CHAPTER 14

Private Enforcement in the Netherlands *New Dutch Legislation, but Little Action*

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I. INTRODUCTION

State aid cases are no rare phenomenon in the Netherlands. A much-discussed recent example concerned the well-known coffee chain Starbucks, which as a result of a fiscal ruling had paid little tax for years. The European Commission regarded this advantage as unlawful State aid. However, tax aid is by no means the most important form of State aid that comes before the Dutch courts. The courts more often deal with alleged support for spatial development projects, subsidy decisions or loans under 'soft' conditions. Competitors of State aid recipients frequently ask the courts to protect them against unfair competition as a result of State aid. This is often referred to as the 'private enforcement' of State aid law. Dutch case law shows, however, that the category of private individuals who invoke State aid law to protect their interests is broader than just competitors. Local residents and insured persons, for instance, also frequently claim a breach of State aid law. In this contribution, we will include these situations in the term private enforcement of State aid law. This decision is based on the idea that the European Commission, wanting to concentrate more on the major issues, leaves less serious cases involving State aid law to the national courts. From the perspective of enforcement, it does not matter much which parties bring alleged violations of State aid law before these courts. We will, therefore, outline how the Dutch judiciary, in ruling on State aid arguments raised by private individuals, contributes to the enforcement of State aid law. What are the most important issues and problems at stake and what best practices can be distinguished in the private enforcement of State aid law in the Netherlands?

To answer these questions, we have studied the Dutch case law that deals with State aid law. For the period from November 2005 up to November 2015, all Dutch case law containing references to the words 'State aid' has already been identified and analysed by Metselaar, who published a study on the enforcement of State aid law in the Netherlands in 2016.[1] In addition, we have analysed the case law in the period from November 2015 up to 1 November 2018. On the basis of this, we can paint a picture of the role that State aid law plays in current Dutch legal practice. This study of case law can, however, only serve as a sketch of the situation. First, www.rechtspraak.nl only publishes a selection of judgments given by the Dutch courts. This makes it impossible

1. A.J. Metselaar, *Drie rechters en een norm. Handhaving van de Europese staatssteunregels voor de Nederlandse rechter en de grenzen van de procedurele autonomie (Three judges and one norm. The enforcement of the European State aid rules before Dutch courts and the limits of national procedural autonomy)* (Wolters Kluwer 2016).

to obtain the full picture, but this is a relative limitation since all judgments of the highest courts are made public. Second, examining the case law does not clarify the number and nature of disputes related to State aid law that are settled outside the courts. To provide more detail and add more colour to this sketch of current Dutch legal practice, the Dutch literature on the private enforcement of State aid law has also been incorporated in our analysis.

On the basis of the acquired data, we will first discuss in section II. the various Dutch courts that offer legal protection in State aid cases. The Netherlands has a complicated division of jurisdiction with regard to government actions, which entails that more than one court may be competent. They all deal with State aid disputes according to the procedural rules applicable in their field of law. We will distinguish mainly between the assessments of State aid cases by, successively, the administrative courts, who have reviewed most of the cases in the aforementioned period, the tax courts, who are rarely confronted with these cases, and the civil courts, who in theory function as ordinary courts, but who nonetheless handle many State aid cases. In sections III., IV. and V., we will discuss how these three courts deal with State aid arguments put forward by private parties. Section VI draws our conclusions – with the thread linking the three Dutch courts being that State aid proceedings by private parties are rarely successful. Finally, in section VII., we will consider the relatively recent State Aid Recovery Act, which entered into force on 1 July 2018. What changes will this legislation bring in Dutch practice dealing with private law enforcement?

II. ILLEGAL STATE AID: WHICH COURT HAS JURISDICTION?

The study of State aid case law referred to above immediately shows that many different Dutch courts can have jurisdiction in State aid disputes. Proceedings are brought before various administrative courts, tax courts and the civil courts. This is due to the division of jurisdiction within the Dutch legal system. Decisive for the jurisdiction of these different courts is the act by which the alleged unlawful State aid was granted. In principle, the administrative courts have jurisdiction in disputes concerning 'decisions':[2] written decisions taken by an administrative authority that involve a unilateral public legal act. If the contested State aid is issued, or partly issued, by such an administrative decision, for example, a subsidy decision or the adoption of a zoning plan, the administrative court is competent. A complicating factor, however, is that there are several last instance administrative courts in the Dutch legal system. The most important of these, with general jurisdiction in appeal, is the Administrative Jurisdiction Division of the Council of State. Another last instance administrative court is the Trade and Industry Appeals Tribunal (*College van Beroep voor het Bedrijfsleven*, *CBb*): a specialised administrative court that rules on disputes in the area of social-economic administrative law. In addition, this Appeals Tribunal also rules on appeals concerning specific laws, such as the Competition Act and the Telecommunications Act. Due to its specialisation, this court deals with State aid cases on a regular basis. A

2. As defined in Article 1:3 of the General Administrative Law Act (GALA).

second specialised highest administrative court is the Central Appeals Tribunal (*Centrale Raad van Beroep, CRvB*): a Court of Appeal which is mainly active in legal areas concerning social security and public service. It is the highest judicial authority in these areas, only dealing with State aid issues in exceptional cases. Finally, where decisions in the field of tax are concerned, the tax courts are competent, with the Supreme Court sitting in last instance. The judgements of the administrative and tax courts in first instance are the results of an annulment claim that is directed against a decision: a decision is annulled or it remains in force. In appeal, the highest administrative court will review the judgement of the Court of First Instance.

If no possibilities exist to bring a case before the administrative or tax courts, then the civil courts step into the picture. The civil courts function like ordinary courts. This is a somewhat misleading term in this respect. In many cases, alleged State aid was provided by means of a private contract; in these cases, the civil courts have jurisdiction. The same applies to support that is made possible by an Act of Parliament. These Acts do not constitute administrative decisions that can be challenged before the administrative court because they are not drawn up by administrative bodies (as follows from Article 1:1(2) of the General Administrative Law Act (hereinafter: 'GALA')). In these cases, the enforcement of State aid law must therefore also be requested before a civil court.

This finely branched division of jurisdiction means that it can be difficult in general to establish which court should offer legal protection to a private individual against the various forms of government action. This problem also arises in the case of government action that involves unlawful State aid. In the Netherlands, it is often uncertain whether an administrative decision has been made, against which a complaint can be lodged before the administrative court, or whether the administrative authorities acted in a different way, which gives the civil courts jurisdiction. Moreover, the case law on this subject is constantly developing and remains a topic of debate. Specifically in relation to the enforcement of State aid law, it is relevant that private law entities that allocate public funds are sometimes regarded as administrative bodies that take subsidy decisions, thus falling under the jurisdiction of the administrative courts, and that some private law contracts between administrative authorities and private parties are nevertheless regarded as subsidy decisions by the administrative courts. In these cases, it is important to note that, in principle, administrative decisions should be challenged within six weeks. Otherwise, the decision will be given formal legal force (*res iudicata*) and will be presumed to be legal, both by the administrative courts and the civil courts.

A second problem arising from this finely branched jurisdiction on government action is that an aid measure may consist of a set of acts that fall under the jurisdiction of different Dutch courts.[3] The jurisprudence on the company *Eigen Veerdienst Terschelling* illustrates that this is not just a danger in theory. This company has litigated for years, in order to be able to compete for a ferry service between Harlingen, Terschelling and Vlieland. *Eigen Veerdienst Terschelling* took the view that this ferry

3. Metselaar, *supra* n. 1, at 115.

service was successfully operated by another company because of government action in violation of State aid law. The alleged State aid consisted of all sorts of different elements: public service contracts, co-use agreements, lease contracts for the access road to the port area, concession loans, exemptions from sales tax and mooring permits.[4] As a consequence, *Eigen Veerdienst Terschelling* had to litigate in both the administrative as well as in the civil courts.[5] It is obvious that the legal position of *Eigen Veerdienst Terschelling* would have been considerably stronger if one court had assessed whether the various elements combined constituted unlawful State aid. It is also conceivable that the fact that private parties sometimes have to litigate before different courts does not lead to much enthusiasm on their part to enforce State aid law in this way. Private enforcement of State aid law tends to be a complex issue that requires detailed knowledge of the Dutch legal system and a lot of perseverance. Submitting a complaint to the European Commission thus quickly becomes a simple and more attractive alternative.

III. THE DUTCH ADMINISTRATIVE COURTS AND STATE AID CLAIMS

When writing on private enforcement of State aid law in the Netherlands, it is logical to first discuss the disputes settled by the administrative courts. If we consider the published case law, the administrative courts receive the highest proportion of disputes in which State aid law plays a role. The study conducted by Metselaar showed that 271 administrative cases were published throughout the period from 2005 to 2015. The research that we carried out for this contribution showed that seventy-seven judgments were added to this category in the period from 1 November 2015 to 1 November 2018.[6] These recent rulings, however, did not change the overall picture, instead only serving to validate it.

A. Spatial planning

The overall picture starts with the observation that the most extensive group of administrative disputes is not initiated by entrepreneurs complaining about State aid given to their competitors. In more than half of the cases, the plaintiffs are citizens who expect they will be harmed in their interests through an environmental law decision. Their feared damages do not include competitive damages. These local residents usually file many sorts of objections against such a decision, including State aid law arguments. The basic contention in these challenges is often that the contested administrative decision to approve or enact a zoning plan can only be implemented if State aid is provided and that this State aid measure has not been or will not be approved by the European Commission.

4. Metselaar, *supra* n. 1, at 116.
5. *See* e.g., Rechtbank Den Haag, 31 December 2013, ECLI:NL:RBDHA:2013:18370 and Rechtbank Leeuwarden, 12 December 2012, ECLI:NL:RBLEE:2012:BY5837.
6. In thirty of these judgements the term 'State aid' was mentioned, but the law on State aid was only indirectly relevant.

