgment of the Court of Justice of 4 March 2020, *CSTP Azienda della Mobilità v Commission*, C-587/18 P, ECLI:EU:C:2020:150, paragraphs 92 to 96.

<sup>(61)</sup> Judgment of the Court of Justice of 14 February 1990, *France v Commission* ('*Boussac*'), C-301/87, ECLI:EU:C:1990:67, paragraphs 9 to 22. This does not preclude the possibility for the Commission to issue a recovery injunction before it has completed the compatibility assessment, in specific cases provided for under Article 13(2) of the Procedural Regulation.

<sup>(62)</sup> Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 66; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 110. In both instances, the Court of Justice was referring to the Procedural Regulation which, in so far as it contains rules of a procedural nature which apply to all administrative procedures in the matter of State aid pending before the Commission, it codifies and reinforces the Commission's practice in reviewing State aid.

<sup>(63)</sup> Judgment of the Court of Justice of 7 March 2002, *Italy v Commission*, C-310/99, ECLI:EU:C:2002:143, paragraph 99.

<sup>(64)</sup> See Article 16(1) of the Procedural Regulation.

<sup>(65)</sup> See Article 17(1) of the Procedural Regulation.

- (40) In some instances, pursuant to Article 13 of the Procedural Regulation, the Commission could, at its discretion, adopt provisional measures while it completes the compatibility assessment. In particular, the Commission may issue suspension or recovery injunctions, provided that a number of conditions are fulfilled <sup>(66)</sup>. These measures seek to limit the damage associated with the implementation of the aid in breach of the notification and standstill obligations <sup>(67)</sup>.

#### 4. THE ROLE OF NATIONAL COURTS

- (41) While the Commission must examine the compatibility of an aid measure with the internal market, even where it has established its implementation in breach of Article 108(3) TFEU, the primary role of national courts is to preserve the rights of individuals faced with that breach <sup>(68)</sup>.
- (42) National courts have the responsibility to offer effective legal protection to third parties <sup>(69)</sup>. Their contribution to the State aid control system is especially necessary in cases where unlawful aid is granted, in the absence of a final Commission decision on the same measure or until the adoption of such decision, as well as in cases where a possibly compatible aid has been granted in violation of the standstill obligation <sup>(70)</sup>.

##### 4.1. Delimitation of the competences of national courts in the application of State aid rules

- (43) National courts have the power to interpret and apply Articles 107(1) and 108(3) TFEU. In particular, in the absence of a Commission decision regarding the same measure <sup>(71)</sup>, national courts are bound only by the objective notion of State aid when exercising their competence to assess the existence of State aid <sup>(72)</sup>.
- (44) The Commission also assesses the existence of State aid, which is normally a first step before assessing its compatibility. Therefore, any proceedings before the Commission, prior or subsequent to those before national courts, could affect the latter <sup>(73)</sup>, as explained in Sections 4.1.1 to 4.1.3.

<sup>(66)</sup> Judgment of the Court of Justice of 14 February 1990, *France v Commission*, C-301/87, ECLI:EU:C:1990:67, paragraphs 19 to 20; Judgment of the Court of Justice of 21 March 1991, *Italy v Commission*, C-303/88, ECLI:EU:C:1991:136, paragraph 46. If the Member State fails to comply with a suspension or a recovery injunction, the Commission is entitled, while carrying out the examination on the substance of the matter, to bring the matter directly before the Court of Justice by applying for a declaration that such failure constitutes an infringement of the TFEU, pursuant to Article 14 of the Procedural Regulation.

<sup>(67)</sup> See Article 13(1) and (2) of the Procedural Regulation.

<sup>(68)</sup> Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraph 38; Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraphs 11 to 12.

<sup>(69)</sup> Judgment of the Court of Justice of 11 December 1973, *Lorenz GmbH v Bundesrepublik Deutschland and Others*, C-120/73, ECLI:EU:C:1973:152, paragraph 8; Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraph 11; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 39.

<sup>(70)</sup> For the role of national courts in the public enforcement of State aid, see the Recovery Notice (OJ C 247, 23.7.2019, p. 1).

<sup>(71)</sup> See also Judgement of the General Court of 20 June 2019, *A&O hostel and hotel Berlin v Commission*, T-578/17, ECLI:EU:T:2019:437, paragraph 72.

<sup>(72)</sup> To that effect, see Judgment of the Court of 22 March 1977, *Steineke e Weilig*, 78/76, ECLI:EU:C:1977:52, paragraph 14.

<sup>(73)</sup> Judgment of the Court of Justice of 4 March 2020, *CSTP Azienda della Mobilità v Commission*, C-587/18 P, ECLI:EU:C:2020:150, paragraphs 92 to 93; Judgment of the Court of Justice of 4 March 2020, *Buonotourist v Commission*, C-586/18 P, ECLI:EU:C:2020:152, paragraph 96.

#### 4.1.1. Following a decision by the Commission

(45) National courts must refrain from taking decisions which conflict with a decision of the Commission <sup>(74)</sup> and must therefore abide by the Commission's assessment on the existence of State aid. National courts also have no jurisdiction to declare Commission decisions invalid <sup>(75)</sup>. The Union Courts alone have that jurisdiction pursuant to Article 263 TFEU <sup>(76)</sup>.

(46) If a national court has doubts about the interpretation or the validity of a Commission decision, that court may seek clarification from the Commission (see Section 5.1) or, depending on the circumstances, may or must <sup>(77)</sup> refer a question to the Court of Justice for a preliminary ruling, in accordance with Article 267 TFEU <sup>(78)</sup>.

##### 4.1.1.1. Following a Commission decision declaring the aid compatible

(47) A final Commission decision recognising the compatibility of unlawful aid after it has been granted does not have the effect of regularising *ex post facto* the implementing measures which had been adopted in breach of the standstill obligation provided for by the TFEU <sup>(79)</sup>.

(48) In this context, national courts must offer individuals the certain prospect that all appropriate conclusions will be drawn <sup>(80)</sup> from the infringement of the standstill obligation, including by ordering the recovery of the interest in respect of the period of unlawfulness, in accordance with their national law <sup>(81)</sup>.

<sup>(74)</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 41.

<sup>(75)</sup> Judgment of the Court of Justice of 22 October 1987, *Foto-Frost v Hauptzollamt Lübeck-Ost*, C-314/85, ECLI:EU:C:1987:452, paragraph 20.

<sup>(76)</sup> Judgment of the Court of Justice of 21 February 1991, *Zuckerfabrik Sünderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, C-143/88 and C-92/89, ECLI:EU:C:1991:65, paragraph 23; Judgment of the Court of Justice of 9 November 1995, *Atlanta Fruchthandelsgesellschaft and Others (I) v Bundesamt für Ernährung und Forstwirtschaft*, C-465/93, ECLI:EU:C:1995:369, paragraph 51; Judgment of the Court of Justice of 18 July 2007, *Luchini*, C-119/05, ECLI:EU:C:2007:434, paragraph 53.

<sup>(77)</sup> Based on Article 267 TFEU, a national court whose decision is not subject to further judicial review is under an obligation to initiate a preliminary reference to the Court of Justice in certain circumstances. Where the interpretation of Union law may be clearly deduced from existing case-law or where it leaves no scope for reasonable doubt, a court against whose decisions there is no judicial remedy under national law is not required to refer the case for a preliminary ruling by the Court of Justice, although it is free to do so. See Judgment of the Court of Justice of 6 October 1982, *CILFIT v Ministero della Sanità*, C-283/81, ECLI:EU:C:1982:335, paragraphs 14 to 20; Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de la Rioja*, C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 42 and 43; Judgment of the Court of Justice of 28 July 2016, *Association France Nature Environnement*, C-379/15, ECLI:EU:C:2016:603, paragraphs 47 to 50; Judgment of the Court of Justice of 15 September 2016, *PGE*, C-574/14, ECLI:EU:C:2016:686, paragraph 40; Judgment of the Court of Justice of 4 October 2018, *Commission v France (Advance Payment)*, C-416/17, ECLI:EU:C:2018:811, paragraphs 108 et seq.

<sup>(78)</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 50 to 51; Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 44.

