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Recovery of Unlawful Aid

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CHAPTER 26

RECOVERY OF UNLAWFUL AID

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1. INTRODUCTION

This chapter deals with the recovery of unlawful aid. According to settled case law the removal of aid by means of recovery is considered to be the logical consequence of a finding that aid is unlawful.¹ The main objective pursued in recovering unlawfully paid state aid is, as the European Court of Justice (hereinafter ECJ) clearly confirmed in *Eesti Pagar*, to eliminate the distortion of competition caused by the competitive advantage which such aid affords. The purpose of recovery is that the recipient, by repaying the aid, loses the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored.² Recovery of unlawful aid can be imposed either by the Commission, or by the national courts as it is established in settled case law.³ In given circumstances national administrative authorities can also be under the obligation of recovering on their own initiative the aid that was unlawfully granted, as the ECJ made clear in the above-mentioned *Eesti Pagar* case. **26-001**

The various situations in which recovery can occur and the rules that will apply accordingly, will be further discussed in this chapter. Prior to this assessment, the **26-002**

¹ *Residex Capital IV v Rotterdam Municipality* (C-275/10) EU:C:2011:814 at [33].

² *Eesti Pagar v Ettevõtjate Arendamise Sihtasutus and Majandus-ja Kommunikatsiooniministeerium* (C-349/17) EU:C:2019:172 at [131].

³ *Klausner Holz Niedersachsen v Land Nordrhein-Westfalen* (C-505/14) EU:C:2015:742 at [20] and following.

concepts of unlawful aid and misuse of aid, to which the various powers of recovery are related, will be analysed in Section 2 more closely. The concept of unlawful aid has already been introduced in Ch.25 (para.25-108). Section 3 will provide an overview of the Commission's power to demand recovery. The relevant rules contained in Regulation 2015/1589 laying detailed rules for the application of art.108 TFEU⁴ (hereinafter "the Procedural Regulation") on the Commission's power, as well as the Commission's practice will be discussed in this section. Given this power of the Commission in this section, the positions of Member States and recipients concerned with regard to recovery imposed by the Commission will also be considered closely. In Section 4 recovery will be dealt with from the perspective of national courts, given their task to ensure that all appropriate action is taken to address the consequences of an infringement of the last sentence of art.108(3) TFEU (the so-called "standstill-provision") in procedures before them. The "private enforcement" and more general aspects of judicial protection will be further discussed in Ch.27. The role of administrative authorities is discussed separately in Section 5, given their duty to recover unlawful aid on their own initiative aid according to the above-mentioned *Eesti Pagar* judgment.

26-003 With respect to the role of the national courts in state aid cases, guidance was provided by the Commission in 2009 in a Notice on the enforcement of State aid law by national courts,⁵ followed by a specific website to provide practical information to the national courts and other parties involved⁶ and a *Handbook on Enforcement of EU State aid law by national courts*, which was issued in 2010.⁷ A recent study, which covered state aid cases before the national courts between 1 January 2007 and 31 December 2017 (including important cases decided in 2018), however shows that the national courts rarely order the recovery of unlawful aid.⁸ In 2019 the Commission adopted a new Notice on Recovery, after consultations with the Member States.⁹

2. THE CONCEPT OF UNLAWFUL AID

26-004 Unlawful aid is a concept relevant for recovery. As transpires from the arts 13(2) and 16(1) of the Procedural Regulation, the Commission's power to order recovery is mainly restricted to unlawful aid.¹⁰ The task assigned to the national courts and

⁴ Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9 (hereinafter: Procedural Regulation).

⁵ Commission Notice on the enforcement of State aid law by national courts [2009] OJ C85/1.

⁶ https://ec.europa.eu/competition/court/overview_en.html [Accessed 26 January 2021]. See also B. Brandtner, T. Beranger and C. Lessenich, "Private State Aid Enforcement" (2010) 9 EStAL 23, paras 23–32 on p.31.

⁷ European Commission, *Handbook on Enforcement of EU State aid law by national courts* (Luxembourg, 2010).

⁸ European Commission, *Study on the enforcement of State aid rules and decisions by national courts—Final study* (European Union, 2019), available at <https://ec.europa.eu/competition/publications/reports/kd0219428enn.pdf> [Accessed 26 January 2021].

⁹ Commission Notice on the recovery of unlawful and incompatible State aid [2019] OJ C247/1 (hereinafter: "2019 Recovery Notice"), which replaced the 2007 Notice [2007] OJ C272/4.

¹⁰ Only in case of "misuse of aid" the Commission also has the power to order recovery (see art.20 of the Procedural Regulation).

administrative authorities with respect to recovery also relates (only) to unlawful aid.¹¹

As was noted in Ch.25 (para.25-013) the concept of unlawful aid is defined in art.1(f) of the Procedural Regulation as new aid put into effect in contravention of art.108(3) TFEU. New aid is defined in art.1(c) as all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid. Given these definitions, which forms of aid are covered by this definition of unlawful aid and, if so, are susceptible to recovery?

26-005

First, this definition covers situations where new aid is implemented without notification. At first sight this looks like a clear-cut case; there are, however, various instances in which the necessity to notify a given measure as new state aid, may not be clear from the outset, or in which such necessity is debated in a specific situation. This occurs, for example, where Member States and the Commission hold different views on the notion of state aid. These differences of opinion will usually translate into a refusal or failure to notify. It should be further noted that situations may also arise where a Member State is of the opinion that a certain aid does not have to be notified because it has already been approved as part of a general aid scheme.¹² A Member State may also be of the opinion that the way a given aid measure is carried out in practice is covered by a positive Commission decision and that it is therefore to be considered as existing aid.¹³ When one of these opinions is contested and finally turns out to be wrong, the given aid will appear to be unlawful new aid, which has been put into effect in contravention of art.108(3) TFEU. A kind of similar situation may occur when a Member States gives state aid on the basis of the assumption that such aid is exempted from the notification obligation, e.g. based on the General Block Exemption Regulation.¹⁴ In the *Dilly's Wellnesshotel* case the ECJ made clear that Member States must comply with all relevant conditions of this regulation in order to rely on the possibility of being exempted from the obligation to notify. Conversely, the ECJ held that state aid not covered by that regulation should remain subject to the obligation to notify laid down in art.108(3) TFEU.¹⁵ Building on this argumentation, the ECJ ruled in the *Eesti Pagar* case that, if aid has been granted pursuant to Regulation 800/2008, which was the applicable Block Exemption Regulation at that time in the given case, although the conditions laid down to qualify for exemption under that regulation were not satisfied, the granting of that aid was in breach of the notification requirement and must, therefore, be considered to be unlawful.¹⁶ The authors suppose that the same reason-

26-006

¹¹ *Deutsche Lufthansa v Flughafen Frankfurt-Hahn GmbH* (C-284/12) EU:C:2013:755 at [29]; *Klausner Holz Niedersachsen* EU:C:2015:742 at [20] and following; *Eesti Pagar* EU:C:2019:172 at [88] and following.

¹² In *CIRFS v Commission* (C-313/90) EU:C:1993:111, both the Commission and France were of the opinion that there was no obligation to notify the measure concerned. The ECJ held otherwise and annulled the Commission's Decision not to open the formal procedure.

¹³ See, e.g. *PGE v Prezes Urzędu Regulacji Energetyki* (C-574/14) EU:C:2016:686.

¹⁴ Commission Regulation (EU) 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the TFEU [2014] OJ L187/1, as amended by Commission Regulation (EU) 2017/1084 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible costs [2017] OJ L156/1.

¹⁵ *Dilly's Wellnesshotel v Finanzamt Linz* (C-493/14) EU:C:2016:174 at [36].

¹⁶ *Eesti Pagar* EU:C:2019:172 at [87].

ing applies to all other applicable exemption regulations or decisions. Another example of a situation in which the necessity to notify new aid was not clear from the outset, follows from the *DEI* case. The application of a preferential electricity tariff granted by a contract, which was considered to be compatible state aid, was in the *DEI* case extended as a result of an order for interim measures by the single-member Court of First Instance of Athens in interlocutory proceedings. Years after, in following judgments of the General Court and the ECJ, it was confirmed that the order for interim measures had resulted in the grant or alteration of aid in breach of art.108(3) TFEU. It should be noted that although the legal instrument constituted only the extension of an earlier measure, the fact remained that, because of the alteration of the duration of the aid at issue, it had to be regarded as new aid. It follows that the extensions at issue were considered to be new aid, not because they stemmed from a legislative intervention, but because of their effects.¹⁷

26-007 The term “unlawful aid” will, secondly, cover notified aid which is, notwithstanding the standstill obligation, implemented before the Commission has given its approval. This may take place during the preliminary or the formal procedure. As already noted in Ch.25 (para.25-008), in the *Lorenz* case, and in many cases since, the ECJ has decided that art.108(3) TFEU extends to the whole period during which it applies, thus in the event of notification, it operates during the preliminary period and, where the Commission sets in motion the contentious formal procedural, up to the final decision.¹⁸ It was noted in para.25-073 that the standstill clause will cease to be applicable when the Commission takes a negative decision, although it will then be replaced by the prohibition contained in that decision.

3. COMMISSION’S POWER TO DEMAND RECOVERY

Rules on the Commission’s power to demand recovery

26-008 The rules on the procedures to be followed by the Commission in case of non-notified new aid contained in Ch.III of the Procedural Regulation have been dealt with in Ch.25 of this book. Here the rules on recovery of alleged unlawful aid shall be discussed.