As of 2004,[7] the Council of State has weighed State aid arguments in such cases within the context of the question whether the zoning plan is 'financially feasible'. According to Dutch spatial planning law, the municipal board must, before enacting a zoning plan, investigate the feasibility of the plan.[8] Where it is not possible to demonstrate that the contested zoning plan could also be implemented if the municipal support required for the plan cannot be granted because of an infringement of State aid law, the Council of State has ruled that the administrative decision to enact the zoning plan was not prepared with due care. This case law led to the initiation of many State aid claims in zoning plan procedures. Some of them were successful, and several zoning plan decisions were annulled on the grounds of State aid law.[9]

In 2011, this approach was refined to include the requirement that in cases where the plaintiff had made a plausible State aid argument, he must also make it plausible that the municipal authorities should in all reasonableness have realised in advance that the plan could not be implemented within the plan period without providing unlawful State aid.[10] When reviewing this aspect, it must considered whether other market parties could possibly have effectuated the plan, instead of the State aid recipient. This line of reasoning in the case law led to a decline in the number of successful claims on the grounds of State aid law in the area of spatial planning from 8% to 2%, according to Aalbers and Jaarsma.[11]

After a relativity requirement (the *Schutznorm*) was introduced in GALA on 1 January 2013,[12] the Council of State decided to limit the possibilities for plaintiffs to successfully invoke State aid law in spatial planning cases even further. In a judgment in 2016,[13] the Council of State stated that before the administrative court is entitled to assess the financial feasibility of the contested zoning plan on the grounds of State aid law, it must first be established whether, in principle, residents who are not affected by competitive interests can invoke the State aid rules in this context. The answer to that question was given in the negative: the Council of State took the view that Article 108(3) Treaty on the Functioning of the European Union (TFEU) is clearly not intended to protect their interests. Since local residents do not derive any rights from Article 108(3) TFEU, the application of the relativity requirement is therefore not in conflict with the requirements imposed by EU law on the application of national procedural law in cases within the realm of EU law, according to the Council of State. This case law is

7. Raad van State, 6 May 2004, ECLI:NL:RVS:2004:AO8853 *Zoning plan Haaksbergen*.
8. *See* Article 3.1.6 Bro.
9. *See* e.g., Raad van State, 15 February 2012, ECLI:NL:RVS:2012:BV5119 *Zoning plan de Zumpel-Kloosterstraat Julianastraat Grubbenvorst*.
10. Raad van State, 13 April 2011, ECLI:NL:RVS:2011:BQ1077 *Zoning plan Centrum Haaren*.
11. M. Aalbers and M. Jaarsma, *Het beginsel van een marktdeelnemer in de markteconomie: rechtsontwikkelingen en praktische knelpunten in gebiedsontwikkeling. Terug naar de basis?* (*The principle of a trader in the market economy: legal developments and practical bottlenecks in area development. Back to the basics?*) [2015] Tijdschrift voor Staatssteun (*Dutch Journal on State aid*) 104, 108.
12. *See* Article 8:69a GALA.
13. Raad van State, 2 November 2016, ECLI:NL:RVS:2016:2892 *Zoning plan De Hagen Hollum*. *See* for a more recent example, Raad van State, 23 May 2018, ECLI:NL:RVS:2018:1686 *Zoning plan Horst aan de Maas*.

now also seen outside the category of zoning plan cases, appearing for example in a complaint against an airport extension decision.[14]

The introduction of the relativity requirement also turned out to have major consequences for claimants in proceedings against a zoning plan decision that claim to have competitive interests that are threatened by unlawful State aid. Since 2016[15] they stumble on the fact that the State aid argument is only reviewed in an indirect way, namely through the assessment of the financial and economic feasibility of the zoning plan. This standard requirement in Dutch spatial law is aimed at protecting interested parties from being confronted with the adverse spatial consequences of a zoning plan that is not feasible, for example in the form of semi-realised objects. These disadvantages are not suffered by competitors who are not located in the immediate vicinity of the area or plot of land in question. They can therefore no longer invoke this provision, and as a consequence, their State aid argument can no longer be considered. Since the possible distortion of competition due to unlawful State aid can be submitted to a national court by challenging a different government action (for instance the accompanying subsidy decision or the purchase agreement for the land), the Council of State does not see any tension in relation to the requirements imposed by EU law on the application of national procedural law in cases within the scope of EU law.[16]

As a result of these recent rulings, only appellants who can be affected in their competitive interests by decisions concerning zoning plans and who are in the immediate vicinity of the concerned area or plot of land can successfully rely on the rules on State aid law in proceedings against the zoning plan.[17] This means that an enormous potential for the private enforcement of State aid law in administrative law has been cut off. In the last three years, seventeen cases against zoning plan decisions faltered on the relativity requirement.[18] In the period from 1 November 2015 to 1 November 2018, we found no examples of successful claims based on State aid law[19] in the area of spatial planning.

In the meantime, the threshold of the relativity requirement has also been applied by other administrative courts to avoid reviewing State aid arguments from appellants who are not affected in terms of their competitive interests. These cases are in the area

14. Raad van State, 15 November 2017, ECLI:NL:RVS:2017:3126 *Airport Regulatory Enforcement Decision Twente Airport*.
15. Raad van State, 9 November 2016, ECLI:NL:RVS:2016:2975 *Zoning plan Leidsche Rijn*. Previously, the Council of State had applied the relativity requirement to shareholders who challenged the expropriation order of the Minister of Finance concerning SNS REAAL and SNS Bank, with a part of their claim being that the State aid provided in the expropriation decision was unlawful: Raad van State, 25 February 2013, ECLI:NL:RVS:2013:BZ2265.
16. Where the Administrative Jurisdiction Division in particular refers to ECJ judgments Case 33/76 *Rewe* [1976] ECR 1989, para. 5; ECJ, Joined Cases C-317/08, 318/08, 319/08 and 320/08 18 March *Alassini et al.* [2010] ECR I-2213, paras 47–49; ECJ, Case C-432/05 *Unibet* [2007] ECR I-2271, para. 65.
17. Cf. Raad van State, 21 December 2016, ECLI:NL:RVS:2016:3386 *Leeuwarden-Bioscoop Harmonieplein*.
18. Meanwhile the test of a 'financially feasible' zoning plan is also still applied. We found twenty judgments in which an administrative judge applied this test in the period from 1 November 2015 to 1 November 2018.
19. In total we administered forty published judgements that mentioned State aid arguments in this field of law.

of social security. Two examples are the challenge raised against a fine due to the refusal of an unemployed person to sign an employment contract[20] and the challenging of a fine for non-fulfilment of the Dutch insurance obligation which, according to the appellant, led to enforced financing of the pharmaceutical industry and thus to illegal State aid.[21]

This line of jurisprudence has led to a situation wherein a large part of the administrative law cases where State aid arguments are put forward, these arguments are not reviewed due to the relativity requirement. National procedural provisions, in particular, the relativity requirement, make it possible to leave State aid questions unanswered. The administrative courts do not see this as a problem, for in their view it is clear that State aid law is not intended to protect these citizens. No questions were referred to the ECJ on this subject, even though the limits of the scope of protection of State aid law had not been dealt with extensively by the European court.

B. Unlawful advantage for the competitor

The classic situation of private enforcement of State aid law by competitors is also a regular occurrence in the Dutch administrative courts. Metselaar reported forty-two published cases in the period from 2005 to 2015, and we added no relevant cases to that number in the past three years.[22] These cases often concern subsidy decisions,[23] but decisions about the granting of licences that provide a financial advantage without having to pay a market-based compensation also occur.[24] In terms of size, this is a limited category of cases in which competitors directly challenge an administrative decision affecting their competitive interests. They, too, do not seem to be able to successfully invoke State aid law in the Dutch courtroom.

This is partly caused by the fact that such competitors are not always seen as an interested party within the meaning of Article 1:2 GALA. In each case, the administrative court first assesses whether the appellant is directly affected by the decision that is being challenged, before reviewing that decision. According to established case law, litigating competitors are required to be active in the same market segment and service area as the addressee of the (alleged) aid decision. The same market segment is assumed when the products or services offered by the two companies are in competition with each other. The service area of products or services concerns the geographic market in which they are delivered. Generally, the Dutch administrative courts are not very strict in applying these requirements. Broad access to the administrative courts for

20. Centrale Raad van Beroep, 21 February 2017, ECLI:NL:CRVB:2017:607.
21. Centrale Raad van Beroep, 20 June 2018, ECLI:NL:CRVB:2018:1857.
22. Competitors only complained indirectly about State aid for their rivals, for instance in a complaint against the rejection of a subsidy application: Rechtbank Zeeland-West-Brabant, 7 November 2016, ECLI:NL:RBZWB:2016:6944 *subsidie aanvraag peuterspeelzaalwerk*.
23. *See* e.g., Raad van State, 17 August 2011, ECLI:NL:RVS:2011:BR5195 *Stichting NOB*.
24. *See* e.g., Raad van State, 6 June 2018, ECLI:NL:RVS:2013BY9933 *Open Universiteit Nederland*.

competitors is in line with low-threshold access for citizens to the administrative courts, something considered desirable in the Netherlands.[25]

It is therefore particularly striking that the interested party test in State aid cases sometimes seems to be carried out more strictly than in other cases involving a competitor challenging an administrative decision. The most widely discussed example of this stricter test concerns the so-called *Vogelaar* case.[26] This case related to financial support provided to certain housing corporations in order to combat problems with living conditions in a few selected disadvantaged neighbourhoods, referred to as the *Vogelaarwijken*. To achieve this, a levy was imposed on all Dutch housing associations. The paying corporations believed this scheme of levying and subsidising to be in conflict with the European State aid rules. They objected to both the levy decision, which was judged legal by the administrative court, and to the subsidy decisions addressed to their competitors. It is striking that although in the proceedings concerning the levy decision the revenues were necessarily allocated to the financing of the aid, the administrative court did not consider this sufficient to automatically consider the payers as also being interested parties in the administrative decisions to grant the subsidies. The Council of State took the position that, under Dutch law, the payers had no direct interest in the subsidy decisions because it was impossible to establish which corporation paid for which supported project. Moreover, the collection of the levy did not automatically lead to the provision of subsidy. The purpose of the collection of the levy was to create financial scope for a subsidy scheme. Which corporations would receive money on the basis of this scheme and which criteria would be applied was a second, separate, issue according to the Council of State. Those parties who are considered to be interested parties in the context of levy decisions are therefore not automatically also interested parties in the subsequent subsidy decisions in the Netherlands. In order to be considered to be an interested party in the administrative decisions on subsidies, parties have to fulfil the requirements of Article 1:2 GALA. It must, therefore, be examined whether the paying parties are active in the same market segment and service area as the subsidy recipients. The levy payers in the *Vogelaar* case seem to comply with this requirement, but interestingly enough this was not deemed sufficient. The Council of State also checked in this case whether the competitors had made a 'reasonable case' that they would indeed suffer a loss of turnover as a result of the alleged State aid. This hurdle was too high for the levy payers, and as a result, their complaint was declared inadmissible.