<sup>(79)</sup> Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraph 40; Judgment of the Court of Justice of 19 March 2015, *OTP Bank*, C-672/13, ECLI:EU:C:2015:185, paragraph 76; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 59.

<sup>(80)</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 30; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 89; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 23; Judgment of the Court of Justice of 13 December 2018, *Rittinger and Others*, C-492/17, ECLI:EU:C:2018:1019, paragraph 42.

<sup>(81)</sup> Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraphs 52 to 55. Within the framework of its domestic law, the national court may, if appropriate, also order the recovery of the unlawful aid, without prejudice to the Member State's right to reimplement it subsequently. It may also be required to uphold claims for compensation for damage caused by reason of the unlawful nature of the aid (*Ibid.*, paragraph 53).

- (49) It follows that, where a third party seeks before a national court the elimination of advantages linked to the premature implementation of the aid, the court should uphold its action even if the Commission has already declared the aid in question compatible. Any other interpretation would have the effect of allowing the Member States to disregard the provisions of the TFEU and thus deprive them of their effectiveness<sup>(82)</sup>.

#### 4.1.1.2. Following an opening decision by the Commission

- (50) The situation is different when the Commission has merely initiated, pursuant to Article 108(2) TFEU, an investigation procedure regarding an aid measure brought before a national court. In the opening decision, the Commission, in principle, expresses doubts as to whether an aid measure is compatible with the internal market. While these doubts generally concern the compatibility of the aid, the assessment of the existence of aid is preliminary in nature and is drawn from an initial examination of the measure in question<sup>(83)</sup>.
- (51) In accordance with Article 4(3) TEU, national courts must take into account the legal situation resulting from the ongoing procedures before the Commission, even if it is provisional.
- (52) This means that, while the investigation procedure is ongoing, national courts must draw legal consequences from the opening decision itself. Following an opening decision, a national court cannot hold that this measure does not constitute aid within the meaning of Article 107(1) TFEU, otherwise the effectiveness of Article 108(3) TFEU would be compromised<sup>(84)</sup>.
- (53) To that end, it is the responsibility of national courts to take all appropriate action to address the potential breach of the standstill obligation. National courts may decide to suspend the implementation of the measure in question and order the recovery of payments already made. They may also decide to order other provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's opening decision<sup>(85)</sup>.
- (54) In addition, the national courts cannot simply stay their proceedings until the Commission has reached a final decision<sup>(86)</sup>, as this would amount to maintaining the advantage on the market in spite of the potential breach of the standstill obligation.
- (55) The same constraints may apply to national courts when a final Commission decision<sup>(87)</sup> has been annulled by the Union Courts, either by a judgment which may be appealed or by a final judgement, as the Commission is not required to recommence the procedure from the start but can resume from the point at which the illegality occurred<sup>(88)</sup>. The opening decision may therefore stand until the Commission takes a new final decision. In those circumstances, national courts are therefore bound to ensure compliance with the stand-still obligation resulting from the opening of the formal procedure, for instance preventing the recovered aid from being paid back.

<sup>(82)</sup> See, to that effect, Judgment of the Court of Justice of 19 December 2019, *Arriva Italia and Others*, C-385/18, ECLI:EU:C:2019:1121, paragraph 85.

<sup>(83)</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraphs 37 to 40.

<sup>(84)</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 38.

<sup>(85)</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraphs 41 to 43.

<sup>(86)</sup> Judgment of the Court of Justice of 11 March 2010, *CELF et ministre de la Culture et de la Communication*, C-1/09, ECLI:EU:C:2010:136, paragraphs 31 et seq.; Order of the Court of Justice of 4 April 2014, *Flughafen Lübeck*, C-27/13, ECLI:EU:C:2014:240, paragraph 30.

<sup>(87)</sup> I.e. a decision closing the formal investigation based on Article 9 of the Procedural Regulation.

<sup>(88)</sup> See, to that effect, Judgment of the Court of Justice of 12 November 1998, *Spain v Commission*, C-415/96, EU:C:1998:533, paragraph 31; Judgment of the Court of Justice of 3 October 2000, *Industrie des poudres sphériques v Council*, C-458/98 P, EU:C:2000:531, paragraph 82; Judgment of the Court of Justice of 9 July 2008, *Alitalia v Commission*, T-301/01, EU:T:2008:262, paragraphs 99 and 142.

#### 4.2. The competences of national courts

- (56) As stated in paragraphs (11) to (13), national courts must establish whether State aid has been granted in accordance with Article 108(3) TFEU within the limits set by the Commission's exclusive competence to assess the aid's compatibility and any pre-existing Commission decision on the same measure.
- (57) National courts carry out their assessment in two steps: first, they assess the nature of the measure to establish whether it qualifies as State aid under Article 107(1) TFEU; second, if the national courts find that the measure constitutes State aid, they have to conclude whether the measure is subject to the standstill obligation. Where national courts find a breach of the standstill obligation, they must adopt appropriate remedies to safeguard the rights of individuals affected by such breach.

##### 4.2.1. Assessing the existence of aid

- (58) The Union Courts have confirmed that, as is the case for the Commission, national courts have jurisdiction to interpret the notion of State aid <sup>(89)</sup>.
- (59) To ascertain the existence of State aid, a series of complex issues often needs to be assessed (see paragraph (14)). In its notice on the notion of State aid, as referred to in Article 107(1) TFEU <sup>(90)</sup>, the Commission issued detailed guidance that can provide assistance to national courts.
- (60) Where doubts arise as to the existence of State aid elements, national courts may ask the Commission to provide its opinion (see Section 5.1.1.2). National courts also have the possibility or the obligation to refer the matter to the Court of Justice for a preliminary ruling under Article 267 TFEU.

##### 4.2.2. Assessing whether there is a breach of the standstill obligation

- (61) In the context of assessing whether an aid measure is subject to the standstill obligation, national courts must consider whether the measure falls under one of the exceptions from the notification obligation (see Section 1.2). In particular, national courts evaluate whether the measure concerned fulfils the criteria set out in a block exemption regulation or constitutes existing aid.
- (62) If an aid measure fulfils all the conditions provided in a block exemption regulation, it is exempted from prior notification to the Commission and it is deemed to be compatible with the internal market.
- (63) Existing aid is not subject to the notification obligation of Member States under Article 108(3) TFEU, but is subject to a different system of review by the Commission under Article 108(1) TFEU. However, alterations to existing aid within the meaning of Article 1(c) of the Procedural Regulation do not fall within the notion of existing aid.

##### 4.2.2.1. Applying the conditions of block exemption regulations

- (64) Member States may rely on a measure being exempted from the notification requirement if it fulfils the general and specific conditions provided for in block exemption regulations. However, if a Member State implements an aid measure that does not meet all conditions of the applicable block exemption without prior notification to the Commission, the implementation of that aid is unlawful.

<sup>(89)</sup> Judgment of the Court of Justice of 22 March 1977, *Steinike & Weinlig*, C-78/76, ECLI:EU:C:1977:52, paragraph 14; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 49; Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraph 10; Judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, ECLI:EU:C:2007:434, paragraph 50; Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 39.

<sup>(90)</sup> OJ C 262, 19.7.2016, p. 1.

- (65) The notification and standstill obligations stemming from the TFEU are binding not merely on national courts but also on all administrative bodies of the Member States <sup>(91)</sup>.
- (66) When national courts assess if a State aid measure has been lawfully implemented, they must verify whether the conditions of a block exemption regulation were complied with to establish that the measure was exempt from the notification obligation. The Court of Justice has defined the scope of the competences of national courts when they establish whether the conditions of the General Block Exemption Regulation were correctly applied <sup>(92)</sup>, that is to say, the extent to which national courts can interpret its provisions.
- (67) The adoption of block exemption regulations does not intend to transfer to Member States the assessment of State aid compatibility with the internal market, which remains the exclusive competence of the Commission <sup>(93)</sup>. It is, however, the duty of national courts to ascertain whether national authorities have granted aid that fully complies with the general and specific conditions of the applicable block exemption regulation, strictly interpreted <sup>(94)</sup>.
- (68) Where aid has been implemented under a block exemption regulation without satisfying all applicable conditions, the recipient of this aid cannot have at that time a legitimate expectation that the granting of the aid was lawful <sup>(95)</sup>. This is because national authorities are not vested with the power to adopt final decisions finding that there is no obligation to notify the aid <sup>(96)</sup>.