26-009 Article 13 of the Procedural Regulation gives the Commission the power to issue injunctions for the suspension or provisional recovery of the aid. The adoption of the first type of injunction, the “suspension injunction”, is only subject to the requirement that the Member State concerned must be given the opportunity to submit its comments. The “recovery injunction” can only be adopted if the following strict criteria are fulfilled: according to an established practice, there are no doubts about the aid character of the measure concerned; there is an urgent need to act; and there is a serious risk of substantial and irreparable damage to a competitor. Recovery is to be effected in accordance with the procedure of art.16(2) and (3), discussed hereinafter, which means that the recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission’s decision. Contrary to the Commission’s power to

¹⁷ *DEI and Commission v Alouminion tis Ellados* (T-542/11) EU:T:2014:859, confirmed by (C-590/14 P) EU:C:2016:797.

¹⁸ *Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz* (120/70) EU:C:1973:152 at [8].

order recovery, the use of the recovery injunction is subject to the Commission's discretion: art.13(2) clearly states that the Commission may issue such a decision. As far as known, the Commission has not yet used this power.¹⁹

Article13(2) also gives the Commission the power to authorise the Member State concerned to couple the refunding of the aid with the payment of rescue aid to the firm concerned. The last sentence of art.13(2) states that the provisions of this paragraph shall be applicable only to unlawful aid implemented after the entry into force of Regulation 2015/1589, the predecessor of Regulation (EC) 659/1999. **26-010**

In cases of non-compliance with recovery injunction decisions of the Commission, art.14 of the Procedural Regulation provides that the Commission may refer the matter to the ECJ directly in accordance with art.108(2) TFEU.²⁰ **26-011**

It is consistent case law that the Commission—apart from the possibility for the Commission to issue a recovery injunction, as mentioned above—cannot request recovery of unlawful aid without first examining the compatibility of the aid with the internal market under the procedure provided for by art.108(2) TFEU.²¹ Where after such a procedure it takes a negative decision,²² i.e. where the Commission finds that the aid is not compatible with the internal market, the Commission's power to order recovery of unlawful aid is laid down in art.16 of the Procedural Regulation.²³ Article 16(1) provides that in such a situation the Commission *shall* decide that the Member State concerned shall take all necessary measures to recover the aid.²⁴ It follows from the *CSTP Azienda della Mobilità v Commission* case that the application of the principle of *res judicata* cannot prevent the Commission from finding the existence of unlawful state aid, even if such a categorisation had been previously ruled out by a national court adjudicating at last instance.²⁵ **26-012**

In the *Volotea v Commission* judgment the General Court rejected the applicant's claim that the Commission would be under an enhanced obligation to state reasons where it orders aid to be recovered. In line with consistent case law of the ECJ,²⁶ the General Court ruled²⁷: **26-013**

"Indeed, it is sufficient to recall in that regard that, in accordance with the case-law, the removal of unlawful State aid by means of recovery is the logical consequence of a finding that it is unlawful. By repaying the aid, which cannot be regarded as a sanction, the recipient forfeits the advantage which it had enjoyed over its competitors on the market,

¹⁹ In *Italy and Brandt Italia v Commission* (T-239/04 and T-323/04) EU:T:2007:260 at [138]–[144] the beneficiary of the aid claimed that the Commission had issued a recovery injunction and therefore had followed the wrong procedure. The Commission, however, contradicted that the contested decision contained an injunction for provisional recovery of the aid. The General Court found that the Commission had not caused the claimant any procedural disadvantage.

²⁰ 2019 Recovery Notice, para.150; See also *Commission v Greece* ("*United Textiles*") (C-363/16) EU:C:2018:12 at [34].

²¹ See *Buonotourist v Commission* (C-586/18 P) EU:C:2020:152 at [107], [110]; *COPEBI v Ministre de l'Agriculture* (C-505/18) EU:C:2019:500 at [30]–[31]; *A-Fonds v Inspecteur van de Belasting-dienst* (C-598/17) EU:C:2019:352 at [48]. See the 2019 Recovery Notice, para.13.

²² Article 9(5) Procedural Regulation.

²³ It should be noted that some Commission decisions constitute a combination of approving a part of the aid and disapproving the other part.

²⁴ See also K. Bach, "A Small Step Towards Stricter Practice in Cases of Breach of the Treaty under Article 108(2) TFEU?" (2012) 11 *EstAL* 667.

²⁵ *CSTP Azienda della Mobilità v Commission* (C-587/18 P) EU:C:2020:150 at [95].

²⁶ Among others *Belgium v Commission* (C-75/97) EU:C:1999:311 at [65]. *Commission v Aer Lingus* (C-164/15 P and C-165/15 P) EU:C:2016:990 at [114] and [116].

²⁷ *Volotea v Commission* (T-607/17) EU:T:2020:180 at [253].

enabling a return to the situation prior to payment of the aid (judgment of 17 June 1999, *Belgium v Commission*, C 75/97, EU:C:1999:311, paragraphs 64 and 65). It follows that, after having found, in recital 421 of the contested decision, that the State aid granted to the airlines by the Autonomous Region constituted unlawful State aid which was incompatible with the internal market, the reasoning set out in recitals 422 to 426 of the contested decision was sufficient to order the recovery of the aid, including in the case of the applicant.”

26-014 According to consistent case law of the ECJ a positive decision of the Commission on the compatibility of the aid does not have the effect of regularising, retrospectively, implementing measures which were invalid because they had been taken in disregard of the prohibition laid down by art.108(3) TFEU. Any other interpretation would have the effect of according a favourable outcome to the non-observance, by the Member State concerned, of the last sentence of art.108(3) TFEU and would deprive it of its effectiveness.²⁸ The Commission itself may not order the repayment of unlawful aid which has been declared compatible in a positive decision. However, one should be aware of a procedure followed in a case where the original Commission decision approving the aid has been annulled by the European Courts. For example, in the *CIRFS* judgment the ECJ ruled that the Commission should not have authorised the aid under the preliminary procedure while doubts persisted as to the compatibility of the aid with the common market.²⁹ In order to comply with the judgment, the Commission opened the formal procedure. In its decision concluding this procedure, the Commission found a substantial part of the aid to be incompatible with the common market and ordered recovery thereof.³⁰

26-015 Recovery shall, according to art.16(1) of the Procedural Regulation, not be required when this would be contrary to a general principle of EU law. Many Commission decisions and European Courts’ judgments deal in particular with the principle of protection of legitimate expectations. In addition, other EU principles must also be considered in recovery proceedings, such as legal certainty and *res judicata*. However, these above-mentioned principles cannot be successfully invoked by Member States to circumvent the obligation to recover unlawful aid. The primacy and direct effect of art.108(3) TFEU and the EU principles of loyal co-operation, effectiveness and equivalence take in most cases precedence in both the Commission’s decisional practice and the ECJ’s case law. Especially when legitimate expectations are invoked, it is only the beneficiary, and not the Member State concerned, that may entertain a legitimate expectation.³¹

26-016 According to the established case law, recipient undertakings cannot in principle rely on legitimate expectations unless the aid has been granted in compliance with the procedure laid down in art.108(3) TFEU. Accordingly, the ECJ reasons that an average diligent economic operator should normally be able to determine whether that procedure has been followed.³² If aid is unlawfully implemented without prior notification to the Commission, the recipient of the aid cannot invoke successfully

²⁸ *CELFF v SIDE* (C-199/06) EU:C:2008:79 at [40]. *Fédération Nationale v France* (C-354/90) EU:C:1991:440 at [16].

²⁹ *CIRFS* EU:C:1993:111.

³⁰ Commission Decision 95/253 on aid awarded by the French Government [1995] OJ L159/21.

³¹ *Presidenza del Consiglio dei Ministri v Fallimento Traghetti del Mediterraneo* (C-387/17) EU:C:2019:51 at [76].

³² *OTP Bank v Magyar Állam* (C-672/13) EU:C:2015:185 at [77]; *Eesti Pagar* EU:C:2019:172 at [98].

any legitimate expectation, unless exceptional circumstances apply.³³ The ECJ has, however, consistently ruled out the defence of exceptional circumstances. As far as the misapplication of block exemptions is concerned, the ECJ ruled in the *Eesti Pagar* judgment that a national authority cannot cause the beneficiary to hold a legitimate expectation that the aid is lawful.³⁴ The ECJ interprets the principle of legal certainty restrictively. In the past the ECJ has once ruled that an unreasonable delay in giving a negative decision could prevent the Commission from requiring recovery.³⁵ However, the current approach seems to be that in case of unlawful aid, a delay by the Commission in ordering recovery is in principle not a sufficient legal ground to limit or exclude recovery.³⁶

The principle of legal certainty applies to a 10-year limitation period according to art.17(1) of the Procedural Regulation. This limitation period starts from the moment that aid is granted according to art.17(2) of the Procedural Regulation.³⁷ The ECJ has ruled in *Fallimento Traghetti del Mediterraneo* that national procedural rules cannot entail limitation periods, since such time limitations would be in breach with the principles of effectiveness and equivalence.³⁸

According to art.16(2), the Commission shall also require interest to be paid from the date on which the unlawful aid was at the disposal of the beneficiary until the moment of recovery. It is important to note that the Commission is under an obligation to order both recovery and the payment of interest (prior case law seemed to point in the direction of the Commission having a discretionary power).³⁹

Pursuant to art.16(2) of the Procedural Regulation a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest must be paid from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery. The purpose of recovery is to re-establish the situation existing before the aid was unlawfully granted. Therefore, in order to ensure equal treatment, the advantage should be measured objectively from the moment when the aid was made available to the beneficiary. In order to achieve this objective, Implementing Regulation 794/2004 lays down the methods for fixing the interest rate and of applying interest.⁴⁰ Article 9 of this Implementing Regulation specifies that, unless otherwise provided for in a specific decision, the interest rate to be used for recovering aid shall be an annual percentage rate fixed for each calendar year (calculated on the basis of the interbank swap rate and, where no such rate or similar reference point exists in a Member State, the Commission will fix the applicable rate in close co-operation with the Member State concerned (art.9(4)). According to art.10 of the Implementing Regulation, the Commission publishes current and relevant historical interest rates in the *Official Journal*. The Implementing

³³ *CELF* EU:C:2008:79 at [42]. See also 2019 Recovery Notice, para.41.