This unusual interested party test has been criticised in Dutch literature, among other reasons because of the requirement that the principles of effectiveness and equivalence must be respected when applying national procedural law in cases that fall within the scope of EU law. Dutch case law provides more examples of a more stringent assessment by the Dutch administrative courts in relation to the interested party aspect,[27] as well as the requirement of sufficient legal interest.[28] This case law has led

25. *See* J. Wieland, *De bescherming van concurrentiebelangen in het bestuursrecht (The protection of competitors interests in Dutch administrative law)* (Boom Juridische uitgevers 2017).
26. Raad van State, 6 February 2013, ECLI:NL:RVS:2013:BZ0794 *Vogelaarwijken*.
27. *See* e.g., Raad van State, 29 May 2013, ECLI:NL:RVS:2013:CA1378 *Edufax*.

to some authors stating that procedural autonomy appears to be a serious obstacle for successfully invoking State aid law.[29] Some even suspect that the courts use procedural arguments in some of these cases in order to avoid a substantive assessment of the dispute.[30]

There are, of course, also cases where competitors successfully overcome the obstacles of the interested party test and the relativity requirement. However, in those cases the plaintiff then has to prove that State aid rules were infringed, which is usually not an easy task due to the lack of information that competitors have. The administrative courts are not inclined to use their own investigative powers to establish illegal State aid.[31] Furthermore, if a substantive assessment by an administrative court is carried out, it is sometimes rather indirect in nature.[32] The contested decision is often reviewed in the light of formal principles of good administration. If it cannot be excluded that the contested aid measure has resulted in unlawful State aid, the contested decision will be annulled due to conflict with the requirement that decisions are carefully prepared, known as the principle of due care.[33] In this context, the administrative court created a duty for the administrative authority to ensure and substantiate that no illegal State aid will be granted. The consequence of this approach is that the State aid rules are not directly applied by the court itself.

It must be concluded that in the vast majority of cases in which administrative courts substantively review a decision that might infringe State aid law, it is ruled that no (illegal) State aid is involved, often with no extensive reasoning being given,[34] and in an increasing number of cases this occurs after the Commission has been asked for advice by the courts themselves.[35] However, the number of published cases in which the administrative courts have turned to the Commission can still be counted on two hands. There are many possible explanations for the fact that the annulment of a decision concerning illegal State aid law by the administrative courts is a rarity[36] in the Netherlands, and these are discussed by Metselaar in her comprehensive 2015 study. Are competitors complaining without good reason? Are they being hindered by a lack of information? Are the Dutch administrative courts not inclined to apply complex State aid law or are they just not strict enough when doing so? These may all be relevant

28. College van Beroep voor het bedrijfsleven, 13 September 2012, ECLI:NL:CBB:2012:BX6991 *Thuiszorg Service Nederland*.
29. *See* Metselaar, *supra* n. 1, at 184 and R.J.M. van den Tweel, *Staatssteun en de rol van de nationale rechter, tien jaar verder* [2015] SEW 553 et seq.
30. Metselaar, *supra* n. 1, at 197.
31. Metselaar, *supra* n. 1, at 312 et seq.
32. Metselaar, *supra* n. 1, at 312.
33. Raad van State, 17 December 2003, ECLI:NL:RVS:2003:AO0234 *Martiniplaza*; Raad van State, 6 June 2012, ECLI:NL:RVS:2012:BW7642; Raad van State, 15 February 2012, ECLI:NL:RVS:2012:BV5119 *Zoning plan de Zumpel-Kloosterstraat Julianastraat Grubbenvorst*.
34. *See* Metselaar, *supra* n. 1, at 288 and 314. *See* for a more recent example: Rechtbank Zeeland-West-Brabant, 7 November 2016, ECLI:NL:RBZWB:2016:6944 *subsidie aanvraag peuterspeelzaalwerk*.
35. *See* for instance Raad van State, 30 January 2013, ECLI:NL:RVS:2013:BY9933 *Open Universiteit*: no State aid involved.
36. Rechtbank Rotterdam, 28 March 2013, ECLI:NL:RBROT:2013:BZ5824 *Veerverbinding Boven Hardinxveld*, is a rare example.

factors but it is not possible to give a final explanation on the basis of the published case law alone. The small chance of a competitor being successful in State aid cases is probably one of the reasons that they lodge very few requests for interim relief. The same goes for requests for compensation of damages by the responsible authorities: the studied case law offers no examples.

C. Levy decisions

As has already been made clear, parties who are obliged to pay levies can also challenge these decisions, as the aforementioned case of the *Vogelaar* neighbourhoods shows. In those cases, the interested party test does not usually lead to problems: the interests of the payers are directly affected as the addressee of the levy decision. However, in such cases, the administrative court does check whether levy decisions fall within the scope of the Treaty provisions on State aid. Taxes do not fall within the scope of the provisions of the Treaty concerning State aid unless they constitute the method of financing an aid measure, thus constituting an integral part of that measure. According to the European Court of Justice (ECJ), a tax or levy can only be regarded as forming an integral part of an aid measure when the revenue is required to be allocated to finance the aid. In several Dutch cases, this connection between revenue and alleged State aid was indeed established. This did not mean, however, that the appellants successfully invoked State aid provisions; it still proved to be very difficult for them to demonstrate unlawful State aid.

In those cases,[37] it is striking that a detailed discussion was held on whether the granting of the subsidies paid from the levies entailed unlawful State aid because the final aid measure had a different design than what had previously been presented to the Commission and had been approved by it.[38] In that context, a discussion arose about the correct interpretation of the relevant Commission decision. Remarkably, the Dutch court did not ask the Commission itself to provide more clarity about its intentions. Despite the fact that the ECJ made it clear that if doubt exists about the correct interpretation of a Commission decision, a request for advice should be put to the Commission or a preliminary question should be sent to the Court,[39] the Council of State gave its own interpretation of the Commission decision. On the basis of that interpretation, it came to the conclusion that no unlawful State aid had been issued. As a result the charged levy decisions were not annulled.

37. Raad van State, 2 November 2011, ECLI:NL:RVS:2011:BU3143 *Vogelaar I*, and Raad van State, 28 September 2016 ECLI:NL:RVS:2016:2568 *Vestia*.
38. This question also appears in the other categories of alleged State aid cases brought before the Dutch administrative courts. The courts have not yet developed a standard approach to deal with this question. *See* Metselaar, *supra* n. 1, at 360–369.
39. ECJ, Case C-574/14 *PGE Górnictwo* [2016] ECLI:EU:C:2016:686, paras 36–40.

D. Decisions to reject a request for aid and revocation decisions

An important category of cases brought before the Dutch administrative courts in which State aid law plays a role is the situation where the national authorities invoke State aid law. In such cases, national authorities argue that the requested support should be refused or granting decisions that have been issued previously should be withdrawn or changed because of the fact that the concerning support or grant has to be qualified as illegal state aid.[40] This category is the second largest after the complaints against decisions on zoning plans by competitors and, more often, local residents. However, this category will not be dealt with here since, strictly speaking, it does not involve private enforcement. After all, it is the government who invokes State aid law, not private parties. It should be noted, however, that the national authorities may request such decisions because private parties have requested enforcement of State aid law. It is, therefore, striking that in our selection there were no cases where this was the case. Metselaar calls this category 'the great absentee' and considers it likely that this is the result of the Dutch law of evidence.[41] When administrative authorities revoke a favourable decision on the basis of State aid law, they are required to prove that unlawful State aid was granted. When reviewing such unfavourable decisions, the Dutch administrative court places strict requirements on the reasoning. This may be an important factor for refraining as much as possible from issuing such decisions, except in cases where it is evident that State aid is involved, and, for example, the discussion is only about whether it falls within the scope of the Commission's approval decision.[42]

E. Recovery decisions

Finally, there is the category of disputes concerning decisions to recover illegal State aid, which can be challenged by the addressee before the Dutch administrative courts. It is striking that only few recovery decisions have been challenged before the administrative courts, but these cases were the source of intense debate on State aid in the Netherlands. This category does not concern private enforcement in the strict sense either since it concerns decisions taken by national authorities. It should be noted, however, that these decisions may constitute the final element of a request for enforcement of State aid law by competitors. This was the case, for example, with the BPM recovery decision.[43] In this classic case, competitors had complained to the European Commission about State aid measures outside the framework of a prior approval decision. The Commission investigated the case and ordered the Dutch State to recover the State aid that had been granted unlawfully. The responsible Dutch minister acted on that order, but it turned out that taking a recovery decision that

40. *See* e.g., College van Beroep voor het bedrijfsleven, 8 July 2008, ECLI:NL:CBB:2007:BD8217 and College van Beroep voor het bedrijfsleven, 8 July 2008, ECLI:NL:CBB:2008:BD8212 (both on MEP subsidies).
41. Metselaar, *supra* n. 1, at 301.
42. *See* e.g., Raad van State, 15 April 2015, ECLI:NL:RVS:2015:1152 *Zorg en Zekerheid*.
43. Raad van State, 11 January 2006, ECLI:NL:RVS:2006:AU9415 *BPM*.

complied with EU law requirements was not an easy task within the context of the Dutch legal order. Dutch law did not provide a suitable legal basis.[44] Furthermore, Dutch law required that the recovery of unlawful State aid was laid down in an administrative decision that could be challenged before the administrative courts, while the interest claim had to be filed by the administrative authorities at the civil court. This case ultimately led to the State Aid Recovery Act, which entered into force on 1 July 2018 and is discussed in section VII. of this chapter.