#### 4.2.2.2. Existing aid

- (69) As stated in paragraph (63), contrary to new aid, existing aid is not subject to the notification obligation. It is exclusively for the Commission to assess whether an existing aid is still compatible with the internal market and propose appropriate measures where it considers that a scheme is no longer compatible. When implementing State aid rules, the role of the national courts is limited to assessing whether an aid measure constitutes existing aid within the meaning of Article 108(1) TFEU. If the measure is existing aid, there is no question of breach of Article 108(3) TFEU to be remedied by the national court.
- (70) The Treaties do not provide any guidance on the classification of an aid measure as existing aid. It is in the provisions of the Procedural Regulation where the circumstances under which aid is to be considered as existing are defined <sup>(97)</sup>. However, the Procedural Regulation does not contain any provision relating to the powers and obligations of national courts, which continue to be governed by the provisions of the TFEU, as interpreted by the Court of Justice <sup>(98)</sup>.

<sup>(91)</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraphs 90 to 92.

<sup>(92)</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 101; Judgment of the Court of Justice of 29 July 2019, *BMW v Commission*, C-654/17 P, ECLI:EU:C:2019:634, paragraph 151.

<sup>(93)</sup> Judgment of the Court of Justice of 29 July 2019, *BMW v Commission*, C-654/17 P, ECLI:EU:C:2019:634, paragraphs 132 and 133; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 67.

<sup>(94)</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 60. In this respect, the Court has clarified that the criteria for the application of the exemption must be clear and easily enforceable and their verification by national courts should not necessitate complex economic assessments on a case-by-case basis (*Ibid.* paragraphs 61 and 68).

<sup>(95)</sup> Judgment of the Court of Justice of 15 December 2005, *Unicredito Italiano*, C-148/04, ECLI:EU:C:2005:774, paragraph 104; Judgment of the Court of Justice of 19 March 2015, *OTP Bank*, C-672/13, ECLI:EU:C:2015:185, paragraph 77; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 104.

<sup>(96)</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 101; Judgment of the Court of Justice of 29 July 2019, *BMW v Commission*, C-654/17 P, ECLI:EU:C:2019:634, paragraph 151.

<sup>(97)</sup> Procedural Regulation, Articles 1(b) and 17(3).

<sup>(98)</sup> Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 66; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 110. For instance, Article 17(1) of the Procedural Regulation, which establishes that the powers of the Commission to recover aid are subject to a limitation period of 10 years, and paragraph 3 of that Article, which provides that 'any aid with regard to which the limitation period has expired shall be deemed to be existing aid', do not lay down a general principle that is applicable to national courts (see paragraph (82) below).

#### 4.2.3. Safeguarding the rights of individuals faced with the breach of the standstill obligation

(71) To safeguard the rights of individuals against the unlawful implementation of State aid, national courts can adopt different types of remedies, depending on the situation. For instance, they may decide to suspend or terminate the implementation of the measure (Section 4.2.3.1), order the recovery of the sums already disbursed (Section 4.2.3.2) or adopt different provisional measures to otherwise safeguard the interests of the parties concerned (Section 4.2.3.3) <sup>(99)</sup>. Finally, they may be asked to rule on compensation for damages suffered by third parties as a consequence of the unlawful implementation of the State aid (Section 4.2.3.4). In any event, national courts must offer to individuals the certainty that all appropriate action will be taken, in accordance with their national law, to address the consequences of the infringement of Article 108(3) TFEU <sup>(100)</sup>.

##### 4.2.3.1 Suspension or termination of the implementation of the measure

(72) Where a State authority has not yet implemented a State aid measure granted in violation of Article 108(3) TFEU, national courts must prevent that implementation, either by suspending it or by terminating it. Such remedy might also be appropriate in cases where the State aid measure has entered into force, but the aid has not yet been disbursed (fully or partly), notwithstanding the need for additional remedies for the part of the aid that has already been paid.

(73) Union law does not impose any specific conclusion that the national courts must necessarily draw about the validity of the act granting the unlawful State aid. It solely requires that they take effective measures to prevent the disbursement of the unlawful aid to the beneficiary. However, there may be situations under national law where the unlawful implementation of the measure can be suspended by annulling the granting act <sup>(101)</sup>.

(74) Accordingly, national courts may declare the contract by which the aid is granted null and void, annul the decision of the Member State's authorities granting the aid, or suspend its implementation (for instance, in cases where the aid is granted in the form of access to a facility or service).

(75) When the aid is granted in instalments, national courts should order the suspension of future payments.

##### 4.2.3.2. Recovery

(76) When the unlawful aid has already been paid to the beneficiary, national courts must, in principle, and in the absence of a Commission decision declaring the aid compatible, order the full recovery of the unlawfully paid amount <sup>(102)</sup>. Removal of the aid by means of recovery is the logical consequence of its unlawfulness <sup>(103)</sup>.

<sup>(99)</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 43; Judgment of the Court of Justice of 21 December 2016, *Commission v Hanseshtadt Lübeck*, C-524/14 P, ECLI:EU:C:2016:971, paragraph 29.

<sup>(100)</sup> Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 23; Judgment of the Court of Justice of 19 December 2019, *Arriva Italia and Others*, C-385/18, ECLI:EU:C:2019:1121, paragraph 84.

<sup>(101)</sup> Judgment of the Court of Justice of 8 December 2011, *Residex Capital IV*, C-275/10, ECLI:EU:C:2011:814, paragraphs 44-47.

<sup>(102)</sup> Judgment of the Court of Justice of 21 July 2005, *Xunta de Galicia*, C-71/04, ECLI:EU:C:2005:493, paragraph 49; Judgment of the Court of Justice of 11 July 1996, *SFEL and Others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 40 and 68; Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraph 12; Judgment of the Court of Justice of 8 December 2011, *Residex Capital IV*, C-275/10, ECLI:EU:C:2011:814, paragraph 43.

<sup>(103)</sup> Judgment of the Court of Justice of 21 December 2016, *Commission v Aer Lingus*, C-164/15 P and C-165/15 P, ECLI:EU:C:2016:990, paragraph 116; Judgment of the Court of Justice of 19 March 2015, *OTP Bank*, C-672/13, ECLI:EU:C:2015:185, paragraph 70; Judgment of the Court of Justice of 8 December 2011, *Residex Capital IV*, C-275/10, ECLI:EU:C:2011:814, paragraph 33.



- (77) To restore the situation existing before the aid was granted, national courts must abolish completely the advantage unlawfully conferred on the beneficiary. Such advantage encompasses the aid (the 'aid principal') as well as the non-payment of the interest that the undertaking would have paid had it had to borrow the amount of the aid on the market during the period of the unlawfulness, which results in the improvement of its competitive position over that period ('illegality interest')<sup>(104)</sup>. Therefore, national courts must order the recovery of both the aid principal and the illegality interest.
- (78) If there are parallel procedures before a national court and before the Commission, and if the Commission declares the aid incompatible, the national court should draw the appropriate consequences from it, according to national rules governing the execution of recovery decisions<sup>(105)</sup>.
- (79) As indicated in paragraph (48), if the Commission declares the aid compatible, Union law only requires Member States to recover the illegality interest in respect of the period of unlawfulness<sup>(106)</sup>, which runs from the aid's payment until the declaration of its compatibility.
- (80) If a Commission decision declaring the measure compatible is annulled, this measure cannot be considered cleared by the Commission, and its implementation is considered unlawful<sup>(107)</sup>. In that case, the recipient is not entitled to invoke any legitimate expectation that the aid was lawful, given that an action for the annulment of the positive decision had been brought<sup>(108)</sup>.
- (81) For calculating the illegality interest, neither Article 16(2) of the Procedural Regulation nor Articles 9 and 11 of Commission Regulation (EC) No 794/2004<sup>(109)</sup> apply to the recovery of unlawful aid by a Member State in the absence of a Commission recovery decision. Therefore, in such cases, the authorities of the Member State concerned must calculate the illegality interest in accordance with the applicable rules of national law, provided that two conditions are fulfilled. First, these rules must respect the principles of equivalence and effectiveness (see Section 2.2); and, second, the illegality interest must be calculated, at the minimum, at a rate equivalent to that which would have been applied if the beneficiary had had to borrow the amount of the aid at issue on the market within that period<sup>(110)</sup>.
- (82) With regard to the prescription period applied to national courts' powers to order recovery, the Union Courts have ruled that the ten-year limitation period provided for by the Procedural Regulation applies solely to the Commission<sup>(111)</sup>. As long as national procedures provide for a longer prescription period, a national judge must order the recovery of aid granted in violation of the standstill obligation, even after the limitation period provided for the Commission has expired. National prescription periods shorter than 10 years also bind national courts, unless there is a Commission recovery decision<sup>(112)</sup>. Where the Commission adopts a recovery decision, Member States cannot justify their failure to implement that decision on the basis of requirements of national law, such as national prescription periods<sup>(113)</sup>.