³⁴ *Eesti Pagar* EU:C:2019:172 at [106].

³⁵ *Rijn-Schelde-Verolme v Commission* (223/85) EU:C:1987:502.

³⁶ *Commission v Salzgitter* (C-408/04 P) EU:C:2008:236 at [106]–[107]. See also 2019 Recovery Notice, para.36.

³⁷ *Fallimento Traghetti* EU:C:2019:51 at [74].

³⁸ *Fallimento Traghetti* EU:C:2019:51 at [75].

³⁹ *Mediaset SpA v Ministero dello Sviluppo economico* (C-69/13) EU:C:2014:71 at [21]–[23]; *Italy v Commission* (C-310/99) EU:C:2002:143 at [99].

⁴⁰ Commission Regulation (EC) 794/2004 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, as amended by Commission Regulation (EU) 2015/2282 of 27 November 2015 as regards the notification forms and information sheets [2015] OJ L325/1.

Regulation further provides that the interest rate to be applied shall be the rate applicable on the date on which the unlawful aid was first at the disposal of the beneficiary (art.11(1)). Compound interest will be applied in order to ensure full neutralisation of the financial advantages resulting from the unlawfully paid aid (art.11(2)). Furthermore, the interest rate shall be recalculated at five-yearly intervals (art.11(3)). Interest to be recovered on the sums unlawfully granted is aimed at eliminating any financial advantages incidental to such aid, that, in itself, would constitute aid which could distort, or threaten to distort, competition; the General Court did, however, observe that interest may only be recovered in order to offset financial advantages that actually result from the allocation of the aid to the recipient, and must be in proportion to the aid.⁴¹ In case of unlawfully granted state aid that is declared compatible with the internal market, according to the ECJ the undue advantage will have consisted, first, in the non-payment of the interest which the aid recipient would have paid on the amount in question of the compatible aid, had it had to borrow that amount on the market pending the Commission's decision, and, secondly, in the improvement of its competitive position as against the other operators in the market while the unlawfulness lasts.⁴²

26-020 Such interest is not “default interest”, i.e. interest payable by reason of the delayed performance of the obligation to repay the aid; the interest must, instead, be equivalent to the financial advantage arising from the availability of the funds in question, free of charge, over a given period.⁴³ The interest period cannot start to run before the date (a date which, in principle, must be fixed by the Commission and not the national authorities) on which the recipient of the aid actually had those funds at its disposal.⁴⁴ As will be discussed in para.26-043, provisions of national law may not render recovery practically impossible. This is not the case if national legislation provides in a non-discriminatory manner that the debts of insolvent companies cease to produce interest from the date of the declaration of insolvency⁴⁵—in such a case, according to the ECJ, the Commission should exclude from the recovery order interest falling due after the recipients were declared insolvent (on “insolvency” see further para.26-050). This judgment, as later explained by the ECJ in *Mediaset*, does not obligate the Commission to primarily take into account the possibility of insolvency proceedings in each recovery order. Nevertheless, it follows from the Court's judgment in *Frucona Košice v Commission* that the duration of an insolvency procedure is a relevant factor for the calculation of total sum of aid which must be recovered.⁴⁶ Therefore, it is sufficient for the Commission to adopt a decision which includes all necessary information—including available information concerning insolvency proceeding—which enables the recipient to work out himself the total amount, including interest, which has to be repaid.⁴⁷

26-021 According to art.16(3), Member States shall effect recovery without delay and in accordance with the procedures under national law, provided that they allow the

⁴¹ *Siemens v Commission* (T-459/93) EU:T:1995:100 at [97]–[99], upheld on appeal, *Siemens v Commission* (C-278/95 P) EU:C:1997:240.

⁴² *CELF* EU:C:2008:79 at [51].

⁴³ *Siemens* EU:T:1995:100 at [101], upheld on appeal, *Siemens v Commission* EU:C:1997:240.

⁴⁴ *Siemens* EU:T:1995:100 at [103].

⁴⁵ *Spain v Commission* (C-480/98) EU:C:2000:559 at [37] and [38].

⁴⁶ *Frucona Košice v Commission* (C-73/11 P) EU:C:2013:32 at [98], [100], [102].

⁴⁷ *Mediaset SpA* EU:C:2014:71 at [21].

immediate and effective execution of the Commission's decision. Member States shall take all necessary steps, including provisional measures. Aid which has been declared unlawful and incompatible with the common market must be immediately recovered by the Member States. When the Commission has ordered recovery within a certain timeframe, Member States may not deviate from the set time limits (see further para.26-043).⁴⁸ For that reason, the Commission on 4 October 2017, for example, referred Ireland to the ECJ for failure to recover in time alleged illegal state aid granted to Apple. However, when a total of €14.3 billion including interest was repaid by Apple into an escrow fund pending the final judgments of the EU Courts in the actions for annulment of the Commission decision brought by Ireland (T-778/16) and Apple (T-892/16), the Commission decided to withdraw the court action, taking into account that the payment into the escrow fund of the illegal aid removed the distortion of competition caused by that aid.⁴⁹

As already stated, art.17(1) of the Procedural Regulation limits the Commission's powers to recover to a period of 10 years. The limitation period begins on the day on which the unlawful aid is awarded.⁵⁰ In *France Télécom v Commission* the ECJ ruled that, for the purpose of determining the date on which the limitation period starts to run, that provision (e.g. art.15) refers to the grant of aid to a beneficiary, not the date on which an aid scheme was adopted.⁵¹ According to the ECJ, the determination of the date on which aid was granted may vary depending on the nature of the aid in question. The ECJ further considered:

26-022

"Thus, in the case of a multi-annual scheme, entailing payments or advantages granted on a periodic basis, the date on which an act forming the legal basis of the aid is adopted and the date on which the undertakings concerned will actually be granted the aid may be a considerable period of time apart. In such a case, for the purpose of calculating the limitation period, the aid must be regarded as not having been awarded to the beneficiary until the date on which it was in fact received by the beneficiary."⁵²

In the 2019 Commission Notice on the recovery of unlawful and incompatible state aid, it is stated that this principle also applies to an aid scheme entailing fiscal measures granted on a periodic basis for which the limitation period starts running for each fiscal exercise on the date on which the tax is due. According to the Commission this applies for instance to tax reliefs on every annual or biannual tax declaration, etc.⁵³

26-023

In its judgment in *Nelson Antunes da Cunha*, the ECJ ruled that the limitation period of 10 years contained in art.17(1) of the Procedural Regulation only applies to the Commission's power in relationship to the Member State concerned.⁵⁴ Referring to its judgments in *Eesti Pagar*⁵⁵ and *Fallimento Traghetti del Mediterraneo*⁵⁶ the ECJ considered that this period cannot be applied to the procedure of recovery of unlawful aid by the competent national authorities.

26-024

⁴⁸ *Commission v Italy (Alumina producers Sardinia)* (C-547/11) EU:C:2014:1319 at [50].

⁴⁹ https://ec.europa.eu/ireland/news/state-aid-commission-decides-withdraw-court-action-against-ireland-failure-recover-illegal-aid_en [Accessed 26 January 2021].

⁵⁰ *ANGED* (C-233/16) EU:C:2018:280 at [82].

⁵¹ *France Télécom v Commission* (C-81/10 P) EU:C:2011:811 at [81].

⁵² *France Télécom v Commission* EU:C:2011:811 at [82].

⁵³ 2019 Recovery Notice, para.58.

⁵⁴ *Nelson Antunes da Cunha v IFAP* (C-627/18) EU:C:2020:321 at [29]–[33].

⁵⁵ *Eesti Pagar* EU:C:2019:172 at [108] and [109].

⁵⁶ *Fallimento Traghetti* EU:C:2019:51 at [52].