IV. THE DUTCH TAX COURTS AND STATE AID CLAIMS

We can be brief about the possibilities for private parties to lodge a complaint against State aid that is provided to their competitors through tax benefits. In the Netherlands, competitors of tax aid recipients do not have access to the tax courts by virtue of their position as competitors.[45] This follows from Article 26a of the State Taxes Act which states that only parties who are addressed by decisions of tax authorities have access to court. This means that it was not possible for competitors of Starbucks, like Coffee Lovers or Costa, to initiate proceedings before a Dutch tax court. Whether the competitor has a direct interest in the fact that his competitor receives a tax advantage is therefore irrelevant. This means that competitors of tax aid recipients must bring proceedings before the civil courts,[46] something that hardly ever occurs.[47] In this regard, Metselaar gives as a first explanation that the question of when a tax measure qualifies as State aid is, by its very nature, very difficult to answer.[48] It took until 2016 before a Commission Communication on the concept of State aid clarified this issue.[49] A second explanation for the fact that proceedings before the civil courts concerning tax aid hardly ever occur, can be found in the fact that Dutch tax law is subject to a duty of confidentiality pursuant to Article 67 of the State Taxes Act.[50] On the basis of this article, the tax authorities are not required to disclose information regarding persons or the property of another party, insofar as this is not necessary for the implementation of the Tax Code. Tax rulings are also treated confidentially.[51] Levy payers who wish to lodge a complaint against tax decisions addressed to them because unlawful State aid would be financed by the levies are admissible at the tax courts.[52] However, such proceedings are also very rare and rarely lead to success.[53]

Since competitors have no access to the tax courts by virtue of their position as competitors only, there is a risk in the Netherlands that fiscal State aid will remain out of the picture. In most cases, neither party – neither the recipient of fiscal State aid nor

44. Also Raad van State, 15 April 2015, ECLI:NL:RVS:2015:1152 *Zorg en Zekerheid*.
45. *See* also Metselaar, *supra* n. 1, at 166.
46. Metselaar, *supra* n. 1, at 167.
47. Metselaar, *supra* n. 1, at 167.
48. Metselaar, *supra* n. 1, at 134.
49. Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C 262/1.
50. Metselaar, *supra* n. 1, at 134.
51. Metselaar, *supra* n. 1, at 134–135.
52. Metselaar, *supra* n. 1, at 168.
53. *See* Metselaar, *supra* n. 1, at 129–130.

the tax authority involved – has an interest in raising a violation of the European State aid rules.[54] Of course, it is still possible for competitors to lodge a complaint with the European Commission.

V. THE DUTCH CIVIL COURTS AND STATE AID CLAIMS

A. Introduction

In this section, we will take a closer look at the various types of State aid disputes that the civil courts have to deal with in the Netherlands. The research conducted by Metselaar has established that in the period from 1 November 2005 up to and including 31 October 2015, civil courts rendered 142 judgments in which State aid was at issue.[55] In the period from 1 November 2015 to 31 October 2018, another seventy-seven judgments were announced in which the keywords 'State aid' appear.[56] A considerable number of these are cases where State aid is addressed only indirectly; these will be left out of our considerations in the rest of this section. We will discuss the different types of State aid disputes that occur most frequently in section V.B. In section V.C. we will discuss the ensuing issues.

B. Types of disputes before the civil courts

In cases where it is not possible to lodge a complaint against government action before the administrative courts or the tax courts, the civil courts have jurisdiction to hear the dispute. This means that if the State aid is not provided in the form of a decision, but in the form of a private law legal act or State aid that is made possible by an Act of Parliament, the civil courts come into the picture.[57] Here, for example, we find purchase agreements, such as the sale of land or a building, but also service agreements related to, for instance, waste collection or advertising objects.[58] Many legal claims can be brought before the civil courts.[59] For example, pursuant to Article 3:296(1) Dutch Civil Code, it may be requested that further support is stopped, that acts are suspended or suspended until the European Commission has given its approval, that the aid already granted or the consequence of the aid is cancelled and that the aid is recovered, including interest. A ban on anti-competitive activities or a prohibition of future aid may also be requested. Requesting that the granting authority be ordered to notify the European Commission of the agreement granting unlawful State aid is also possible.[60]

54. Metselaar, *supra* n. 1, at 135 and R.H.C. Luja, *De rol van nationale rechters bij de handhaving van de standstill-bepaling in fiscale zaken* [2014] Tijdschrift voor Staatssteun 99, 101.
55. Metselaar, *supra* n. 1, at 117.
56. Searched at www.rechtspraak.nl on the basis of the word 'staatssteun' (State aid).
57. Cf. Adriaanse, *Handhaving van EG-recht in situaties van onrechtmatige staatssteun*, 241 (Wolters Kluwer 2006).
58. Cf. Metselaar, *supra* n. 1, at 117.
59. *See* Adriaanse, *supra* n. 57, at 283–284 and Metselaar, *supra* n. 1, at 417.
60. *See* e.g., District Court Limburg, 3 August 2016, ECLI:NL:RBLIM:2016:6765 *Maankwartier*, and District Court Noord-Nederland, 1 July 2015, ECLI:NL:RBNNE:2015:3300 *Spaansen Holding*.

Various provisions from the Dutch Civil Code can be used as a basis for these claims: tort (Article 6:162), nullity (Article 3:40), undue payment (Article 6:203), unjustified enrichment (Article 6:212), dissolution (Articles 6:258 and 6:265), standards of reasonableness and fairness (Article 6:2) and general principles of good administration (*see* sections 3:14 Dutch Civil Code and 3:1(2) GALA).[61] It is also possible to claim damages for a breach of the standstill clause in Article 108(3) TFEU, which constitutes a wrongful act (Article 6:162 Dutch Civil Code).[62] Finally, pursuant to Article 3:302 Dutch Civil Code, a declaratory judgment may be requested to have the (partial) nullity of a given legal act – such as an agreement granting State aid – established in court.[63] It is important to note that besides substantive proceedings, interim proceedings can also be brought before the civil courts (Article 254(1), Dutch Judicial Proceedings Act).

Which claim is chosen depends on the type of dispute that is at stake. For example, if a third party is of the opinion that unlawful State aid has been granted to a competitor by means of a private law agreement, a claim for undue payment is not very helpful. After all, no payment has been made in the relationship between the third party and the competitor receiving State aid from the government; it is not the third party, but the granting authority that has performed the act.[64] In such a case, it is more obvious that the granting authority is held liable for unlawful State aid (Article 6:162 Civil Code), or the invalidity of the private law agreement is invoked because of a conflict with a mandatory legal provision, namely Article 108(3) TFEU.[65]

In the remainder of this section, we will deal with the State aid disputes that are brought most frequently before the civil courts.

1. Disputes where the government is accused of having granted an advantage to a competitor

Most State aid litigation that comes before the civil courts deals with the situation where a private party takes the government to court because it is deemed to have provided unlawful State aid to a competitor. In the period from 1 November 2005 to 1 November 2015, sixty such judgments were published.[66] For the period from 1 November 2015 to 1 November 2018, we counted another thirteen judgments at www.rechtspraak.nl in which a private party had invoked Article 108(3) TFEU against the government. Enforcing the State aid rules is frequently closely related to the argument that the public procurement rules have been violated.[67] For example, a group of cleaning companies, which had previously been hired to provide cleaning services for government premises, disagreed with the transfer of these cleaning activities to a

61. Metselaar, *supra* n. 1, at 417.
62. Cf. Metselaar, *supra* n. 1, at 417.
63. Metselaar, *supra* n. 1, at 415.
64. Cf. Adriaanse, *supra* n. 57, at 304.
65. Cf. Adriaanse, *supra* n. 57, at 298 et seq.
66. Metselaar, *supra* n. 1, at 117–118.
67. Metselaar, *supra* n. 1, at 118. In the period after 1 November 2015, four out of twelve cases concerned public procurement disputes.

new organisation that had been set up for this purpose.[68] The cleaning companies argued that this was not only in conflict with public procurement law but also with State aid law. Besides a violation of public procurement law, a company can also argue that an agreement concluded between the government and a market party is not consistent with the market, e.g., disputes about agreements concerning the exploitation of car parks or concerning land in the waste sector.[69] A private party may also claim that certain buildings[70] or land[71] have been sold at prices below the market price, thus constituting unlawful State aid. Situations also occur where a company argues that a subsidy scheme involves unlawful State aid because only a few parties are entitled to the subsidy under the scheme or because the eligible activity has been wrongly classified as a service of general and economic interest (SGEI).[72]

2. Disputes between the alleged beneficiary and another private party

The most interesting dispute in this category is where a private party claims that its competitor has received unlawful State aid and has therefore acted unlawfully in relation to the claimant. This situation occurred only once during the period from 1 November 2005 to 1 November 2018, namely in the *Baby Dan* case.[73] In this case, Baby Dan, a manufacturer of stair safety gates under the name Danamic, argued that its competitors WeDeKa and De Risse had acted unlawfully towards it by accepting unlawful State aid from the government.