<sup>(104)</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 132; Judgment of the Court of Justice of 8 December 2011, *Residex Capital IV*, C-275/10, ECLI:EU:C:2011:814, paragraph 39.

<sup>(105)</sup> In that sense, see the Recovery Notice (OJ C 247, 23.7.2019, p. 1).

<sup>(106)</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 134.

<sup>(107)</sup> Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraph 63.

<sup>(108)</sup> Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraph 68.

<sup>(109)</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

<sup>(110)</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 141.

<sup>(111)</sup> Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 61.

<sup>(112)</sup> Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraphs 71 to 75.

<sup>(113)</sup> Judgment of the Court of Justice of 20 March 1997, *Land Rheinland-Pfalz v Alcan Deutschland*, C-24/95, ECLI:EU:C:1997:163, paragraphs 34 to 37; Judgment of the Court of Justice of 29 March 2012, *Commission v Italy*, C-243/10, ECLI:EU:C:2012:182, paragraph 35; Judgment of the Court of Justice of 30 April 2020, *Nelson Antunes da Cunha*, C-627/18, ECLI:EU:C:2020:321, paragraph 60.

#### 4.2.3.3. Interim measures

- (83) As part of their obligations under Article 108(3) TFEU, national courts are required to take interim measures where this is appropriate to safeguard the rights of individuals and the direct effect of Article 108(3) TFEU <sup>(114)</sup>. National courts adopt these measures, which aim to eliminate the anti-competitive effects of the aid on a provisional basis <sup>(115)</sup>, in accordance with their national law, provided that the conditions of equivalence and effectiveness are fulfilled (see Section 2.2).
- (84) National courts may choose to take interim measures where presumably unlawful aid has already been paid <sup>(116)</sup> or is about to be paid. In the first case, national courts may order either the repayment of the aid with illegality interest or the provisional transfer of the aid, including interest for the period between the implementation of the aid and its transfer, on a blocked account. These options ensure that the advantage linked to the presumably unlawful aid does not remain further at the disposal of the beneficiary. Where there is a risk of imminent payment of the aid, the court may issue an interim order preventing the disbursement of the presumably unlawful aid until the substance of the matter is resolved <sup>(117)</sup>.
- (85) An ongoing Commission investigation does not release the national court from its obligation to protect rights of individuals under Article 108(3) <sup>(118)</sup>. The national court may therefore adopt appropriate interim measures as a way to address the consequences of a potential infringement of the standstill obligation.
- (86) National courts have an obligation to adopt interim measures if the following conditions are satisfied: (a) there is no doubt regarding the existence of State aid; (b) the aid is about to be, or has been, implemented; and (c) no exceptional circumstances have been found, which would make recovery inappropriate <sup>(119)</sup>.

#### 4.2.3.4. Action for damages

- (87) As part of their role under Article 108(3) TFEU, national courts may also be required to adjudicate on claims for compensation for damages caused to third parties by unlawful State aid. If successful, such claims provide the claimants with direct financial compensation for the loss suffered.
- (88) The Court of Justice has repeatedly held that affected third parties can bring such actions for compensation for damages before national courts, in accordance with national law <sup>(120)</sup>, which should comply with the principles of equivalence and effectiveness (see Section 2.2).

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<sup>(114)</sup> Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraph 12; Judgment of the Court of Justice of 21 December 2016, *Commission v Hansestadt Lübeck*, C-524/14 P, ECLI:EU:C:2016:971, paragraph 29; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 52; Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 46.

<sup>(115)</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 52; Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 46.

<sup>(116)</sup> An interesting French court order following a negative decision of the Commission was reported in the Enforcement Study: in order to compensate for the automatic suspensory effect of an appeal against the recovery order, the national court ordered the beneficiary to pay the sums due on a blocked account. In doing so, the court used a provision of French law by which provisional payment is possible in cases where the obligation to pay cannot be seriously called into question. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 156, Case Summary FR8: *Cour administrative d'appel de Bordeaux*, 10 December 2015.

<sup>(117)</sup> Judgment of the Court of Justice of 26 October 2016, *DEI and Commission v Alouminion tis Ellados*, C-590/14 P, ECLI:EU:C:2016:797, paragraph 101.

<sup>(118)</sup> National courts may also choose to take provisional measures while awaiting an opinion or information from the Commission, or a judgement from a higher national court or from the Union Courts.

<sup>(119)</sup> Judgment of the Court of Justice of 11 March 2010, *CELF et ministre de la Culture et de la Communication*, C-1/09, ECLI:EU:C:2010:136, paragraph 36; Order of the General Court of 3 March 2015, *Gemeente Nijmegen v Commission*, T-251/13, ECLI:EU:T:2015:142, paragraph 45.

<sup>(120)</sup> Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraph 55; Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 56; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 75; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 56.

- (89) Based on the *'Francovich'* <sup>(121)</sup> and *'Brasserie du Pêcheur'* <sup>(122)</sup> case-law of the Court of Justice <sup>(123)</sup>, Member States are required to compensate for loss and damage caused to individuals as a result of breaches of Union law for which the State is responsible <sup>(124)</sup>. Such liability exists where the following requirements are met: (a) the rule of law infringed is intended to confer rights on individuals; (b) the breach is sufficiently serious; and (c) there is a direct causal link between the breach of the Member State's obligation and the damage suffered by the injured parties <sup>(125)</sup>.
- (90) The first two requirements set out in paragraph (89) will generally be met in relation to violations of Article 108(3) TFEU. The Court of Justice has confirmed the existence of rights of individuals under this provision and clarified that the protection of these rights is the genuine role of national courts <sup>(126)</sup>.
- (91) Similarly, as Member State authorities are, in principle, under an obligation to notify State aid measures prior to their implementation, the infringement of Article 108(3) TFEU will in most cases be sufficient to establish the existence of a serious breach under the case-law of the Union Courts. In the presence of State aid, Member State authorities cannot normally argue that they were not aware of the standstill obligation, as there is sufficient case-law and Commission guidance on the application of Articles 107(1) and 108(3) TFEU. In case of doubt and for reasons of legal certainty, Member States can always notify the measure to the Commission prior to its implementation <sup>(127)</sup>.
- (92) The third requirement set out in paragraph (89), that the breach of Union law must have caused actual and certain financial damage to the claimant, can be met in various ways. The Enforcement Study pointed out that national courts have rarely awarded damages, specifying that the damage quantification and the establishment of the causal link between the harm and the unlawful aid represent major obstacles for claimants <sup>(128)</sup>.
- (93) Claimants will often argue that the aid directly caused a loss of profit. When confronted with such claims, national courts should take into account the following considerations:
- (a) by virtue of Union legal requirements of equivalence and effectiveness, national rules may not exclude a Member State's liability for loss of profit <sup>(129)</sup>. Should national law contain such an exclusion, the national court should leave that provision unapplied as regards damage claims for breach of Article 108(3) TFEU;

<sup>(121)</sup> Judgment of the Court of Justice of 19 November 1991, *Francovich and Bonifaci v Italy*, C-6/90 and C-9/90, ECLI:EU:C:1991:428, paragraphs 30 to 46.

<sup>(122)</sup> Judgment of the Court of Justice of 5 March 1996, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, C-46/93 and C-48/93, ECLI:EU:C:1991:428, paragraph 51.