26-025 Article 17(2) provides that the limitation period shall be interrupted by any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid; each interruption shall start time running afresh. The General Court, supported by the ECJ, has decided in the *Scott* case that not only a formal act is capable of constituting a measure of such a kind as to interrupt the limitation period. A single request for information is an act which has the effect of interrupting the limitation period. Moreover, the fact that the beneficiary was not aware of the letter does not deprive this request of the effect of interrupting the 10-year limitation period. The General Court observed that the limitation period for recovery of aid applies in the same way to the Member State concerned and to third parties.⁵⁷ The ECJ has recognised that the wording of art.17 does not give guidance as to whether there is a requirement to notify the action to the beneficiary of the aid if the limitation period is to be interrupted. The ECJ further found that art.17 is designed to protect interested parties such as the Member State and the beneficiary involved which would therefore have a “practical interest” in being informed by the Commission of any action which can interrupt the limitation period. However, that “practical interest” cannot have the effect of making the interruption subject to the requirement that such action be notified to the beneficiary of the aid measure concerned.⁵⁸ It is noteworthy that the “practical interest” of the beneficiary does not translate into any procedural right (other than the right to put forward arguments, as any other interested party, in the formal review procedure). At the same time, however, as also pointed out by AG Jacobs, nothing in the wording of the Procedural Regulation suggests the existence of a duty on the Commission to inform the beneficiary of any action that would interrupt the limitation period. So, the practical interest of the beneficiary to be informed cannot be claimed as a right. The period is also suspended as long as the Commission’s decision is subject to proceedings before the ECJ, which presumably should include proceedings before the General Court. Also, in the *ANGED* judgment, a letter sent by the Commission to the Spanish authorities was considered to constitute an action taken by the Commission within the meaning of art.15(2) of the Procedural Regulation, which interrupts the limitation period, so that the aid awarded during the 10-year period preceding that letter could not be regarded as existing aid. In the given letter the Commission had informed the Spanish authorities that a regional tax on large retail establishments was likely to constitute state aid and that the tax had to be amended or withdrawn.⁵⁹

26-026 In *Ceobus v Commission* the General Court ruled that it is apparent from the very wording of art.17(2) that that provision is intended to regulate all aspects of the applicable limitation period in the event of a decision by the Commission to recover aid. The bringing of an action before the national courts by a competitor cannot, according to the General Court, therefore constitute “action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid”, within the meaning of art.17(2). The General Court considered that in those circumstances, even if the national courts had decided, as regards the aid scheme at issue, that the aid granted under that scheme was time-barred from

⁵⁷ *Scott v Commission* (T-366/00) EU:T:2003:113 at [58]–[60], upheld on appeal (C-276/03 P) EU:C:2005:590.

⁵⁸ *Scott v Commission* EU:C:2005:590 at [31]–[32].

⁵⁹ *ANGED* EU:C:2018:280 at [83].

the date on which the first action was brought before them by a competitor of the final beneficiaries, that decision would not have been binding on the Commission.⁶⁰

It should be mentioned that recovery can also take place when lawfully implemented aid is subsequently *misused* by the beneficiary. It concerns according to art.1(g) of the Procedural Regulation aid used by the beneficiary in contravention of a decision of the Commission not to raise objections,⁶¹ or a positive decision⁶² or a conditional decision.⁶³ Article 20 of the Procedural Regulation empowers the Commission to open the formal procedure pursuant to art.4(4) of this Regulation. The second sentence of art.20 provides that arts 6–9, 11 and 12, art.13(1) and arts 14–17 shall apply *mutatis mutandis*. The result is that the powers to recover and to issue a suspension injunction are also applicable in cases of misuse of aid. It should be noted that the Commission is not entitled to issue recovery injunctions in case of misuse of aid.⁶⁴

26-027

Use of power

Even though the Commission's power to require recovery of unlawful aid is now firmly established in the Procedural Regulation, it may nevertheless be useful to provide a short background in the case law. In its *Kohlengesetz* judgment, the ECJ held as early as 1973 that the Commission was competent under art.108(2) TFEU (at that time art.93 EEC) to decide that a state must alter or abolish a state aid that is incompatible with the internal market. "To be of practical effect", it stated, "this abolition or modification may include an obligation to require repayment of aid granted in breach of the Treaty, so that, in the absence of measures for recovery, the Commission may bring the matter before the Court".⁶⁵ This right to order recovery has been confirmed, implicitly or explicitly, in a great number of judgments since 1985,⁶⁶ such as the *Alcan* and *Siemens* cases.⁶⁷

26-028

The 1973 judgment in *Kohlengesetz* formed the basis for the Commission's announcement in 1983 that recipients of illegal aid would be liable to repay it. The Commission had already published a communication in the *Official Journal* of 1980,⁶⁸ in which it stated that "the Commission has decided to use all measures at its disposal to ensure that Member States' obligations under art.88 (now art.108 TFEU) are respected". Three years later the Commission published another communication⁶⁹ in which it observed:

26-029

⁶⁰ *Ceobus v Commission* (T-330/17) EU:T:2019:527 at [75]–[76]. See also *Transdev v Commission* (T-291/17) EU:T:2019:534 at [95]–[96]; *Keolis CIF v Commission* (T-289/17) EU:T:2019:537 at [97]–[98].

⁶¹ Article 4(3) Procedural Regulation.

⁶² Article 9(3) Procedural Regulation.

⁶³ Article 9(4) Procedural Regulation.

⁶⁴ The reason, according to para.28 of the preamble of the Procedural Regulation, is that, unlike unlawful aid, aid which has possibly been misused is aid which has been previously approved by the Commission.

⁶⁵ *Commission v Germany (Kohlengesetz)* (70/72) EU:C:1973:87 at [13].

⁶⁶ For example, *Commission v Belgium* (52/84) EU:C:1986:3; *Deufil v Commission* (310/85) EU:C:1987:96.

⁶⁷ *Land Rheinland Pfalz v Alcan* (C-24/95) EU:C:1997:163; *Siemens* EU:T:1995:100, upheld on appeal, *Siemens v Commission* EU:C:1997:240.

⁶⁸ Communication on the notification of State aids to the Commission pursuant to Article 93 (3) of the EEC Treaty: the failure of Member States to respect their obligations [1980] OJ C252/2.

⁶⁹ Commission Communication [1983] OJ C318/3.

“In spite of this formal reminder and the numerous other reminders it has had occasion to deliver in connection with aids under examination, the Commission is obliged to note that illegal aid grants are becoming increasingly common, i.e. aid incompatible with the Common Market granted without the obligations laid down in art.88 (now art.108 TFEU) having been fulfilled.”

26-030 As a result, the Commission informed potential recipients of the risk attaching to any aid granted to them illegally, “in that any recipient of the aid granted illegally, i.e. without the Commission having reached a final Decision, may have to refund the aid”. Since then the Commission, in its notice to other Member States and interested parties, which is published in the *Official Journal* soon after the opening of formal proceedings under art.108(2) TFEU, usually included a warning to potential aid recipients of the risks of aid measures adopted contrary to art.108(3). In line with the Opinion of AG Van Gerven in C-303/88, the ECJ followed the view of the Commission that if the decision substantiates the incompatibility of the aid with the EC Treaty (now TFEU), the Commission can require recovery without further motivation; the argument sometimes raised by Member States that recovery is disproportionate is usually rejected as “... recovery is the logical consequence of a decision of illegality and cannot therefore be disproportionate”.⁷⁰

26-031 Following the 1983 communication, the Commission has made increasing use of orders for repayment. The Commission started to order recovery in earnest in 1984. Since that year this has been standard practice. In exceptional circumstances the Commission does not order the recovery if this would be contrary to a general principle of EU law, as it is prescribed by art.16(1) of the Procedural Regulation.⁷¹ In its decision of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions implemented by Spain the Commission for example took the view that, given the exceptional circumstances of the case, it would be contrary to the EU principle of the protection of legitimate expectations to order recovery of the aid at issue, inter alia, in respect of the beneficiaries of the measure at issue which had acquired shareholdings in a foreign company by 21 December 2007, the date of publication of the initiation decision.⁷²

26-032 Various studies on the application of national recovery procedures over the years show that recovery of unlawful aid may still face a number of obstacles, e.g. lack of clarity as to the identity of the national body responsible for issuing a recovery decision, and of the beneficiary required to repay the aid, and as to the exact amount of the aid to be repaid; absence of a clear predetermined procedure to recover aid in some Member States; no availability or no use of interim relief to recover aid; stay of the recovery proceedings while an appeal is pending; difficulties experienced by the governmental authorities of a Member State when recovering aid at local level; and the particular consequences for the enforcement of recovery decisions of insolvency of the beneficiary of unlawful aid. All this results, generally, in an excessive length of the recovery proceedings.⁷³

⁷⁰ See, e.g. *Commission v Hellenic Republic* (C-419/06) EU:C:2008:89 at [53]–[55].

⁷¹ *Mediaset v Ministero dello Sviluppo economico* (C-403/10 P) EU:C:2011:533 at [124].

⁷² See *Banco Santander and Santusa v Commission* (T-399/11 RENV) T-399/11 RENV at [288]. Still under appeal at the moment of writing, see C-53/19 P.