3. Disputes about levies intended to finance state aid

Civil courts are also sometimes confronted with cases where it is argued that a levy has been used to finance unlawful State aid. In these cases, it is not the levy decision that is at issue – this decision has to be challenged at the tax courts or administrative courts (*see* section III.C.) – but the Acts of Parliament on the basis of which the levy has been imposed. These disputes are also rare: there have been only five such cases in the period from 1 November 2005 to 1 November 2018.[74]

68. Rechtbank Den Haag, 24 January 2018, ECLI:NL:RBDHA:2018:316.
69. Metselaar, *supra* n. 1, at 118.
70. Rechtbank Den Haag, 30 December 2015, ECLI:NL:RBDHA:2015:15812 *De Stolp* and District Court Limburg, 3 August 2016, ECLI:NL:RBLIM:2016:6765 *Maankwartier*.
71. Rechtbank Midden-Nederland, 7 December 2016, ECLI:NL:RBMNE:2016:6542 *Park Vliegbasis Soesterberg*.
72. Rechtbank Den Haag, 26 April 2017, ECLI:NL:RBDHA:2017:4278 *Non Invasive Prenatal Test*.
73. Gerechtshof Amsterdam, 29 June 2006, ECLI:NL:GHAMS:2006:AZ1425 *Baby Dan*.
74. There are four cases in the period from 1 November 2005 – 1 November 2015. *See* Metselaar, *supra* n. 1, at 120. In the period from 1 November 2015 to 1 November 2018, we found one ruling that looks at this situation, namely Gerechtshof Den Haag, 5 July 2016, ECLI:NL:GHDHA:2016 :1951.

4. Disputes concerning expropriation

The next category of disputes worth mentioning is that concerning expropriation, where a party relies on the State aid rules to prevent expropriation initiated by the government.[75] In these types of proceedings, it is argued that it is uncertain whether the plan, which the expropriation is intended to benefit, could be realised without unlawful State aid being provided.[76]

5. Disputes on the enforcement of a recovery decision taken by the European Commission

Disputes concerning the enforcement of a recovery decision taken by the European Commission usually relate, in practice, to a situation where the government brings proceedings before the civil courts to recover unlawful State aid. The category of disputes discussed in the section below also refers to claims to prevent or recover unlawful State aid. Similar to the refusal and withdrawal decisions that are litigated in the administrative courts (*see* section III.D.), it is tempting not to pay much attention to these categories. After all, these categories do not strictly concern private enforcement; it is the government that invokes State aid law. Nevertheless, both categories merit further discussion, since again it cannot be ruled out that the government initiates these proceedings at the civil courts because individuals have requested enforcement of State aid law. Judgments by the Dutch civil courts concerning the enforcement of recovery decisions taken by the European Commission are very rare. In the period from 1 November 2005 to 1 November 2018 there were only three such judgments. Metselaar clarifies this by stating that apparently there are only few recovery decisions by the European Commission that give rise to questions to be submitted to the civil courts.[77] The underlying disputes relate, for example, to the question of how State aid should be recovered when aid recipients have gone bankrupt.[78]

6. Disputes where the government has revoked a granted benefit or refuses to grant an advantage

Even if the European Commission has not taken a recovery decision, it regularly occurs that the government granting authority itself invokes State aid law. This occurred no less than twenty-four times between 1 November 2005 and 1 November 2015.[79] In the period from 1 November 2015 to 1 November 2018, we counted two judgments relating to a situation of this nature.[80] At issue were cases where a municipality relied on the

75. Metselaar, *supra* n. 1, at 120.
76. Hoge Raad *(Supreme Court)*, 30 June 2006, ECLI:NL:HR:2006:AV9441.
77. Metselaar, *supra* n. 1, at 118–119.
78. Rechtbank Rotterdam, 24 August 2011, ECLI:NL:RBROT:2011:BR6507 *Kliq Re-integratie*.
79. Metselaar, *supra* n. 1, at 119.
80. Rechtbank Noord-Nederland, 16 December 2015 ECLI:NL:RBNNE:2015:5815 and Rechtbank Overijssel, 14 March 2018, ECLI:NL:RBOVE:2018:788.

nullity of a concluded guarantee agreement[81] or a purchase agreement[82] because these agreements included unlawful State aid.

C. Available judgment options for the civil courts

The administrative and tax courts deliver their judgments in the context of an annulment procedure that is directed against a decision: a decision is annulled or it remains in force. The civil courts have much more variety in their judgment options.[83] They can impose various prohibitions carrying the consequence that the granting of State aid is prevented or stopped or that State aid must be recovered.[84] The civil courts can also award damages and issue a declaratory judgment, establishing, for example, that contracts in violation of the standstill obligation are null and void.[85] In State aid cases, it can be worthwhile to ask for a declaratory judgment stating that certain services have been unduly paid or that the other party has acted unlawfully, but foremost that certain actions are null and void.[86] Declarations of this nature make it easier to ensure that a claim is made for undue payment, that an agreement is dissolved or that compensation is awarded.

Notwithstanding all these judgment options, this does not mean that the effective enforcement of State aid is guaranteed. The Dutch civil courts are bound to the principle of party autonomy.[87] In other words: the parties act autonomously in what they claim before the court; the civil courts cannot consider anything other than what has been claimed.[88] This means that if a party only claims suspension, dissolution or termination of an agreement which allegedly embodies state aid, the Dutch civil courts cannot order the recovery of the aid that was already granted. This, after all, was not demanded by the parties.[89] Because proceedings in the Dutch civil courts take a long time, it is important to note that interim proceedings can be conducted; this opportunity is gratefully used in practice.[90] Interim proceedings are completely independent proceedings before a preliminary relief judge. They can be started without having to initiate proceedings on the merits of the underlying case.[91] When a case is subsequently initiated on its merits, the interim court order will not be binding on the court hearing the main action.[92] Because the interim court order is provisional in nature, the

81. *See* e.g., Hoge Raad, 29 March 2013, ECLI:NL:HR:2013:BY6012 *Commerz* and Hoge Raad, 26 April 2013 ECLI:NL:HR:2013:BY0539 *Residex*.
82. Rechtbank Noord-Nederland, 16 December 2015 ECLI:NL:RBNNE:2015:5815.
83. Metselaar, *supra* n. 1, at 414.
84. Adriaanse, *supra* n. 57, at 312. *See* for an extensive discussion on the various ruling options of the civil court, Metselaar, *supra* n. 1, at 458–499.
85. Adriaanse, *supra* n. 57, at 312.
86. Cf. Metselaar, *supra* n. 1, at 417.
87. Metselaar, *supra* n. 1, at 414.
88. Metselaar, *supra* n. 1, at 414.
89. *See* in detail Metselaar, *supra* n. 1, at 482–484.
90. Metselaar, *supra* n. 1, at 415.
91. Metselaar, *supra* n. 1, at 415.
92. Metselaar, *supra* n. 1, at 415.

decision-making possibilities of the preliminary relief court are limited.[93] For example, it cannot issue a declaratory judgment since this would be a binding judgment; nor can it give a constitutive judgment, in the sense that an agreement is dissolved or annulled.[94] However, the preliminary relief judge may be asked to suspend an agreement or draft agreement, as well as its preparation or execution, until the time when the European Commission will be able to decide on the admissibility of the aid.[95]

D. Bottlenecks in state aid cases before the civil courts

The two preceding sections have demonstrated that private parties and government authorities have many opportunities at their disposal before the civil courts when raising the issue of unlawful State aid. The civil courts also have various options when it comes to a judgment: they can award compensation or order the suspension or recovery of unlawful State aid. Adriaanse concluded from this that the civil courts in the Netherlands can comply to a large extent with the requirements set by the ECJ for legal protection at national level.[96] More important, however, is the question about where these proceedings ultimately lead. Do civil courts actually play a significant role in the fight against unlawful State aid? This section will consider the extent to which civil courts impose interest (standing) requirements on the parties who invoke State aid rules (section V.D.1), the problems that arise in the qualification of State aid (section V.D.2) and the possibilities for obtaining compensation when a breach of the State aid rules has been established (section V.D.3). The case law leads to the conclusion that State aid claims brought before the civil courts are rarely successful. In section V.D.4, it will nevertheless be discussed whether we can find some glimmers of light in the case law of the civil courts.

1. Interest requirements and the Schutznorm

a) Competitors

Unlike administrative law, no admissibility requirement exists in civil law for competitors comparable to Article 1:2 GALA, which requires that a party is directly affected by the decision that is being challenged.[97] This means that the civil courts do not assess whether litigating competitors are active in the same market segment and service area as the aid recipient. However, under Article 3:303 of the Dutch Civil Code, the competitor should have sufficient interest in the claim. A civil court has never ruled that a claimant does not qualify as a competitor and therefore lacks sufficient interest.[98] To the contrary, from various judgments, it emerges that civil courts take the view that

93. Metselaar, *supra* n. 1, at 415.
94. Metselaar, *supra* n. 1, at 415–416.
95. Cf. Metselaar, *supra* n. 1, at 482.
96. Adriaanse, *supra* n. 57, at 320.
97. Cf. Metselaar, *supra* n. 1, at 199.
98. Metselaar, *supra* n. 1, at 200–201.

finding insufficient interest may not be done too lightly.[99] When a competitor claims to have suffered, to suffer or that it will suffer damage as a result of the actions of the granting authority and the aid recipient, it is quickly assumed that the competitor has sufficient legal interest. It is plausible, however, that the question of whether a competitor is actually materially and individually affected by the actions of the granting authority and the aid recipient may become relevant at a later stage in the proceedings, namely when assessing whether the damage suffered by the competitor was actually caused by unlawful State aid.[100] In that case, a judgment must first have been reached establishing unlawful State aid. As discussed in the next section, competitors who claim that unlawful State aid was granted have never been able to demonstrate a violation of State aid rules before the Dutch civil courts.[101]

b) Other private parties that invoke state aid law

If private parties other than competitors and levy payers claim unlawful State aid, but it is established that an appeal to the State aid rules is not intended to reverse the unlawful State aid, the civil courts assume that sufficient procedural interest is lacking. In the *Accolade/Ludinga* judgment, the Accolade Foundation sought a declaratory judgment stating that a contract by which the municipality of Harlingen had sold certain plots of land to Ludinga Vastgoed was null and void because it conflicted with Article 108(3) TFEU.[102] However, Accolade's motive in this claim was not the reversal of unlawful State aid but the reversal of the sale of land by Ludinga to the Accolade Foundation,[103] as it regretted the purchase of this land. The District Court of Noord-Nederland rejected Accolade's claim for that reason.[104]