<sup>(123)</sup> Judgment of the Court of Justice of 13 June 2006, *Traghetti del Mediterraneo*, C-173/03, ECLI:EU:C:2006:391, paragraph 41.

<sup>(124)</sup> Judgment of the Court of Justice of 19 November 1991, *Francovich and Bonifaci v Italy*, C-6/90 and C-9/90, ECLI:EU:C:1991:428, paragraphs 31 to 37; Judgment of the Court of Justice of 5 March 1996, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, C-46/93 and C-48/93, ECLI:EU:C:1991:428, paragraph 31.

<sup>(125)</sup> Judgment of the Court of Justice of 13 June 2006, *Traghetti del Mediterraneo*, C-173/03, ECLI:EU:C:2006:391, paragraph 45.

<sup>(126)</sup> Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraphs 12 to 14; Judgment of the Court of Justice of 21 October 2003, *van Calster and Cleeren*, C-261/01 and C-262/01, ECLI:EU:C:2003:571, paragraph 53; Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraph 38.

<sup>(127)</sup> In some cases, however, the Union Courts have taken the view that, in order to determine whether a mere infringement of Union law by a Member State constitutes a sufficiently serious breach, national courts must take account of several factors, such as the excusability of the relevant breach or the fact that the position taken by a Union institution may have contributed to that breach. In that sense, see Judgment of the Court of Justice of 25 January 2007, *Robins and Others*, C-278/05, ECLI:EU:C:2007:56, paragraph 71; Judgment of the Court of Justice of 4 July 2000, *Haim*, C-424/97, ECLI:EU:C:2000:357, paragraph 38; Judgment of the Court of Justice of 23 May 1996, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)*, C-5/94, ECLI:EU:C:1996:205, paragraph 28.

<sup>(128)</sup> In some cases, however, the national courts accepted the principle of responsibility of the State. In that sense, see Administrative Court of Appeal of Marseille, *CTC v Corsica Ferries France*, 12 February 2018; Rapport d'expertise, *CTC v Corsica Ferries France*, 28 February 2019, N/REF: 500060, Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 152.

<sup>(129)</sup> Judgment of the Court of Justice of 5 March 1996, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, C-46/93 and C-48/93, ECLI:EU:C:1991:428, paragraphs 87 and 90.

- (b) determining the actual amount of lost profit will be easier where the unlawful aid enabled the beneficiary to win over a contract or a specific business opportunity from the claimant and the latter has already been executed by the beneficiary;
- (c) more complicated damage quantifications are required where the aid merely leads to a loss of market share. One possible way for dealing with such cases could be to 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 <sup>(130)</sup>;
- (d) there may be circumstances where the damage suffered by the claimant exceeds the lost profit. This could be the case where, as a consequence of the unlawful aid, the claimant is forced out of business.
- (94) National procedural rules will sometimes allow national courts to seek the advice of experts for the purpose of determining the actual amount of damage compensation. Where that is the case, and provided the principle of effectiveness <sup>(131)</sup> is respected, the use of such estimates would also be possible for claims for damages arising under Article 108(3) TFEU.
- (95) The possibility to claim damages is, in principle, independent of any parallel Commission investigation concerning the same aid measure. Any ongoing investigation by the Commission does not release national courts from their obligation to safeguard rights of individuals under Article 108(3) TFEU <sup>(132)</sup>. Since claimants may be able to demonstrate that they suffered a loss due to the aid's premature implementation and, more specifically, as a result of the beneficiary's illegal time advantage, successful damage claims are also not ruled out where the Commission has already declared the aid compatible by the time the national court decides <sup>(133)</sup>.
- (96) The Court of Justice recalled that State aid is fundamentally different in its legal nature from damages that national authorities may be ordered to pay to individuals in compensation for the damage they have caused (*Asteris case-law*) <sup>(134)</sup>. However, when ruling on the compensation to third parties for the costs incurred as a direct result of an unlawful aid, national courts must be careful not to adopt decisions having the effect of granting an aid <sup>(135)</sup> or enlarging the circle of beneficiaries <sup>(136)</sup>.

<sup>(130)</sup> An interesting case was reported in the Enforcement Study where a French administrative court, following a Commission decision ordering recovery of incompatible aid, decided to award damages for loss of market share to the main competitor of the beneficiary. The court of appeal partially quashed the previous judgement on the estimation of damages and consequently appointed an independent expert to calculate the exact amount of compensation. The expert assessed the number of customers that had shifted from the complainant to the beneficiary because of the incompatible aid and quantified the amount of income subsequently lost. Such quantification is often complex and will depend on the characteristics of the market and the number of competitors. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 152, Case Summary FR6: Tribunal administratif de Bastia, 23 February 2017. See also, Court of Appeal of Marseille, *CTC v Corsica Ferries France*, 12 February 2018; Rapport d'expertise, *CTC v Corsica Ferries France*, 28 February 2019, N/REF: 500060.

<sup>(131)</sup> See Section 2.2.

<sup>(132)</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 44; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraphs 57 to 58.

<sup>(133)</sup> Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraphs 53 and 55; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 60.

<sup>(134)</sup> Judgment of the Court of Justice of 27 September 1988, *Asteris and Others v Greece and EEC*, C-106 to 120/87, ECLI:EU:C:1988:457, paragraph 23; Judgment of the Court of Justice of 21 December 2016, *Commission v Aer Lingus*, C-164/15 P and C-165/15 P, ECLI:EU:C:2016:990, paragraph 72.

<sup>(135)</sup> See Commission Decision 2014/201/EU of 2 October 2013 on compensation to be paid to SIMET SpA for public transport services provided between 1987 and 2003 (State aid measure SA.33037 (2012/C) Italy) (OJ 2014 L 114, p. 67), upheld on this point by Judgment of the General Court of 3 March 2016, *Simet v Commission*, Case T-15/14, ECLI:EU:T:2016:124, paragraphs 102 to 104. See also Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award *Micula v Romania* of 11 December 2013 (OJ L 232, 4.9.2015, p. 43), annulled by Judgment of the General Court of 18 June 2019, *European Food and Others v Commission*, T-624/15 ECLI:EU:T:2019:423, currently under review by the Court of Justice in case C-638/19 P, *Commission v European Food and Others*.

<sup>(136)</sup> Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 57.

- (97) While individuals may request national courts to order the payment of damages which they consider to be entitled to, such actions cannot have the effect of circumventing the effective application of EU State aid rules<sup>(137)</sup>. In particular, individuals who might be entitled under national law to receive aid which has not been notified to and approved by the Commission, but who have not received such aid, cannot claim as compensation for damages the equivalent of the sum of the non-received aid, since this would constitute an indirect grant of unlawful aid<sup>(138)</sup>. It follows that the *Asteris* case-law does not concern cases where the applicant requests a national court to award to it previous State aid, which the applicant has not received for whatever reason<sup>(139)</sup>.
- (98) Beneficiaries of unlawful aid sometimes try to claim damages from the State after having been ordered to reimburse the amount. Usually, these beneficiaries put forward arguments concerning the alleged breach of their legitimate expectations. Nevertheless, the Court of Justice held that an unlawfully granted measure could not generate any legitimate expectation for the beneficiary, which should be able to determine whether the correct procedure for the granting of the aid has been followed<sup>(140)</sup>. Their claims should therefore be rejected.
- (99) While the case-law has recognised an EU right to seek damages against the Member State concerned by third parties that suffered losses because of the unlawful implementation of an aid, actions for damages against beneficiaries of aid are allowed but not required as a matter of EU State aid law, since Articles 107 and 108 TFEU do not impose any direct obligations on beneficiaries. In the '*SFEI*' judgment, the Court of Justice concluded that, because Article 108(3) TFEU does not impose any direct obligations on the beneficiary, the breach of that Article is not a sufficient basis for the recipient to incur liability<sup>(141)</sup>. This is without prejudice to the possibility of bringing an action for damages against the beneficiary in accordance with national law, for instance on the basis of national provisions governing non-contractual liability<sup>(142)</sup>.