⁷³ Over the years the Commission has launched several studies on the enforcement of EU state aid policy at national level. A first study was carried out in 1999, followed by a comprehensive study consisting of two parts, which became available in early 2006: *Study of the Enforcement of State Aid law at the national level*, reports co-ordinated by Jestaedt, Derenne, Ottervanger. See also Ch.28,

As mentioned before, in 2019 the Commission issued a renewed Notice on the recovery of unlawful and incompatible state aid (the “2019 Recovery Notice”) which gives guidance to Member States as to how to achieve a more immediate and effective execution of recovery decisions. In this Notice it is mentioned that “[t]he Commission, for its part, has enhanced the downstream monitoring to ensure that Member States remove distortions to competition by recovering the aid which is paid in breach of the State aid rules. This is an important part of the Commission’s overall enforcement agenda”.⁷⁴ The Commission also stresses that “[b]oth the Commission and the Member States have an essential role to play in implementing recovery decisions and must contribute to the effective enforcement of recovery policy. A robust enforcement of recovery policy, coupled with close and proactive co-operation, effectively remedies distortions of competition in the internal market and promotes its full potential”.⁷⁵

As far as the role of the Commission is concerned, it is stated in the 2019 Recovery Notice that the Commission “endeavours in its recovery decisions to identify the beneficiaries of the incompatible aid and quantify the aid to be recovered”.⁷⁶ According to the Commission, “this allows recovery decisions to be implemented more swiftly and facilitates the fulfilment of the recovery obligation”.⁷⁷ It should be recalled in this concern that, according to consistent case law, no provision of EU law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. According to the ECJ, it is sufficient for the Commission’s decision to include information enabling the addressee of the decision to work out itself, without overmuch difficulty, that amount.⁷⁸ In *Fortischem v Commission* the General Court recalled “that the obligation on a Member State to calculate the exact amount of aid to be recovered forms part of the more general reciprocal obligation, enshrined in art. 4(3) TEU, incumbent upon the Commission and the Member States of sincere cooperation in the implementation of Treaty rules concerning State aid”.⁷⁹ The General Court considered “that the amount of the aid may be precisely quantified subsequently, at the stage of recovery of the aid, that is to say after the adoption of the contested decision”.⁸⁰ If the Commission does decide to order the recovery of a specific amount, it must, according to the General Court in the case *Dunamenti Erőmu v Commission*, pursuant to its obligation to conduct a diligent and impartial examination of the case under art.108 TFEU, assess as accurately as

Section 4. The purpose of the latter study was, amongst other things, to identify the strengths and weaknesses of national recovery procedures. In 2009 an update of the data on the application of state aid rules by national courts and their extension to the 27 Member States was presented: *2009 update of the 2006 Study on the enforcement of state aid rules at national level—FINAL REPORT*, coordinated by Derenne, Kaczmarek and Clovin: http://ec.europa.eu/competition/state_aid/studies_reports/enforcement_study_2009.pdf [Accessed 26 January 2021]. In 2019 the European Commission published a *Study on the enforcement of State aid rules and decisions by national courts* (2019), available at <https://ec.europa.eu/competition/publications/reports/kd0219428enn.pdf> [Accessed 26 January 2021].

⁷⁴ 2019 Recovery Notice, para.1.

⁷⁵ 2019 Recovery Notice, para.65.

⁷⁶ 2019 Recovery Notice, para.66.

⁷⁷ 2019 Recovery Notice, para.66.

⁷⁸ *Mediaset v Ministero dello Sviluppo economico* (C-403/10 P) EU:C:2011:533 at [126].

⁷⁹ *Fortischem v Commission* (T-121/15) EU:T:2019:684 at [168]. Still under appeal at the moment of writing, see C-890/19 P.

⁸⁰ *Fortischem v Commission* EU:T:2019:684 at [168].

the circumstances of the case will allow, the actual value of the benefit received from that aid by the beneficiary.⁸¹ It must ensure that the real advantage resulting from the aid is eliminated and it must thus, according to the General Court, order recovery of the aid in full. The General Court further considered:

“The Commission may not, out of sympathy with the beneficiary, order recovery of an amount which is less than the value of the aid received by the latter. On the other hand, the Commission is not entitled to mark its disapproval of the serious character of the illegality by ordering recovery of an amount in excess of the value of the benefit received by the recipient of the aid ...”⁸²

26-035 As far as the identification of the beneficiaries is concerned, it is stated in the 2019 Recovery Notice that “[w]hilst it is generally not complex to identify the beneficiary of individual aid, the Commission is generally not in the position to identify each and all of the beneficiaries of an incompatible aid scheme”.⁸³ If that is not possible, the Commission will describe in the recovery decision the methodology by which the Member State has to identify the beneficiaries.⁸⁴ This also applies to the determination of the aid amount to be recovered.⁸⁵

26-036 In the 2019 Recovery Notice, the Commission pays special attention to the identification of the aid beneficiary belonging to a group of undertakings. The Commission considers that:

“[w]here certain transactions occurred within a group of undertakings, the Commission may limit the scope of recovery to only one aid beneficiary within the group. The Commission may conclude in its recovery decision that undertakings belonging to a group, even if they are qualified under national law as separate legal entities, form an economic unit for the purposes of competition law and have benefitted from the aid.”⁸⁶

26-037 The Commission considers that “it may also conclude that other undertakings of such group have benefitted from the aid”.⁸⁷ The 2019 Recovery Notice states that in these circumstances, “the recovery decision may order the Member State concerned to recover the aid not only from the undertaking which directly benefitted from it but also from the whole group of undertakings forming an economic unit or from some of the legal entities belonging to it that also benefitted from the aid”.⁸⁸ It seems that this approach taken by the Commission has not yet been confirmed by the EU Courts. From the perspective of the ECJ the Commission is actually required “to look at the individual situation of each undertaking concerned” during the recovery phase.⁸⁹

⁸¹ *Dunamenti Erőmu v Commission* (T-179/09) EU:T:2014:236 at [177]. Judgment upheld by judgment of the ECJ of 1 October 2015 *Electrabel SA and Dunamenti Erőmu v Commission* (C-357/14 P) EU:C:2015:642. See also *Transavia Airlines v Commission* (T-591/15) EU:T:2018:946 at [302].

⁸² *Dunamenti Erőmu v Commission* EU:T:2014:236 at [198]. See also *Transavia Airlines* EU:T:2018:946 at [303].

⁸³ 2019 Recovery Notice, para.66, fn.86.

⁸⁴ 2019 Recovery Notice, para.66.

⁸⁵ See further 2019 Recovery Notice, para.110 on the calculation of the amount of aid.

⁸⁶ 2019 Recovery Notice, para.86.

⁸⁷ 2019 Recovery Notice, para.86.

⁸⁸ 2019 Recovery Notice, para.87.

⁸⁹ *Belgium v Commission (Magnetrol)* (T-131/16 and T-263/16) EU:T:2019:91 at [78] (appeal pending, C-337/19 P); *Comitato “Venezia vuole vivere” v Commission* (C-73/09 P and C-76/09 P) EU:C:2011:368 at [63].

In the 2019 Recovery Notice it is stated that:

26-038

“pursuant to the principle of sincere cooperation, the Commission assists the Member State concerned in implementing the recovery decision, among other things, by:

- sharing examples of spreadsheets for the Member State concerned to provide information on aid beneficiaries and aid amounts;
- assessing requests to extend the deadline to execute a recovery decision;
- organising a kick-off meeting;
- providing a tool to calculate recovery interest;
- sharing examples of escrow agreements suitable for the provisional recovery of aid;
- informing the Member State concerned about the provisional or definitive closure of a recovery procedure.”⁹⁰

In the 2019 Recovery Notice it is further stated that the Commission, in its recovery decision: **26-039**

“sets two deadlines for the Member State concerned to (i) submit precise information on the measures it has planned and already undertaken to execute the recovery decision (generally within 2 months of its service); and (ii) fulfil the recovery obligation (generally within 4 months of its service). In particular, within the first deadline the Member State is generally required to provide complete information on the identity of the beneficiaries, if not already identified in the recovery decision, the amount to be recovered and the national procedure applicable to fulfil the recovery obligation.”⁹¹

The 2019 Recovery Notice states that the Commission has over recent years developed the internal practice of “provisional closure” of recovery procedures. According to the Commission: **26-040**

“[t]his applies to situations where a recovery decision has been provisionally implemented by a Member State but cannot be considered as definitively executed due to: (i) pending litigation at European Union or national level; (ii) ongoing national administrative procedures that may still affect the fulfilment of the recovery obligation; or (iii) still pending insolvency proceedings in which the State aid claims have been properly registered at the appropriate rank.”⁹²

The Notice states that “the Commission endeavours to communicate to the Member State concerned when it provisionally closes a recovery procedure”.⁹³ According to the Notice, “the Member State concerned must keep the Commission updated following the provisional closure of a recovery procedure and must continue providing information and evidence on request and at least once per year until the Commission concludes that the Member State concerned has definitively executed the recovery decision”.⁹⁴ The Recovery Notice further states that “the Commission also continues to inform the Member State concerned about its assessment of the state of the procedure”.⁹⁵ It is further mentioned that, “by letter from its services, the Commission also informs the Member State when the recovery **26-041**

⁹⁰ 2019 Recovery Notice, para.67.

⁹¹ 2019 Recovery Notice, para.72.

⁹² 2019 Recovery Notice, para.136.

⁹³ 2019 Recovery Notice, para.137.

⁹⁴ 2019 Recovery Notice, para.138.