In cases where a party wants to prevent expropriation and wishes to argue that the plan which requires the expropriation could not be realised without unlawful State aid being granted, the Supreme Court has ruled that State aid law does not aim to protect private property but rather to promote fair competition in the common market.[105] The possibility that there is unlawful State aid cannot, therefore, affect the

99. *See* Rechtbank Limburg, 3 August 2016, ECLI:NL:RBLIM:2016:6765. *See* also Rechtbank Maastricht, 3 May 2010, ECLI:NL:RBMAA:2010:BM3162 *AZM*, where the court also takes into account the EU law principle of effective judicial protection.
100. *See* Rechtbank Limburg, 3 August 2016, ECLI:NL:RBLIM:2016:6765 and Metselaar, *supra* n. 1, at 201.
101. Metselaar, *supra* n. 1, at 201.
102. Rechtbank Noord-Nederland, 4 June 2014, ECLI:NL:RBNNE:2014:2790.
103. *See* Metselaar, *supra* n. 1, at 489.
104. Although the District Court Noord-Nederland does not explicitly mention Article 3:303 Dutch Civil Code, it can be deduced from the ruling that the District Court is of the opinion that sufficient legal interest is lacking. The court writes as follows: 'Accolade has also not stated what interest it has in State review other than other the (private) interest mentioned above. This implies that there is no reason for an investigation into the question whether the unlawful State aid has actually been involved in the land transaction between the municipality and Ludinga VG'.
105. *See* Hoge Raad, 30 June 2006, ECLI:NL:HR:2006:AV9441 and also Hoge Raad, 23 December 2011, ECLI:NL:HR:2011:BU4934 and the related conclusion of Advocate General IJzerman, Parket bij de Hoge Raad, 23 December 2011 ECLI:NL:PHR:2011:BU4934.

legality of the expropriation order.[106] The reasoning of the Supreme Court is comparable with the *Schutznorm* applied by the administrative judge. It is interesting to note that the Supreme Court did not refer to European Union case law and also did not refer questions for preliminary rulings.[107]

Nevertheless, the above does not mean that parties lacking a competitive interest – like non-government actors or levy payers –[108] never have an interest in bringing proceedings when they invoke State aid rules. Relevant in this context is the case *Stichting Vrijplaats Koppenhinksteeg*.[109] The Koppenhinksteeg Foundation had squatted a building in the municipality of Leiden, which the municipality had previously sold. In interim proceedings, the municipality of Leiden demanded that the Foundation vacate the premises. However, the Foundation believed that the sale of the property had taken place in violation of State aid rules and, in the counterclaim, requested a ban on the further implementation of the purchase agreement. According to the municipality of Leiden, the Foundation could not rely on State aid law because it was not a competitor or levy payer. The District Court of The Hague, however, ruled that the Foundation could invoke the standstill clause. The court reasoned that the purchase agreement would ultimately result in the building Vrijplaats Koppenhinksteeg being vacated and renovated, with all the associated consequences for the Foundation, and that this agreement was the result of a sales procedure in which the Foundation participated and against which it was raising objections.[110] This assessment suggests that private parties that are not competitors and not subject to a levy may also invoke State aid law under certain circumstances, provided they are significantly affected by the alleged State aid in another way.[111] The Court of Appeal in The Hague, however, subsequently left the question of who is protected by State aid law – the *Schutznorm* – in a state of uncertainty. The Court ruled that the Foundation had, in any event, sufficient interest within the meaning of Article 3:303 Dutch Civil Code because it participated in the public procurement procedure that led to the sale of the squatted property. The Foundation was thus still regarded as a competitor, albeit a competitor in the public procurement procedure.[112] The case demonstrates that a party can have sufficient interest in relying on the State aid rules in civil law procedures even if it is not directly affected by the alleged unlawful State aid.[113] The Foundation did not claim that it was adversely affected by its competitive interests. A similar decision of the Court of Appeal of the District Court of Dordrecht also demonstrated that the Polders Graafstroom Foundation, which did not compete with the aid recipient at issue in that case

106. *See* Metselaar, *supra* n. 1, at 207–208.
107. Cf. Metselaar, *supra* n. 1, at 212.
108. Levy payers always have sufficient interest in bringing proceedings before the civil court against an Act of Parliament on the basis of which they have to pay the levy. *See* Metselaar, *supra* n. 1, at 203. However, this is only the case if the levy forms an integral part of an aid measure, which means that the revenues are necessarily allocated to the financing of the aid.
109. *See* Rechtbank's-Gravenhage, 8 January 2010 ECLI:NL:RBSGR:2010:BK8654.
110. Metselaar, *supra* n. 1, at 206.
111. Metselaar, *supra* n. 1, at 206.
112. Metselaar, *supra* n. 1, at 206.
113. Cf. Metselaar, *supra* n. 1, at 206.

but which was active for environmental interests, had standing by virtue of Article 108(3)TFEU.[114]

It follows from this case law that it is not precluded in advance that private parties other than competitors and levy payers can invoke the standstill obligation under Article 108(3) TFEU when they claim to have been otherwise harmed by a violation of the State aid rules.[115] In that respect, the civil courts appear to take a slightly more flexible approach than the administrative courts. It should be noted, however, that this issue – as far as we have been able to ascertain – was dealt with in only a few judgments, coming from lower civil courts. In addition, the Supreme Court in expropriation cases takes a very strict approach: the standstill obligation in Article 108(3) TFEU does not extend to the protection of private property. Moreover, if it is certain that improper use is made of State aid law, the civil courts rule that there can be no valid assertion of a legal interest. Further judgments on this point have yet to be given.

c) Government interest in bringing proceedings in the civil courts

The case law of the civil courts shows that the courts have hardly ever concluded that the government has insufficient interest in invoking State aid rules. The point of departure is that the government is free to recover the illegal State aid or invoke the nullity of an agreement concluded by it on the ground that it might involve illegal State aid.[116] There is only one judgment published in which a civil court considered whether the government was obliged under EU law to invoke State aid law in relation to its demand.[117]

2. Qualification of state aid

It appears from the previous section that the requirement of sufficient legal interest for competitors who call on the civil courts to enforce State aid law poses few problems. This implies that the claims of competitors that are based on State aid law are usually assessed in terms of content. However, a much bigger problem arises in this phase. To date, no competitor has yet succeeded in convincing the civil courts that the government provided unlawful State aid.[118] The claims of competitors are rejected in many cases because they have not complied with the obligation to furnish facts. Party autonomy and the passivity of the court are two fundamental principles in proceedings before the Dutch civil courts, and in line with this, the civil courts base their judgment on the facts that are established.[119] These facts are mainly determined by the dispute between the parties. Thus, the party who is obliged to furnish facts must state all the

114. Rechtbank Dordrecht, 12 May 2009, ECLI:NL:RBDOR:2009:BI3617.
115. Cf. Metselaar, *supra* n. 1, at 212.
116. *See* Metselaar, *supra* n. 1, at 203–205.
117. Rechtbank Middelburg, 13 August 2010, ECLI:NL:RBMID:2010:BN9817.
118. *See* Metselaar, *supra* n. 1, at 264 for the period from 1 November 2005 – 1 November 2015. Also after this date we have not come across any judgments to the contrary.
119. Article 149(1), Dutch Judicial Proceedings Act. *See* in this regard Metselaar, *supra* n. 1, at 236.

facts necessary for the occurrence of the intended legal consequence.[120] In principle, the obligation to furnish facts and the burden of proof rest on the party who relies on the legal consequences of the facts or rights that it is claiming. For example, the party claiming an agreement null and void by virtue of unlawful State aid must provide all the facts to that effect and must prove them in relation to each of the conditions of Article 107(1) TFEU.[121] In most cases, it is determined that the State aid claims cannot be awarded because those invoking the State aid rules have failed to comply with their duty to furnish facts.[122] Specifically, facts are deemed unsubstantiated or insufficiently substantiated, or they are seen as not leading to the qualification of State aid.[123] The case law shows that it is not easy to substantiate facts sufficiently. In theory, competitors can argue before the civil court that the government or the alleged aid recipients should provide information about the alleged State aid agreements. However, this sort of claim has so far been rejected due to insufficient interest.[124] For example, the District Court of Limburg ruled that the plaintiffs had insufficiently argued and substantiated that the requested information was necessary to provide proof of unlawful State aid,[125] and the District Court of Gelderland concluded that the plaintiff had not sufficiently demonstrated that the municipality had provided benefits to JCDecaux in breach of Article 107(1) TFEU.[126]

Although the claims of competitors in the area of State aid law have little success, the case law shows that the civil courts do in general discuss the arguments, disputes and substantiation of these claims in a thorough manner.[127] In interim proceedings, however, it is a different matter. The preliminary relief judge is usually brief in articulating whether State aid has been established or not.[128] This is not surprising; in these proceedings the formal rules of civil evidence do not apply and the parties have less time to bring their point of view to the fore or to substantiate it.[129] However, there are exceptions, such as the *NIPT* case, where the Court of Appeal in The Hague, after detailed justification and substantiation, came to the conclusion that the contested NIPT Subsidy Scheme was compatible with the internal market and was exempted