## 5. COOPERATION BETWEEN THE COMMISSION AND NATIONAL COURTS

- (100) The Commission must support national courts in fulfilling their key role in the enforcement of State aid rules, pursuant to Article 4(3) TEU. Conversely, national courts can request the Commission's assistance when applying these rules in the context of a pending case. Close cooperation between the national courts and the Commission contributes to an increased level of consistency<sup>(143)</sup> and effectiveness in the application of State aid rules across the Union.

<sup>(137)</sup> Judgment of the Court of Justice of 29 June 2004, *Commission v Council*, C-110/02, ECLI:EU:C:2004:395, paragraph 43; Judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, ECLI:EU:C:2007:434, paragraphs 59 to 63; Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraphs 42 to 44.

<sup>(138)</sup> See also, in this respect, the opinion of Advocate General Ruiz-Jarabo Colomer of 28 April 2005 in Joined Cases C-346/03 and C-529/03 *Atzeni and Others*, EU:C:2005:256, paragraph 198.

<sup>(139)</sup> Instead, the *Asteris* case-law covers cases where the applicant simply requests compensation (e.g. rectification of damage caused unlawfully by public authorities) that any other person in a similar situation would be entitled to in that Member State. In that latter case, the mere fact that the defendant is a public entity does not transform into State aid the compensation that any litigant would have received in a similar situation, such as in similar litigation between two private entities.

<sup>(140)</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraphs 98 to 104; Judgment of the Court of Justice of 15 December 2005, *Unicredito Italiano*, C-148/04, ECLI:EU:C:2005:774, paragraph 104; Judgment of the Court of Justice of 19 March 2015, *OTP Bank*, C-672/13, ECLI:EU:C:2015:185, paragraph 77.

<sup>(141)</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 72 to 74.

<sup>(142)</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 75. In situations involving a conflict of laws, the law applicable is determined by Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, p. 40).

<sup>(143)</sup> Recital 37 of the Procedural Regulation.

### 5.1. Commission's assistance to national courts

(101) When supporting national courts, the Commission must respect its duty of professional secrecy and safeguard its own functioning and independence<sup>(144)</sup>. In fulfilling its duty under Article 4(3) TEU towards national courts, the Commission is committed to remaining neutral and objective. The Commission may ask national courts to transmit the information and documents necessary to provide the requested assistance. When the Commission assists national courts, it will not serve the private interests of the parties. The Commission's contribution is, indeed, part of its duty to ensure that State aid rules are correctly implemented and to defend the public interest<sup>(145)</sup>. The Commission will, therefore, not hear any of the parties involved in the national proceedings.

(102) The support offered to national courts under Article 29 of the Procedural Regulation is without prejudice to the possibility or obligation<sup>(146)</sup> for national courts to ask the Court of Justice for a preliminary ruling<sup>(147)</sup> on the interpretation or the validity of Union law in accordance with Article 267 TFEU<sup>(148)</sup>. However, it is no longer possible to question the validity of the Commission decision by way of a preliminary ruling where the claimant could undoubtedly have challenged the Commission decision before the Union Courts under Article 263 TFEU but failed to do so<sup>(149)</sup>.

#### 5.1.1. The means of cooperation

(103) Article 29 of the Procedural Regulation codified three means of cooperation between the Commission and national courts. Sections 5.1.1.1, 5.1.1.2 and 5.1.1.3 of this notice explain in further detail these means of cooperation.

##### 5.1.1.1. Transmission of information to national courts

(104) Pursuant to Article 29 of the Procedural Regulation, national courts may ask the Commission to transmit to them information in its possession<sup>(150)</sup>.

(105) National courts may ask the Commission to provide information on State aid procedures before it. This includes, for instance, information on: (a) whether a procedure regarding a State aid measure is pending before the Commission; (b) whether a Member State has duly notified a certain aid measure in accordance with Article 108(3) TFEU; (c) whether the Commission has initiated a formal investigation; and (d) whether the Commission has already adopted a decision<sup>(151)</sup>.

(106) In addition, national courts may request that the Commission transmits documents in its possession. This can include copies of existing Commission decisions if these decisions have not already been published on the Commission's website, factual data, statistics, market studies and economic analyses.

<sup>(144)</sup> Order of the Court of Justice of 6 December 1990, *Zwartveld and Others*, C-2/88 Imm., ECLI:EU:C:1990:440, paragraphs 10 and 11; Judgment of the General Court of 18 September 1996, *Postbank v Commission*, T-353/94, ECLI:EU:T:1996:119, paragraph 93.

<sup>(145)</sup> Recital 37 of the Procedural Regulation.

<sup>(146)</sup> See Judgment of the Court of Justice of 6 October 1982, *CILFIT v Ministero della Sanità*, C-283/81, ECLI:EU:C:1982:335, paragraphs 14 to 20; Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de la Rioja*, C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 42 to 43; Judgment of the Court of Justice of 28 July 2016, *Association France Nature Environnement*, C-379/15, ECLI:EU:C:2016:603, paragraphs 47 to 50; Judgment of the Court of Justice of 15 September 2016, *PGE*, C-574/14, ECLI:EU:C:2016:686, paragraph 40; Judgment of the Court of Justice of 4 October 2018, *Commission v France (Advance Payment)*, C-416/17, ECLI:EU:C:2018:811, paragraphs 108 et seq.

<sup>(147)</sup> Requests for information or an opinion have the advantage of being less formalistic, and can always be complemented by a request for a preliminary ruling – see, in that respect, Judgment of the Court of Justice of 28 October 2020, *INAIL*, C-608/19, ECLI:EU:C:2020:865, where both possibilities have been used.

<sup>(148)</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 44; Judgment of the Court of Justice of 15 September 2016, *PGE*, C-574/14, ECLI:EU:C:2016:686, paragraph 40.

<sup>(149)</sup> Judgment of the Court of Justice of 9 March 1994, *TWD Textilwerke Deggendorf v Germany*, C-188/92, ECLI:EU:C:1994:90, paragraphs 17, 25 and 26; see also Judgment of the Court of Justice of 23 February 2006, *Atzeni and Others*, C-346/03 and C-529/03, ECLI:EU:C:2006:130, paragraph 31; and Judgment of the Court of 5 October 2006, *Commission v France*, ('Scott'), C-232/05, ECLI:EU:C:2006:651, paragraph 59; Judgment of the Court of Justice of 25 July 2018, *Georgsmarienhütte and Others*, C-135/16, ECLI:EU:C:2018:582, paragraph 17.

<sup>(150)</sup> Procedural Regulation, Article 29(1), first part.

<sup>(151)</sup> Upon receipt of this information, the requesting national court may ask for regular updates on the state of play.

- (107) The duty of sincere cooperation enshrined in Article 4(3) TEU requires the Commission to provide national courts with whatever information they may seek <sup>(152)</sup>. That also includes information covered by the obligation of professional secrecy.
- (108) In transmitting information to national courts, the Commission must uphold the guarantees given to natural and legal persons under Article 339 TFEU <sup>(153)</sup>. Article 339 TFEU prevents members, officials and other servants of the Commission from disclosing information that is covered by the obligation of professional secrecy. That can include confidential information and business secrets.
- (109) Where the Commission intends to transmit information covered by professional secrecy to a national court, it will ask the national court to confirm that it will guarantee the protection of such confidential information and business secrets. Where the national court offers such a guarantee (e.g. by referring to the national legal basis for it), the Commission will transmit the information requested, indicating those parts that are covered by professional secrecy and should therefore not be disclosed. Where, on the other hand, the national court cannot offer such a guarantee, the Commission will refrain from transmitting the information concerned <sup>(154)</sup>.
- (110) The Commission may also not be able to disclose information to national courts in other situations. In particular, the Commission may refuse to transmit information to a court of a Member State where such transmission would interfere with the functioning and independence of the Union. This would be the case where disclosure would jeopardise the accomplishment of the tasks entrusted to the Commission <sup>(155)</sup> (for example, information concerning the Commission's internal decision-making process).
- (111) To ensure efficiency in its cooperation with national courts, the Commission endeavours to provide national courts with the requested information within one month from the date of the request. Where the Commission needs to ask national courts for further clarifications on their initial requests or to consult third parties directly affected by the transmission of the information, the one-month period starts to run afresh from the moment the clarification is received or the consultation concluded <sup>(156)</sup>.