⁹⁵ 2019 Recovery Notice, para.139.

procedure is definitively closed. After closing the recovery procedure, the Commission will remove the case from the list of State aid cases with pending recovery procedures published on the website of the Commission's Directorate-General for Competition".⁹⁶ The Commission makes a disclaimer however: "Neither the provisional nor the definitive closure of a recovery procedure precludes the Commission from resuming closer scrutiny of the matter or reopening the procedure. That would be the case if new facts change the situation that had led the Commission to the closure."⁹⁷

26-042 Article 28 of the Procedural Regulation deals with non-compliance with decisions and judgments. In particular in cases where the Member State concerned does not comply with the recovery decision referred to in art.16 of this Regulation, the Commission may, according to art.28(1), refer the matter to the ECJ directly in accordance with art.108(2) TFEU. According to art.28(2), the Commission may pursue the matter in accordance with art.260 TFEU if the Commission considers that the Member State concerned has not complied with a judgment of the Court of Justice of the European Union. As far as the Commission's power to refer a matter under art.108(2) TFEU to the Court of Justice is concerned, the 2019 Recovery Notice states that the Commission must first establish which obligation imposed on the Member State by the recovery decision was not fulfilled. The Commission notes that, generally, the recovery decision includes two different types of obligations: (i) the obligation to inform the Commission of the measures taken or to be taken to implement the decision and keep it informed about the state of play of the case following the recovery deadline; and (ii) the obligation to execute the obligation to recover the state aid within the recovery deadline.⁹⁸ According to the Commission, the infringement of either of these obligations, as well as of any other obligation established in the recovery decision, may lead to an action pursuant to art.108(2) TFEU.⁹⁹ The 2019 Recovery Notice states that the Commission systematically considers launching a court action if recovery is not achieved, irrespective of the reasons for that failure and of the national administration or organ which internally bears responsibility for the failure to comply with the recovery obligation.¹⁰⁰ With regard to possible penalties to be imposed on the Member State concerned in case of a following procedure on the basis of art.260(2) TFEU, the Commission takes the view that the infringement of the recovery obligation is always a serious infringement.¹⁰¹

Implementation of recovery

26-043 Following from art.16(1) of the Procedural Regulation, the Member State concerned shall be obliged to take all necessary measures to recover the aid from the beneficiary when the Commission takes a recovery decision addressed to the Member State.

26-044 With regard to the implementation of a recovery decision, art.16(3) provides that:

⁹⁶ 2019 Recovery Notice, para.139.

⁹⁷ 2019 Recovery Notice, para.140.

⁹⁸ 2019 Recovery Notice, para.149.

⁹⁹ 2019 Recovery Notice, para.150.

¹⁰⁰ 2019 Recovery Notice, para.151.

¹⁰¹ 2019 Recovery Notice, para.57.

“recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission’s decision. To this effect and in the event of a procedure before national courts (see section 4), the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Union law.”¹⁰²

The ECJ has ruled repeatedly that only an absolute impossibility to properly implement a recovery decision can be invoked as a legitimate justification.¹⁰³ Member States have on many occasions failed to convince the ECJ that national legislation or policy practices precluded immediate and full recovery proceedings.¹⁰⁴ The ECJ considers such “internal circumstances” solely attributable to the Member States’ “own acts and omissions”.¹⁰⁵ This also holds true for invoking a so-called “passing on defence” in which case benefits for consumers provided by the aids are raised by Member States to prevent recovery.¹⁰⁶ Such invoked defences are null and void according to art.108 TFEU because they obstruct the goal of recovery, which is restoring the level playing field.¹⁰⁷ **26-045**

In *Scuola Elementare Maria Montessori*, the ECJ ruled that the principle of loyal co-operation obliges the Commission to investigate during the formal investigation whether the recovery of unlawful aid is absolutely impossible.¹⁰⁸ Loyal co-operation does not require the Commission to attach an order for recovery to every decision declaring aid to be unlawful and incompatible with the internal market, but it requires the Commission services to take into consideration the arguments put to it by the Member State concerned on the existence of absolute impossibility of recovery.¹⁰⁹ **26-046**

The Member State concerned that encounters difficulties in recovering the aid concerned at the stage of the procedure must immediately inform the Commission of the unforeseen and unforeseeable difficulties it encounters.¹¹⁰ However, the ECJ ruled in *Scuola Elementare Maria Montessori* that: **26-047**

“the condition of absolute impossibility of implementation is not satisfied where the Member State does no more than inform the Commission of the internal difficulties of a legal, political or practical nature, attributable to the national authorities’ own acts or omissions, raised by implementation of a decision, without taking real steps to recover the aid from the undertakings concerned and without suggesting to the Commission alternative

¹⁰² *Scuola Elementare Maria Montessori v Commission* (C-622/16 P and C-624/16 P) EU:C:2018:873. See also *Commission v Slovak Republic* (C-507/08) EU:C:2010:802 at [48].

¹⁰³ *Scuola Elementare Maria Montessori* EU:C:2018:873; *Belgium v Commission* (C-591/14) EU:C:2017:670. See also 2019 Recovery Notice, paras 47–55.

¹⁰⁴ *Nelson Antunes* EU:C:2020:321 at [59]; *Commission v Greece* (C-263/12) EU:C:2013:673.

¹⁰⁵ *Scuola Elementare Maria Montessori* EU:C:2018:873 at [91], [95].

¹⁰⁶ See also G. Ølykke, “The Passing-on Defence Catapulted Out of State Aid Law: Annotation on the Judgments of the Court of Justice the European Union (Third Chamber) of 21 December 2016 in Joined Cases C-164/15 P *Commission v Aer Lingus* and C-165/15 P *Commission v Ryanair*” (2017) 16 *European State Aid Law Quarterly* 93.

¹⁰⁷ *Ryanair and Aer Lingus* (C-164/15 P and C-165/15 P) EU:C:2016:990 at [99]; *Iberpotash v Commission* (T-257/18) EU:T:2020:1 at [187].

¹⁰⁸ *Scuola Elementare Maria Montessori* EU:C:2018:873 at [92].

¹⁰⁹ *Scuola Elementare Maria Montessori* EU:C:2018:873 at [84]–[85].

¹¹⁰ *Scuola Elementare Maria Montessori* EU:C:2018:873 at [90], [92].

methods of implementing the decision which would allow those difficulties to be overcome.”¹¹¹

26-048 Moreover, according to the “*Deggendorf* principle”, the Member States are required to suspend the payment of a new aid to beneficiaries concerned in application of the *Deggendorf* principle until all outstanding unlawful aid expenditure has been recovered.¹¹² If unforeseen or unforeseeable difficulties would arise in recovering aid, the ECJ has consistently held that the Commission and Member States should “overcome difficulties whilst fully observing the Treaty provisions, and in particular the provisions on State aid”, in keeping with art.4(3) TEU.¹¹³ In *Blumar* the ECJ renewed the scope of its previous *Deggendorf* judgment. In this preliminary reference case the Italian *Corte suprema di cassazione* asked the ECJ whether the principle of proportionality, in conjuncture with art.108(3) TFEU, “precludes national legislation pursuant to which the award of State aid is subject to a declaration by the applicant in which the applicant must profess it has not received unlawful or incompatible aid, which it has failed to repay, even in the circumstance that there has not been a request for repayment (under a Commission decision)”.¹¹⁴ The ECJ ruled that “national legislation, although intended to ensure compliance with the conditions in *Deggendorf*, may lay down more restrictive conditions in case it allows for the payment of State aid to be refused on the sole ground that the applicant has not produced a sworn declaration, irrespective of whether it has actually benefited from unlawful aid, or whether there is an explicit request for repayment of that aid”.¹¹⁵ In those circumstances the ECJ does not consider such a requirement as contrary to the principle of proportionality.¹¹⁶ Furthermore, the ECJ ruled that art.108(3) TFEU does not require Member States to grant aid.¹¹⁷ Consequently, the ECJ ordered that a Commission’s decision which approves state aid does not preclude Member States from retaining the right to refuse to grant aid, despite the fact that aid was approved by the Commission.¹¹⁸

26-049 Particular enforcement problems may arise in the many cases where the beneficiary is insolvent and/or has gone bankrupt. Recovery must then take place under a large variety of national insolvency procedures that often tend to protect the economic activities against creditors, including the Member State, in an attempt to achieve continuation of the business. Insolvency proceedings tend to take several years while in the meantime the activities of the insolvent company, and thereby the distortion of competition, continues. The fact that a company is insolvent or in financial difficulties does not affect the obligation of repayment; removal of this obligation in the event of liquidation would render meaningless the state aid rules.¹¹⁹

¹¹¹ *Scuola Elementare Maria Montessori* EU:C:2018:873 at [91].

¹¹² 2019 Recovery Notice, para.159; *TWD v Commission* (C-355/95 P) EU:C:1997:241 at [25]–[26].

¹¹³ *Commission v Germany* (94/87) EU:C:1989:46 at [9].

¹¹⁴ *Blumar SpA, Roberto Abate, Commerciale Gicap v Agenzia delle Entrate* (C-415/19 to C-417/19) EU:C:2020:360 at [18].

¹¹⁵ *Blumar SpA, Roberto Abate, Commerciale Gicap* EU:C:2020:360 at [21] and [26].

¹¹⁶ *Blumar SpA, Roberto Abate, Commerciale Gicap* EU:C:2020:360 at [26].

¹¹⁷ *Blumar SpA, Roberto Abate, Commerciale Gicap* EU:C:2020:360 at [23].

¹¹⁸ *Blumar SpA, Roberto Abate, Commerciale Gicap* EU:C:2020:360 at [24].

¹¹⁹ *United Textiles* EU:C:2018:12 at [36].