120. Beenders, *T&C Rv 2012*, Article 149, note 2.
121. Metselaar, *supra* n. 1, at 263.
122. Metselaar, *supra* n. 1, at 264.
123. Metselaar, *supra* n. 1, at 264.
124. Rechtbank Limburg, 9 December 2015, ECLI:NL:RBLIM:2015:10461 *Stichting Laurentius en Petronella* and Rechtbank Gelderland, 26 April 2018, ECLI:NL:RBGEL:2018:2856.
125. Rechtbank Limburg, 9 December 2015, ECLI:NL:RBLIM:2015:10461 *Stichting Laurentius en Petronella*.
126. Rechtbank Gelderland, 26 April 2018, ECLI:NL:RBGEL:2018:2856. *See* also Gerechtshof Den Haag, 7 March 2017, ECLI:NL:GHDHA:2017:470.
127. Metselaar, *supra* n. 1, at 267. *See* e.g., for judgments subsequent to 1 November 2015: Rechtbank Limburg, 21 March 2016, ECLI:NL:RBLIM:2016:6765 and Rechtbank Amsterdam, 18 October 2017, ECLI:NL:RBAMS:2017:10553.
128. Metselaar, *supra* n. 1, at 271. *See* e.g., Rechtbank Amsterdam, 25 June 2016, ECLI:NL:RBAMS:2016:3127, where the provisional relief judge briefly stated that Becton Dickinson insufficiently substantiated its claim that the tender procedure violated the prohibition of State aid, such that the claim was disregarded.
129. Metselaar, *supra* n. 1, at 271–272.

from the requirement to provide notification to the European Commission, as laid down in Article 108(3) TFEU.[130]

In cases where a complaint has also been submitted to the European Commission with regard to alleged State aid, the civil courts are sometimes willing to put questions to the European Commission about the status of the investigation.[131] The answer from the European Commission is, after all, relevant to the assessment of the claim.[132]

Unlike competitors, in a number of cases, the government did succeed in making a reasonable case for the existence of State aid.[133] This can be explained by the fact that the government, which relies on the standstill clause in civil proceedings against an alleged beneficiary, is in a favourable position.[134] First, the government is a party to the agreement in which State aid is deemed to be present; it therefore has knowledge of the relevant facts and circumstances.[135] Second, in this type of dispute the government is usually the defendant in the proceedings at first instance.[136] The government relies on the standstill provision as its defence against the alleged beneficiary's claim to enforce an established right, such as the right to fulfilment of the agreement.[137] As a result, the alleged beneficiary must first make a reasonable case for the government having a certain obligation that it must fulfil.[138] Only when this is successful will State aid come into the picture in the government's defence.[139] In that event, the government must then demonstrate that all elements of the concept of State aid within the meaning of Article 107(1) TFEU are present; the government, therefore, bears the obligation to furnish facts as well as the burden of proof.[140]

3. Compensation for damages in state aid cases

Since competitors have not once succeeded in convincing the civil courts that the government provided unlawful State aid, compensation has simply never been included in a judgment.[141] In Dutch literature, it is pointed out that – even if a competitor

130. Rechtbank Den Haag, 26 April 2017 ECLI:NL:RBDHA:2017:4278 *Non Invasive Prenatal Test*. *See* also Rechtbank Limburg, 12 May 2016 ECLI:NL:RBLIM:2016:4033, where the preliminary relief judge discussed extensively whether the cumulative criteria of Article 107(1) TFEU have been met.
131. *See* Rechtbank Limburg, 15 August 2018, ECLI:NL:RBLIM:2018:7705 and Gerechtshof 's-Hertogenbosch, 16 May 2017, ECLI:NL:GHSHE:2017:2127 *Shanks*.
132. Gerechtshof 's-Hertogenbosch, *supra* n. 131.
133. *See* Metselaar, *supra* n. 1, at 278 et seq.
134. Metselaar, *supra* n. 1, at 283.
135. Metselaar, *supra* n. 1, at 283.
136. Metselaar, *supra* n. 1, at 283. This is not always the case. *See* e.g., Rechtbank Noord-Nederland, 16 December 2015 ECLI:NL:RBNNE:2015:5815, in which the government as claimant argued that unlawful State aid was at stake and that the agreement in question was thus null and void/must be annulled.
137. Metselaar, *supra* n. 1, at 283.
138. Metselaar, *supra* n. 1, at 283.
139. Metselaar, *supra* n. 1, at 283.
140. Metselaar, *supra* n. 1, at 283.
141. Metselaar, *supra* n. 1, at 491. This has also not occurred after 1 November 2015 nor prior to 1 November 2005 (*see* in this respect Adriaanse, *supra* n. 57, at 312).

were to succeed in proving unlawful State aid – the demonstration of a causal link between damage suffered and a violation of the European rules will be problematic.[142]

The *Baby Dan* case shows that it is extremely complicated in the Netherlands to hold the recipient of alleged State aid liable for the receipt of unlawful State aid.[143] The Court of Appeal in Amsterdam for the time being has indeed assumed that the benefits provided to the competitors of Baby Dan – WeDeKa and De Risse – do qualify as State aid within the meaning of Article 87 of the EC Treaty (now Article 107 TFEU) and thus should have been notified to the European Commission.[144] However, this does not lead to the conclusion that WeDeKa and De Risse acted unlawfully and are therefore liable for damages. WeDeKa and De Risse are not obliged to give notification of the State aid; this obligation applies only to the authorities that grant the alleged State aid. It is only if the European Commission were to decide that the State aid is unlawful that this could in certain circumstances result in WeDeKa and De Risse – on the basis of national law – having acted unlawfully in relation to Baby Dan by receiving this support. In that regard, it is relevant whether WeDeKa and De Risse should have understood that there was a real risk that they had received unlawful State aid, according to the Court of Appeal. But even if it must be assumed that WeDeKa and De Risse should have grasped this, it does not automatically lead to a successful claim. The fact is that the European Commission had never given an opinion on the alleged State aid given to WeDeKa and De Risse. Furthermore, on the basis of what Baby Dan had put forward, it could not be established how the European Commission would have assessed the aid in question and what this would then have led to. In short: in order to make the recipient liable for damages suffered, the competitor of an alleged aid recipient must prove that the Commission in the intervening period has ruled that the aid measure is contrary to EU law or make a reasonable case that the Commission would have done so if it had given an opinion on the aid.[145] It is clear that this is a very complicated task, if not an impossible one.

4. A ray of light: the alleged support conflicts with general principles of sound administration

The previous sections demonstrate that litigation before the civil courts does little to help competitors in their fight against unlawful State aid. In most cases, it is impossible to make a reasonable case that State aid has been provided. Nevertheless, competitors have achieved small victories in two cases in which their competitive interests were threatened by alleged State aid. Although the Dutch civil court did not rule that unlawful State aid was involved because the criteria of Article 107(1) TFEU had not

142. Metselaar, *supra* n. 1, at 492. This is also affirmed in the case law in the rare judgments where the court did mention the possibility of compensation for damage without it already having established whether unlawful State aid was involved at all. *See* Rechtbank Assen, 30 May 2012, ECLI:NL:RBASS:2012:BW7185.
143. *See* Metselaar, *supra* n. 1, at 493.
144. Gerechtshof Amsterdam, 29 June 2006, ECLI:NL:GHAMS:2006:AZ1425 *Baby Dan*.
145. Metselaar, *supra* n. 1, at 493.

been fulfilled, it did ultimately conclude that the alleged aid was contrary to the general principles of sound administration.

The first case that is relevant in this context is *MuzyQ*. This case concerned a EUR 26-million guarantee issued by the board of the sub-municipality Oost/Watergraafsmeer (a district of the Amsterdam municipality) to the Orfeus Studios Foundation for the creation of practice rooms for musicians. This resulted in the MuzyQ music centre. Two companies that also rent practice studios to musicians initiated proceedings before the civil court, claiming that the guarantee qualified as unlawful State aid. However, the District Court of Amsterdam found that the two companies had insufficiently substantiated the (potential) effect of the aid on trade. This means the State aid criterion had not been fulfilled. However, the court held that the municipality had breached the principle of due care by not taking into account the interests of the two companies in deciding to stand surety for the Orfeus Studios Foundation. In a later interlocutory judgment, the District Court of Amsterdam ruled that there was a causal link between the careless actions of the municipality and the decline in sales of the two competing companies.[146] Eventually, the municipality was ordered to pay compensation amounting to EUR 195,079.75.[147]

The second case in which the civil court came to the conclusion that favouring a competitor violated the duty of care and Article 3:14 of the Civil Code concerned the sale by the municipality of Krimpenerwaard of a municipal sports hall and activity centre called De Stolp to the foundation *Stichting Stolwijk Ontmoet*.[148] The owner of a restaurant and conference centre in Stolwijk alleged that prohibited state support had been provided and brought proceedings before the civil court. According to the owner, the municipality had sold De Stolp for a price that was too low, had borne costs that a normal salesman would not carry and had provided a loan to *Stichting Stolwijk Ontmoet* which the foundation would not have been able to obtain in the open market. The renting out of reception rooms at De Stolp had led to a drop in turnover for the owner of the restaurant. However, the District Court of The Hague ruled that there was no State aid involved because the criterion that the aid measure should have an effect on trade between Member States was not met. According to the court, the alleged support was granted to a local citizens' initiative, which was set up with the aim of preserving social activities in De Stolp, a village hall in Stolwijk which is located in the middle of the Netherlands and not in the vicinity of the national borders, for the local population. The activities had a purely local character and a limited geographic scope. However, the court subsequently ruled that the municipality nevertheless had acted unlawfully in relation to the owner of the restaurant and therefore had to pay compensation. According to the court, the municipality had violated the principle of due care. The municipality had not shown that it had at any time considered the competitive interests of the owner of the restaurant or that it had weighed these interests against the sale of De Stolp to *Stichting Stolwijk Ontmoet*, this despite the fact that the municipality had provided the foundation with advantages in terms of both the

146. District Court of Amsterdam, 15 October 2014, not published.
147. *See* Rechtbank Amsterdam, 29 April 2015, ECLI:NL:RBAMS:2015:2388.
148. Rechtbank Den Haag, 30 December 2015, ECLI:NL:RBDHA:2015:15812 *De Stolp*.

purchase agreement and the loan that it could not have obtained on the open market. The District Court also considered it plausible that the owner of the complaining restaurant and conference centre had suffered a loss of turnover and had thus suffered damage.