#### 5.1.1.2. Transmission of opinions on the application of State aid rules

- (112) Article 29 of the Procedural Regulation also provides the possibility for national courts to ask the Commission to provide its opinion on questions concerning the application of State aid rules <sup>(157)</sup>.
- (113) When applying State aid rules to a case pending before them, national courts must respect the relevant Union rules and case-law of the Union Courts. Without prejudice to the ultimate interpretation of the Treaties by the Union Courts, national courts may find guidance on the application of State aid rules in the Commission's decision-making practice, as well as in the relevant Commission notices and guidelines. National courts may also find guidance on previous Commission opinions or observations published on the Commission's website, when the issues at stake present elements of analogy with those faced by other national courts <sup>(158)</sup>.

<sup>(152)</sup> Judgment of the General Court of 18 September 1996, *Postbank v Commission*, T-353/94, ECLI:EU:T:1996:119, paragraph 64; Order of the Court of Justice of 13 July 1990, *Zwartveld and Others*, C-2/88 Imm., ECLI:EU:C:1990:315, paragraphs 16 to 22.

<sup>(153)</sup> Judgment of the Court of Justice of 28 February 1991, *Delimitis v Henninger Bräu*, C-234/89, ECLI:EU:C:1991:91, paragraph 53; Judgment of the General Court of 18 September 1996, *Postbank v Commission*, T-353/94, ECLI:EU:T:1996:119, paragraph 90.

<sup>(154)</sup> Judgment of the General Court of 18 September 1996, *Postbank v Commission*, T-353/94, ECLI:EU:T:1996:119, paragraph 93; Order of the Court of Justice of 6 December 1990, *Zwartveld and Others*, C-2/88 Imm., ECLI:EU:C:1990:440, paragraphs 10 and 11.

<sup>(155)</sup> Order of the Court of Justice of 6 December 1990, *Zwartveld and Others*, C-2/88 Imm., ECLI:EU:C:1990:440, paragraph 11; Judgment of the Court of Justice of 26 November 2002, *First and Franex*, C-275/00, ECLI:EU:C:2002:711, paragraph 49; Judgment of the General Court of 18 September 1996, *Postbank v Commission*, T-353/94, ECLI:EU:T:1996:119, paragraph 93.

<sup>(156)</sup> This could be the case, for example, for certain types of information submitted by a private person, or where information submitted by one Member State is being requested by a court of a different Member State.

<sup>(157)</sup> Procedural Regulation, Article 29(1), second part.

<sup>(158)</sup> See Section 5.1.2.

- (114) However, there may be circumstances in which previous Commission decisions or opinions and Commission notices and guidelines do not provide sufficient guidance to the national courts. In accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, and given the essential role played by national courts in State aid enforcement, the Commission offers the national courts the opportunity to request the Commission's opinion on relevant issues concerning the application of State aid rules <sup>(159)</sup>.
- (115) Requests for a Commission opinion may, in principle, cover all economic, factual or legal matters relating to State aid that arise in the context of the national proceedings. The national courts may ask the Commission, among other things:
- (a) whether a certain measure has aid elements within the meaning of Article 107(1) TFEU and, if so, request guidance on how to quantify the amount of the aid. Such requests can relate to a specific State aid element under Article 107 TFEU (namely, notion of undertaking, existence of a selective advantage, imputability of the measure to the Member State and involvement of State resources, possible distortion of competition and effect on trade between Member States).
  - (b) whether a certain aid measure fulfils a requirement of a block exemption regulation or a requirement of a *de minimis* regulation, which would mean that prior notification to the Commission is not necessary and the standstill obligation provided in Article 108(3) TFEU does not apply.
  - (c) whether an individual aid falls under an aid scheme notified to the Commission and declared compatible with the internal market by a Commission decision, or otherwise qualifies as existing aid, and hence the standstill obligation under Article 108(3) TFEU does not apply.
  - (d) whether exceptional circumstances <sup>(160)</sup>, which would prevent the national court from ordering full recovery under Union law, exist.
  - (e) what the legal prerequisites are for damage claims under Union law and guidance on how to quantify the damage incurred.
  - (f) how to calculate the amount of the aid to be recovered and how to calculate the recovery interest.
- (116) National courts do not have jurisdiction to assess the compatibility of an aid measure on the basis of Article 107(2), Article 107(3), Article 106(2) and Article 93 TFEU <sup>(161)</sup>. Therefore, they cannot ask the Commission to provide its opinion on the compatibility of a certain aid measure with the internal market. National courts can, however, ask the Commission whether it is already assessing the compatibility of a certain aid measure, as explained in Section 5.1.1.1.
- (117) When giving its opinion, the Commission, in line with the principle of sincere co-operation of Article 4(3) TEU, will provide the national court with the factual information or economic or legal clarification sought. Unlike the authoritative interpretation of Union law by the Union Courts, the Commission's opinion does not legally bind the national court.
- (118) The Commission will provide its opinion to national courts in accordance with their procedural rules and practices. To ensure effective cooperation with the national courts, the Commission will endeavour to provide the national court with the requested opinion within 4 months from the date of the request. Where the Commission needs to ask the national court for further clarifications concerning its request, this four-month period may be extended.

<sup>(159)</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 50.

<sup>(160)</sup> To that effect, see Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraphs 68 to 71.

<sup>(161)</sup> Judgment of the Court of Justice of 4 March 2020, *CSTP Azienda della Mobilità v Commission*, C-587/18 P, EU:C:2020:150, paragraph 90; Judgment of the Court of Justice of 19 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraphs 50 to 52.



- (119) National courts must protect rights of individuals under Article 108(3) TFEU also during the period in which the Commission prepares the requested opinion. As set out above <sup>(162)</sup>, the national court's obligation to protect rights of individuals under Article 108(3) TFEU, including by way of interim measures, applies irrespective of an outstanding Commission opinion.

#### 5.1.1.3. Submission of *amicus curiae* observations

- (120) Pursuant to Article 29(2) of the Procedural Regulation, the Commission may submit written observations to national courts applying State aid rules. It may also make oral observations with the permission of the national court in question. These observations are also known as '*amicus curiae* observations'. The Commission submits *amicus curiae* observations on its own initiative.
- (121) The national courts or the parties to a case pending before a national court may, however, ask the Commission to provide *amicus curiae* observations in a case where State aid matters are at stake. The decision to intervene as *amicus curiae* in a case before a national court is an exclusive prerogative of the Commission and falls entirely within its discretion. However, with a view to allowing national courts to plan their proceedings, the Commission will inform them without delay on its intention to intervene as *amicus curiae*.
- (122) The Commission submits *amicus curiae* observations in the context of national judicial proceedings to ensure a coherent application of Articles 107(1) or 108(3) TFEU <sup>(163)</sup>. To evaluate the necessity and appropriateness of its contribution, the Commission may consider, among other things:
- (a) whether the case is expected to have a significance beyond the specific case at hand (for example, where the case involves a general question of State aid);
  - (b) whether the observations from the Commission may contribute to the effectiveness of the enforcement of State aid rules by the concerned national courts;
  - (c) if the case involves a novel question of substance, which is not covered by the Commission decision-making practice or notices and guidelines; or
  - (d) whether the case is pending before a court whose judgment cannot be subject to further appeals.
- (123) The Commission fully respects the independence and functioning of national courts. As for the Commission's opinions referred to in Section 5.1.1.2 above, *amicus curiae* observations are not binding on the national court adjudicating the case in which the Commission intervened. Before submitting on its own initiative *amicus curiae* observations, the Commission informs the Member State concerned by sending a letter to its Permanent Representation to the Union.
- (124) In order to be able to submit useful observations, the Commission may request the relevant national court to transmit documents at its disposal that are necessary for the Commission's assessment of the matter. The Commission will only use those documents for the purpose of preparing its observations.
- (125) The Procedural Regulation does not provide for a procedural framework within which the *amicus curiae* observations are to be submitted. Therefore, the Commission submits its observations in accordance with the Member States' procedural rules and practices, including those safeguarding the rights of the parties. Where a Member State has not yet established the relevant procedural framework, it is for the national court to determine which procedural rules should be followed for the submission of *amicus curiae* observations in the case pending before it, bearing in mind that these submissions are based on Article 29 of the Procedural Regulation.