Insolvency proceedings

Concerning recipient undertakings which have become insolvent the Commission states in its Recovery Notice: **26-050**

“that restoration of the previous situation and elimination of the distortion of competition resulting from the aid can be achieved through registration of the claim relating to the aid to be recovered in the schedule of liabilities within the recovery deadline. In that case, the registration of the claim must be followed by (i) recovery of the full recovery amount, or, if that cannot be achieved, (ii) the winding-up of the undertaking and the definitive cessation of its activities.”¹²⁰

In order to recover unlawful aid from an insolvent beneficiary, a Member State is required to seize the assets of the aid beneficiary and to cause its liquidation if the latter is unable to repay aid or to take any other measure enabling the aid to be recovered.¹²¹ **26-051**

Where possible, the Member State, as creditor of the recovery claim, is obliged to register the claim in the insolvency proceedings.¹²² The registration of the recovery claim must lead to the full recovery of the unlawful aid (including interest) or, if not possible, the recipient undertaking must be liquidated and its economic activities must be terminated for good.¹²³ **26-052**

Transfer of shares or assets

The Commission enjoys a relatively wide discretion in the application and enforcement of the state aid provisions and it takes a strict approach to any attempts to evade the effect of an adverse state aid decision.¹²⁴ The unlawful aid must be recovered from the undertaking which actually benefited from it.¹²⁵ In principle, the beneficiary is the recipient, i.e. the undertaking which received the aid. However, the aid might also be recovered from other undertakings if it is established that they benefited from it.¹²⁶ Such a situation can arise when the recipient is bought by another company or when the assets of the recipient are transferred to another undertaking at a price that is lower than their market value or to a successor company set up in order to circumvent the recovery order. **26-053**

With regard to the acquisition of the recipient by another company through a *share deal* the ECJ has ruled in *Germany v Commission* that when the recipient is bought at a market price, “that is to say at the highest price which a private investor acting under normal market conditions was ready to pay for that company in the situation it was in, in particular after having enjoyed State aid”, the aid element is **26-054**

¹²⁰ 2019 Recovery Notice, para.129.

¹²¹ *United Textiles* EU:C:2018:12 at [36]; 2019 Recovery Notice, para.128.

¹²² 2019 Recovery Notice, paras 128, 132.

¹²³ 2019 Recovery Notice, para.129; *Commission v Spain* (“*Magefesa II*”) (C-610/10) EU:C:2012:781 at [72] and [104].

¹²⁴ See Opinion of AG Saugmandsgaard Øe in *Nelson Antunes da Cunha v IFAP* (C-627/18) EU:C:2019:1084 at [81]–[82]; *AZA v Agenzia della Entrate* (C-89/14) EU:C:2015:537 at [42]; *Diputación Foral de Vizcaya v Commission* (C-471/09 P to C-473/09 P) EU:C:2011:521 at [63]–[66]; *Alcan* EU:C:1997:163 at [34].

¹²⁵ *SNCF Mobilités v Commission* (C-127/16 P) EU:C:2018:165 at [106]; *Commission v Aer Lingus* (C-164/15 P and C-165/15 P) EU:C:2016:990 at [90].

¹²⁶ *Germany v Commission* (C-277/00) EU:C:2004:238 at [75].

assessed at the market price and included in the purchase price.¹²⁷ In a situation where the recipient retains its legal personality and continues to carry out, for its own account, the activities subsidised by unlawful aid, the ECJ considers that the recipient “also retains the competitive advantage connected with that aid and it is therefore that undertaking that must be required to repay an amount equal to that aid. The buyer cannot therefore be asked to repay such aid.”¹²⁸ Therefore, in the case of a *share deal* it is in principle the beneficiary and not the purchaser that remains liable for repayment of the unlawful state aid, regardless of whether the repayment is taken into account in determining the conditions of sale.¹²⁹ This approach is underlined by the Commission in its 2019 Recovery Notice.¹³⁰

26-055 When dealing with the *sale of assets* (a so-called “asset deal”) the ECJ ruled that a transfer of the advantage created by the aid may occur when the assets of the beneficiary are transferred to a third party at a price that is lower than their market value, or to a successor company that is set up to circumvent the recovery order; the recovery order can be extended to that third party.¹³¹ In its 2019 Recovery Notice the EC states that “the buyer of the assets may, if it retains that advantage, be required to pay back the aid in question”.¹³² In such a situation the Commission will assess whether there is an existence of economic continuity between the original recipient of the unlawful aid and the third party which purchases the former.¹³³ Accordingly the Commission may for instance take into account the scope of the transfer price, liabilities, the maintenance of personal and management and the identity of shareholders or owners of the seller and buyer.¹³⁴ In *Fortischem v Commission*, the General Court ruled that assessing the sale price, although the one of most significant indicators, is not sufficient for finding that there is no economic continuity.¹³⁵ Since the Commission had based its decision “on the asset transfer price, consistent with the market price, and on the mismatch between the shareholders and the economic logic of the transaction, and not merely on the transfer price”, the General Court ruled that the Commission had assessed the asset deal in accordance with art.16(1) TFEU.¹³⁶

26-056 In *Olympic Airways* the ECJ considered that, where a transfer of assets from the beneficiary to a new company was structured in such a way that it would be impos-

¹²⁷ *Germany v Commission* EU:C:2004:238 at [80]. See also *NeXovation v Commission* (T-353/15) EU:T:2019:434 at [116] (still under appeal, see C-665/19 P) and *CDA Datenträger Albrechts v Commission* (T-324/00) EU:T:2005:364 at [101], [103], [108]–[109].

¹²⁸ *Electrabel* EU:C:2015:642 at [113]. See also *Germany v Commission* EU:C:2004:238 at [81]–[82].

¹²⁹ *Germany v Commission* EU:C:2004:238 at [84].

¹³⁰ 2019 Recovery Notice, para.94.

¹³¹ *Germany v Commission* EU:C:2004:238 at [86], [98].

¹³² 2019 Recovery Notice, para.91.

¹³³ 2019 Recovery Notice, paras 89–92.

¹³⁴ 2019 Recovery Notice, para.92; see for instance Commission Decision of 15 October 2014, Slovakia: NCHZ (SA.33797 (2013/C) (ex 2013/NN) (ex 2011/CP)) and *Fortischem* EU:T:2019:684 at [208]–[209], [281]–[283]. See also *AceaElectrabel v Commission* (C-480/09) EU:C:2010:787 at [68]–[69].

¹³⁵ *Fortischem* EU:T:2019:684 at [208]–[210].

¹³⁶ *Fortischem* EU:T:2019:684 at [21]–[284]. On 31 January 2020 Fortischem lodged an appeal against this judgment (*Fortischem v Commission* (C-890/19 P)). At the time of writing the appeal was still pending.

sible to recover the debts of the beneficiary from the new company, that operation created an obstacle to the effective implementation of the recovery decision.¹³⁷

The calculation of the amount of aid by the Member States

As noted in above, the ECJ ruled in accordance with settled case law, that no provision of EU law requires the Commission, when it orders restitution of aid declared incompatible with the internal market, to fix the precise amount of the aid to be repaid. According to the ECJ, “it is sufficient for the Commission’s decision to include information enabling the recipient to work out himself, without overmuch difficulty, that amount”.¹³⁸ Therefore, the Member States are required to calculate the exact amount when aid is to be recovered.¹³⁹ In *Larko v Commission*, the ECJ confirmed that in case of recovery of state guarantees given to firms in difficulty, these must be regarded as aid equal to the amount of the loan guaranteed. According to the ECJ, in such a situation the recovery from the firm in receipt of aid of that amount equal to the guaranteed loan is intended precisely to restore the status quo and not to impose a penalty on that firm.¹⁴⁰

26-057

In *Electrabel*, the ECJ ruled that there is no general method of calculation in state aid law which requires Member States to calculate the recovery amount based on profits.¹⁴¹ Where the Commission has rendered a recovery decision the national authorities must recover the precise amount of aid as determined in that decision.¹⁴² Where the Commission has not quantified the exact amount of aid to be recovered, the national authorities must follow the method the Commission has described in its decision.¹⁴³ Article 16(2) of the Procedural Regulation requires that the interest from the day the aid was granted is calculated based on compound interest rates, which are published on the website of DG Competition (see text).¹⁴⁴

26-058

Next to the national administrative authorities the national courts may also be involved in the calculation of the amount of aid to be recovered. In the *Mediaset* case the ECJ recalled that recovery decisions are binding on all the organs of the state to which they are addressed, including the national courts.¹⁴⁵ The ECJ further held that the national courts may contact the Commission for assistance, where they entertain doubts or have difficulties as regards the quantification of the amount of aid to be recovered.¹⁴⁶ Given the principle of national procedural autonomy, which applies to the recovery of aid in the absence of pertinent provisions of EU law, the recovery is to be carried out in accordance with the rules and procedures laid down by national law. For the purposes of quantification of the amount of aid to be recovered, the ECJ specified “that the national court must take into account ... all the relevant information of which it has been made aware, including the exchanges

26-059

¹³⁷ *Commission v Greece* (C-415/03) EU:C:2005:287 at [33]–[34].

¹³⁸ *Mediaset SpA* EU:C:2014:71 at [21].

¹³⁹ *Spain v Commission* (T-461/13) EU:T:2015:891 at [160].

¹⁴⁰ *Larko v Commission* (C-244/18 P) EU:C:2020:238 at [115]–[116].

¹⁴¹ *Electrabel* EU:C:2015:642 at [145]–[146].

¹⁴² 2019 Recovery Notice, para.98.

¹⁴³ 2019 Recovery Notice, para.99.

¹⁴⁴ DG Competition website: https://ec.europa.eu/competition/state_aid/legislation/reference_rates.html [Accessed 26 January 2021]; 2019 Recovery Notice, paras 110–111.

¹⁴⁵ *Mediaset SpA* EU:C:2014:71 at [23].