Both judgments demonstrate that competitors – in spite of the fact that State aid is not established because the criteria of Article 107(1) TFEU are not met – are not always left empty-handed. Their interests as competitors are protected by applying a national principle of good administration.

VI. TAKING STOCK OF THE PRIVATE ENFORCEMENT OF STATE AID LAW IN THE NETHERLANDS

We started this contribution with the question of what the most important issues and problems are and which best practices can be distinguished in the private enforcement of State aid law in the Netherlands.

For a good understanding of Dutch practice in the context of State aid law, it is crucial to keep in mind that the Netherlands has a complicated division of jurisdiction with regard to government action, entailing that more than one court may be competent. This finely branched jurisdiction for government action can lead to uncertainty about which court is competent in a dispute concerning alleged State aid and – more often – can mean that when an aid measure consists of a set of acts, private parties sometimes have to litigate before different courts. Submitting a complaint to the European Commission then soon becomes a simple and more attractive alternative.

Nevertheless, private parties do end up in the national courtrooms with disputes concerning State aid. The various courts deal with State aid disputes according to the procedural rules applicable in their field of law. Therefore problems and best practices differ in each field of law.

Looking at the administrative courts those not surprisingly handle the majority of disputes in which State aid law is relevant, a first conclusion must be that national procedural law plays a very important role. Since the introduction of a relativity requirement (the *Schutznorm*) in GALA in 2013, the chances of plaintiffs successfully invoking State aid law in spatial planning disputes (these representing the majority of the cases in which State aid law is invoked in administrative courts) have been seriously reduced. This holds true not only for residents who lack any competitive interests that are affected by the challenged zoning plan decision but also for competitors whose competitive interests could be affected by the unlawful State aid. The *Schutznorm* cut off an enormous potential for the private enforcement of State aid law in administrative law in the Netherlands.

Not only must the *Schutznorm* threshold be passed by competitors, other national procedural rules can hinder them as well, e.g., the requirement that appellants qualify as interested parties. According to established case law, litigating competitors are required to be active in the same market segment and service area as the addressee of the (alleged) aid decision. This interested party test seems to be carried out more strictly in cases invoking State aid law than is customary in Dutch legal practice.

When competitors successfully overcome the obstacles of Dutch administrative procedural law, they have to prove or at least make plausible that State aid rules have been infringed. This turns out to be no easy task due to many competitors lacking information about aid arrangements. The administrative courts are not inclined to use their own investigative powers to establish illegal State aid. Furthermore, if a substantive assessment is made by an administrative court, it is sometimes rather indirect in nature. Most important is the conclusion that in most cases in which administrative courts substantively review a decision that might infringe State aid law, they rule that no (illegal) State aid is involved and often give no extensive reasoning for this decision. All in all, the chances of success are very small for competitors who lodge a State aid complaint at the administrative courts.

When it comes to fiscal state support, competitors do not have access to the tax courts by virtue of their position as competitors. It is therefore almost impossible for them to raise the issue of fiscal state support at the tax courts. Submitting a complaint to the European Commission thus, once again, becomes a simple and more attractive alternative.

State aid that is provided through private law instruments, such as an agreement, must be challenged by competitors before the civil courts. Although there are many possible claims and the civil courts quickly assume that a competitor has an interest in bringing proceedings, in practice, it appears to be very difficult to stop or reverse the provision of State aid. This is caused by the passive approach of the Dutch civil courts. The civil court has never been convinced by a competitor that unlawful State aid has actually been granted. However, in some cases, the civil court concluded that the alleged aid was contrary to general principles of sound administration.

The above leads to the conclusion that competitors are rarely successful when they complain to the Dutch courts about the provision of alleged unlawful State aid. This applies to the administrative courts, the tax courts and the civil courts. It is therefore more attractive for competitors to submit a complaint to the European Commission.

Thus the question arises whether it would help competitors if the EU were to impose rules governing actions for damages under the European State aid rules, comparable to Directive 2014/104. Although the rules laid down in this Directive hardly offer a solution to the problems identified above, it would help competitors if it became easier to gain access to evidence (*see* Chapter II of Directive 2014/104).

VII. DUTCH STATE AID RECOVERY ACT

In the previous section, it was concluded that it is not easy for private parties to successfully raise State aid law before the various Dutch courts. This is mainly caused by Dutch procedural law. The *Schutznorm* and the interested party test form the most important obstacles before the administrative courts. At the tax court, it is not possible at all for competitors to challenge State aid that is granted to their economic rivals through tax law. Finally, at the civil courts, competitors hardly ever succeed in convincing the passive civil court of the fact that there is a situation involving State aid.

The State Aid Recovery Act,[149] which entered into force on 1 July 2018 and is intended to facilitate the implementation of State aid law in the Netherlands, does little to provide a solution to these problems. We therefore do not expect a significant decrease in the procedural obstacles which private parties encounter when they attempt to raise the issue of unlawful State aid at a Dutch court.

The State Aid Recovery Act refers primarily to the recovery of unlawful State aid by governments, in the event the European Commission takes a recovery decision. In view of the background to the State Aid Recovery Act, this is not surprising. The origins of the Act lie in the fact that in 2005 it became clear that it was legally difficult in the Netherlands for the Dutch authorities to recover unlawful State aid pursuant to the requirements of EU law.[150] Indeed, there was no general competence to claim the recovery of interest.[151] Threatened with an infraction procedure by the European Commission, the Dutch legislature set to work on a law that would deal with the recovery of unlawful State aid. It took almost fifteen years before the law eventually came into force.

If the State Aid Recovery Act does not offer a solution to the problems identified in this contribution, what does it achieve? The State Aid Recovery Act, first of all, creates a legal basis for administrative authorities to recover unlawful State aid as a result of a decision by the European Commission, by means of a so-called payment decision. It does not matter whether this concerns State aid that has been provided by means of administrative or private law (legal) acts. The aid to be recovered also includes interest.[152] A special scheme applies to fiscal support; pursuant to Article 2(2), fiscal aid is recovered on the basis of the tax laws themselves.

Second, in cases where no Commission recovery decision is available, Article 7(1) of the State Aid Recovery Act stipulates that the administrative authority concerned is obliged to amend a decision if this decision is in conflict with the European State aid rules. Pursuant to Article 7(2), the relevant administrative authority is also obliged and authorised to claim interest. The law on the recovery of State aid therefore has the effect that administrative bodies always have the power to modify a decision if unlawful State aid is established. Private parties can therefore ask administrative authorities to make use of the obligations and powers laid down in the State Aid

149. This Act has received much attention in Dutch legal literature. *See* J.C. van Haersolte, *Terugvordering van staatssteun vindt zijn plek in de Nederlandse wetgeving (Recovery of State aid finds its way into Dutch legislation)* [2018] INTER 176; A.A. al Khatib, *De wet terugvordering staatssteun: een adequate grondslag voor de terugvordering van staatssteun? (The State Aid Recovery Act: an adequate legal basis for the recovery of State aid?)* [2018/2] De Gemeentestem 2. This includes the legislative proposal. *See* A.J. Metselaar, *Een vogel in de hand: nieuwe regels voor de terugvordering van staatssteun (A bird in the hand: new rules for the recovery of State aid)* [2016] Tijdschrift voor Staatssteun 110.

150. Raad van State, 11 January 2006, ECLI:NL:RVS:2006:AU9416.

151. *See* Raad van State, 11 January 2006, ECLI:NL:RVS:2006:AU9416 and Rechtbank Rotterdam, 4 July 2007, ECLI:NL:RBROT:2007:BB0270.

152. Concerning the recovery of unlawful State aid in response to a recovery decision of the European Commission, this has been laid down in Article 3(1), State Aid Recovery Act. For the recovery of unlawful State aid in the event that there is not (yet) a Commission decision, the claim for interest is established in Article 7(2) and (4) State Aid Recovery Act.

Recovery Act.[153] This also means that competitors can always obtain an opinion from the governing body about the allegedly unlawful State aid; they can thus provoke decisions which they can challenge before the administrative courts. As a result, it can no longer be argued against them that a decision granting the State aid has formal legal force and cannot be revoked. However, the State Aid Recovery Act does not regulate State aid provided through private law instruments in the event a Commission recovery decision is lacking.[154]

Third, the State Aid Recovery Act not only refers to the recovery of unlawful State aid but also partly focuses on preventing it. For example, the Act gives administrative authorities the competence to reject an application for a subsidy if, in the opinion of the administrative authorities, the provision of the subsidy is not compatible with the provisions of Articles 107 and 108 TFEU. This also gives guidance to competitors if they oppose decisions that include State aid aimed at economic rivals.[155] However, this advantage should not be overestimated, as in addition it is already forbidden to take subsidy decisions that are in conflict with EU law. The State Aid Recovery Act merely constitutes a clarification of this point. Nevertheless, this clarification is a positive development; for competitors it becomes clearer that it is possible to ask an administrative body to use this competence to disallow subsidies that constitute unlawful State aid. This also gives guidance to competitors if they oppose decisions that include State aid aimed at economic rivals

Finally, the State Aid Recovery Act contains an important development in terms of legal protection. If an administrative authority takes a payment decision in response to a decision of the European Commission, it must be challenged before a specialised administrative court: the Trade and Industry Appeals Tribunal.[156] This means that a more specialised State aid court will be established in the Netherlands. It should be noted immediately that State aid disputes will continue to have a much wider scope than the payment decision alone. For most State aid disputes, after all, there is no Commission decision available. Private parties will also want to litigate in those cases to prevent or reverse unlawful state support. In such situations, other courts – other administrative courts and the civil courts – are authorised to hear their disputes. In the future, those Dutch courts will thus also be confronted with State aid disputes, in the process facing all the complications that have been outlined above.

153. *See* also Metselaar, *supra* n. 149, at 117.
154. This is currently the case. *See* Raad van State, 17 August 2011, ECLI:NL:RVS:2011:BR5195 *Stichting NOB*.
155. The Recovery of State Aid Act provides for an extension of this in Article 4:35 GALA.
156. Article 9 State Aid Recovery Act.