<sup>(162)</sup> See *supra*, Section 4.2.3.3.

<sup>(163)</sup> Since 2014, the Commission has submitted *amicus curiae* observations about the existence of aid, the definition of service of general economic interest, the execution of the Commission's recovery decisions and guidance on whether to use national or Union law. In that sense, see 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 111.

- (126) The national procedural framework should respect the principles set out in Section 2.2 of this notice. This implies that the national procedural framework for the submission of observations on issues concerning the application of Articles 107(1) and 108(3) TFEU cannot make the submission of such observations (a) excessively difficult or practically impossible (in line with the principle of effectiveness); and (b) more difficult than the submission of observations in court proceedings where equivalent national law is applied (pursuant to the principle of equivalence).

#### 5.1.2. *Single contact point and publication of opinions and amicus curiae observations*

- (127) For more effective cooperation and communication with the national courts, the Commission has established a single contact point to which national courts or parties can address their requests:

European Commission  
Directorate General for Competition  
COMP Amicus State Aid  
1049 Bruxelles/Brussel  
BELGIQUE/BELGIË  
Tel. +32 22976271  
Fax +32 22953584

Email: COMP-AMICUS-STATE-AID@ec.europa.eu

- (128) The Commission invites national courts to continue using this single contact point to convey to the Commission any information or request in accordance with Section 5.1.1 of this notice. National courts can send their submissions in any of the 24 official languages of the Union <sup>(164)</sup>.
- (129) The Commission will report on its cooperation with national courts in its annual report on competition policy. It will also make its opinions and observations in the context of *amicus curiae* interventions available on its website.
- (130) When submitting opinions or *amicus curiae* observations, the Commission asks national courts to authorise their publication. This allows the Commission to publish on its website the opinions and *amicus curiae* observations submitted by the Commission and, when available, the judgments rendered by the national court concerned.

#### 5.2. **National courts' assistance to the Commission**

- (131) The duty of sincere cooperation enshrined in Article 4(3) TEU also implies that Member States, including their judicial authorities, have to assist the Union institutions in attaining the objectives of the Union.
- (132) To ensure the effective enforcement of State aid rules, national courts are invited to forward to the Commission without delay a copy of any written judgment they have issued following the provision by the Commission of information or an opinion, or its submission of *amicus curiae* observations. This enables the Commission to become aware in a timely fashion of cases for which it might be appropriate to submit observations, should one of the parties lodge an appeal against the judgment. When sending a judgment, national courts indicate to the Commission whether they give their authorisation for that judgment to be published on the Commission's website.
- (133) For a more effective and consistent application of State aid rules, the Commission encourages the Member States to set up coordination points for national judges dealing with State aid issues. These coordination points should match with the administrative structure of the Member States and respect the independence of the judicial authority. The Commission also takes the view that the creation of formal or informal networks of judges dealing with State aid matters, either at national or European level, may be particularly important for knowledge sharing. Central coordination points and networks of judges may allow national judges to share best practices in the field of State aid and facilitate the conveyance of information by the Commission on any recent developments in State aid policy by way of, for instance, training courses and newsletters.

<sup>(164)</sup> A complete list of the Union official languages is provided in Article 55(1) TEU.

## 6. CONSEQUENCES OF THE FAILURE TO IMPLEMENT STATE AID RULES AND DECISIONS

- (134) As indicated in Sections 4.2.1 and 4.2.2 of this notice, national courts may be called upon to apply directly in their national legal systems the provisions of Articles 107(1) and 108(3) TFEU. Where national courts, by their judgments, grant new aid in breach of the standstill obligation, the Commission may initiate an investigation procedure pursuant to Article 12 of the Procedural Regulation to assess the compatibility of the unlawful State aid with the internal market. In addition, where the national courts fail to ensure compliance with the obligations stemming from a Commission recovery decision or the Treaties <sup>(165)</sup>, the Commission may initiate infringement proceedings against the Member States concerned.
- (135) As organs of the Member States, national courts are called upon to take appropriate measures to ensure that recovery decisions are effectively implemented. The consequences of Member States' failure to implement Commission recovery decisions are outlined in the Recovery Notice <sup>(166)</sup>.
- (136) National courts must also safeguard the rights of individuals faced with a possible breach of the standstill obligation <sup>(167)</sup>. As indicated in Section 6.2 of this Notice, Member States, including their national courts, which fail to safeguard these rights fail to fulfil their obligations under Union law <sup>(168)</sup>.

### 6.1. Procedures before the Commission regarding unlawful aid

- (137) National courts may infringe directly Article 108(3) TFEU by granting new aid in the context of their proceedings. This can occur where a national court issues a judgment affecting the implementation of an act granting State aid. This is the case for instance, where the interpretation of a contract or an aid-granting decision has the effect of prolonging the original duration of an aid measure <sup>(169)</sup>.
- (138) As a result, national courts have to comply with Article 108(3) TFEU and accordingly make sure that any of their decisions that results in amending or prolonging an act granting State aid, for instance by way of interpretation <sup>(170)</sup>, is notified before its implementation, in accordance with applicable administrative rules in force in the Member State.
- (139) If the national court does not ensure compliance with the standstill obligation and the new aid is not notified, subject to the Commission's review, the Commission may initiate an investigation concerning the unlawful State aid on its own initiative or after receipt of a complaint from any interested party pursuant to Article 12 of the Procedural Regulation.

### 6.2. Infringement proceedings

- (140) Pursuant to Article 258 TFEU, if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it may launch an infringement procedure. The purpose of the procedure is to end the infringement. The Commission may refer the matter to the Court of Justice following a pre-litigation phase where it delivers a reasoned opinion after a formal exchange of views with the Member State concerned <sup>(171)</sup>.

<sup>(165)</sup> Judgment of the Court of Justice of 11 September 2014, *Commission v Germany*, C-527/12, ECLI:EU:C:2014:2193, paragraph 56.

<sup>(166)</sup> See Recovery Notice (OJ C 247, 23.7.2019, p. 1), Section 6.

<sup>(167)</sup> Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 38; Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 28.

<sup>(168)</sup> Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 66; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 110.

<sup>(169)</sup> Whether the national court delivers its judgment in the context of interlocutory proceedings or substantive procedures is irrelevant, as in both cases the judgment may be liable to affect the aid measure, even if only temporarily.

<sup>(170)</sup> Judgment of the Court of Justice of 26 October 2016, *DEI and Commission v Alouminion tis Ellados*, C-590/14 P, ECLI:EU:C:2016:797, paragraphs 107 and 108.

<sup>(171)</sup> If the Commission considers that the Member State has failed to fulfil the obligations established in a judgment pursuant to Article 258(2) TFEU, the Commission may bring the matter to the Court of Justice pursuant to Article 260(2) TFEU, after giving the Member State concerned the opportunity to submit its observations.

- (141) When national courts do not draw the appropriate consequences from the breach of Article 108(3) TFEU, they infringe their obligations under the Treaties. This may be the case where national courts do not prevent an unlawful measure from being implemented or do not order its recovery <sup>(172)</sup>.
- (142) Failure by national courts to safeguard the rights of individuals in violation of their obligations stemming from Article 108(3) TFEU may also give rise to liability on the part of the Member State. The Court of Justice has held that Member States are liable for damage resulting from infringements of Union law, including infringements stemming from a decision of a national court adjudicating at last instance <sup>(173)</sup>.

#### 7. FINAL PROVISIONS

- (143) This notice replaces the 2009 Enforcement Notice.
- (144) This notice aims to provide guidance to national courts in the application of the State aid rules. It does not bind the national courts or affect their independence.
- (145) The Commission may review this Notice, when it considers it appropriate, *inter alia*, on the basis of modifications of the applicable Union rules or future developments in the case-law.

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<sup>(172)</sup> Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraph 12; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 70.

<sup>(173)</sup> Judgment of the Court of Justice of 30 September 2003, *Köbler*, C-224/01, ECLI:EU:C:2003:513, paragraph 50.