¹⁴⁶ *Mediaset SpA* EU:C:2014:71 at [30].

between the Commission and the national authorities by application of the principle of cooperation in good faith”.¹⁴⁷

26-060 To prevent any failure to implement a Commission (recovery) decision, art.108(2) TFEU proceedings allow the Commission to give Member States a deadline to recalculate the total amount for recovery (including interest).¹⁴⁸

26-061 When it comes to implementing recovery orders within the timeframes of the Commission decision the Member States have no discretion, since any derogations under national procedural law would render it impossible or extremely difficult in practice for third parties affected by unlawful aid to protect their rights.¹⁴⁹ Moreover, the ECJ ruled in *Fallimento Traghetti del Mediterraneo* and *Nelson Antunes da Cunha* that the effectiveness of art.16 of the Procedural Regulation requires Member States to initiate recovery proceedings beyond the Commission’s limitation period of 10 years for ordering recovery set out in art.17 of the Procedural Regulation. According to art.16(2) of the Procedural Regulation no national limitation periods may hinder the effectiveness of art.108(3) TFEU.¹⁵⁰ Based on the same rationale the ECJ reasoned in *Fallimento Traghetti del Mediterraneo* that the limitation period of art.17 of the Procedural Regulation “would be contrary to the principle of legal certainty to apply ... to an action for damages brought against the Member State concerned by a competitor of the company benefiting from State aid”.¹⁵¹

4. ACTIONS BY THIRD PARTIES BEFORE THE NATIONAL COURTS

26-062 As discussed in more detail in Ch.27, the last sentence of art.108(3) TFEU, entailing the so-called standstill obligation, has direct effect. Article 108(3) TFEU may be directly relied upon by individuals before the national courts.¹⁵² Consequently, the national courts have to uphold art.108(3) TFEU, and in addition art.2 of the Procedural Regulation, when a measure constitutes unlawful state aid and was implemented in breach with the standstill provision.¹⁵³ The national courts have to draw all the appropriate conclusions from an infringement of art.108(3) TFEU, or from an incorrect application of the Block Exemption Regulations, in accordance with their national law.¹⁵⁴ Accordingly, they may suspend the implementation of state aid measures and order the recovery of the implemented unlawful state aid.

¹⁴⁷ *Mediaset SpA* EU:C:2014:71 at [36].

¹⁴⁸ *Commission v France* (C-37/14) EU:C:2015:90; *Commission v Greece* (C-363/16) EU:C:2017:746 at [47].

¹⁴⁹ *Fallimento Traghetti* EU:C:2019:51 at [72].

¹⁵⁰ *Nelson Antunes* EU:C:2020:321 at [61]–[62]; *Fallimento Traghetti* EU:C:2019:51 at [75].

¹⁵¹ *Fallimento Traghetti* EU:C:2019:51 at [72].

¹⁵² *Deutsche Lufthansa* EU:C:2013:755; *CELF* EU:C:2008:79.

¹⁵³ See S. Donzelli, “The Role of the European Commission and the Cooperation with National Courts Private Enforcement” (Ch.10, p.215) and J. van den Brink and W. den Ouden, “Private Enforcement in the Netherlands” (Ch.14, p.289) in F. Wollenschläger et al. (eds), *Private Enforcement of European Competition and State Aid Law* (Alphen aan den Rijn: Kluwer, 2020); see Kreuschitz and N. Bermejo, “The Role of National Courts in the Enforcement of the European State Aid Rules” in V. Tomljenović, N. Bodiroga-Vokobrat et al, *EU Competition and State Aid Rules: Public and Private Enforcement* (Heidelberg, 2017); see also P. Nicolaides, “Are National Courts Becoming an Extension of the Commission?” (2014) 13 EStAL 409.

¹⁵⁴ *Trapeza Eurobank v ATE* (C-690/13) EU:C:2015:235 at [52]; *Nerea v Regione Marche* (C-245/16) EU:C:2017:521 at [39]; *Eesti Pagar* EU:C:2019:172 at [89]–[92], [100] and [130]; *Bayerische Motoren Werke v Commission and Freistaat Sachsen* (C-654/17 P) EU:C:2019:634 at [139].

Therefore, the national courts play an important role in the private enforcement of the EU state aid rules.¹⁵⁵ Next to the Commission, the national courts play a separate but complementary role, especially by providing interim relief by means of suspending payments or ordering of recovery of unlawful aid.¹⁵⁶

The national courts may also order provisional measures to safeguard both the interests of the parties concerned and the effectiveness of the Commission's subsequent decision.¹⁵⁷ During and after formal investigations initiated by the Commission, the national courts co-operate closely with the Commission's services. When ordering provisional measures, pending a formal investigation by the Commission, the national courts must either verify with the Commission whether such measures do not obstruct the outcome of a formal investigation, or alternatively ask the ECJ for a preliminary reference.¹⁵⁸ The national courts may rely on art.29(2) of the Procedural Regulation to request the Commission to provide a non-binding opinion on the scope of arts 107 and 108 TFEU in national procedures.¹⁵⁹ The Commission has conducted a study to enhance its co-operation with the national courts and wants to co-operate more closely as an *amicus curiae* according to art.29 of the Procedural Regulation.¹⁶⁰ When ordering provisional measures, pending a formal investigation by the Commission, the national courts must either verify with the Commission, or refer a preliminary question to the Court, as to determine whether such measures do not obstruct, or contradict, the outcome of a formal investigation initiated by the Commission.¹⁶¹ In practice, especially during proceedings for interim measures, a national court may consider involving the Commission at first instance due to expediency reasons.

The implementation of recovery procedures is, however, a matter to be settled for the national courts alone under their national procedural law.¹⁶² National authorities may seek a judicial order to force an unwilling beneficiary to pay back illegal aid.¹⁶³ In addition, beneficiaries may contest a recovery order and/or individual measures to ensure recovery.¹⁶⁴ In these scenarios, the national courts may execute recovery decisions of the Commission within the limitations of procedural autonomy, but must refrain from interpreting their validity.¹⁶⁵ In its 2019 Recovery Notice the Commission gives the national courts some guidance on the execution of a recovery decision.¹⁶⁶ According to the Commission, the national courts may

26-063

26-064

¹⁵⁵ *Deutsche Lufthansa* EU:C:2013:755.

¹⁵⁶ *Vodafone Magyarország* (C-75/18) EU:C:2020:139 at [21]–[23]; *Deutsche Lufthansa* EU:C:2013:755 at [28]. European Commission, *State Aid Manual of Procedures* (Luxembourg, 13 July 2013).

¹⁵⁷ *Klausner Holz Niedersachsen* EU:C:2015:742 at [26].

¹⁵⁸ *Deutsche Lufthansa* EU:C:2013:755.

¹⁵⁹ A. Scott, "Co-Operation and Good Faith: State Aid Rules and National Courts—Procedural and Interpretive Consequences State Aid and National Jurisdictions" (2017) 16 *ESTAL*, 354. See also E. Szyszczak, *Research Handbook on EU State Aid Law* (Cheltenham: Edward Elgar, 2011), p.390.

¹⁶⁰ European Commission, *Study on the enforcement of State aid rules and decisions by national courts* (2019), available at <https://ec.europa.eu/competition/publications/reports/kd0219428enn.pdf> [Accessed 26 January 2021].

¹⁶¹ *Arriva v Ministero della Infrastrutture e dei Trasporti* (C-385/18) EU:C:2019:1121 at [91]–[92]; *Deutsche Lufthansa* EU:C:2013:755.

¹⁶² *Mory v Commission* (C-33/14) EU:C:2015:609.

¹⁶³ 2019 Recovery Notice, para.42.

¹⁶⁴ 2019 Recovery Notice, para.42.

¹⁶⁵ *Mory* EU:C:2015:609 at [76].

¹⁶⁶ 2019 Recovery Notice, para.144.

provide interim relief where four cumulative criteria of the case law of the ECJ are met:

- The national court entertains serious doubts as to the validity of a contested EU act (e.g. the recovery decision) and has referred a preliminary question to the ECJ;
- There is an urgency due to the circumstance that without interim relief “serious and irreparable damage is being caused to the party seeking the relief”;
- The national court establishes that the interim relief is in the interest of the EU;
- The national court respects the applicable decisions and rulings of the EU Courts on the lawfulness of the EU act or on the interim relief provided at the EU level.¹⁶⁷

26-065 The national courts must guarantee the rights of those affected and draw the necessary conclusions according to national law, as regards both the validity of acts granting aid and the recovery of financial support granted in infringement of art.108(3) TFEU. The role of the national courts in safeguarding plaintiffs’ rights is fundamentally different from the Commission’s role of assessing the compatibility of aids and in no way conflicts with that latter role. The ECJ recalled in the *A-Fonds* and *Deutsche Lufthansa* judgments that whilst the assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, it is for the national courts to ensure that the rights of individuals derive from the standstill—obligations are safeguarded pursuant to art.108(3).¹⁶⁸

26-066 A decision by the Commission declaring that an aid is compatible with the internal market does not regularise *a posteriori* the acts granting aid in infringement of art.108(3) TFEU, which remain invalid.¹⁶⁹ Even in a situation where the Commission has initiated the formal examination procedure but not yet decided whether the aid can be declared compatible, a national court is obligated to take all the necessary measures, which may also include the recovery of payments already made.¹⁷⁰ The direct effect of art.108(3) TFEU requires a national court to declare the implementation of aids in breach with the standstill obligation as unlawful and order its recovery

26-067 The ECJ has made clear that any other interpretation of art.108(3) TFEU would deprive this Treaty provision of its effectiveness.¹⁷¹ Consequently, the obligation for a national court to order recovery even applies in a situation where a previous judgment of a national court in *res judicata* failed to establish a breach of art.108(3)

¹⁶⁷ *Commission v Italy* (“Hotel industry in Sardinia”) (C-243/10) EU:C:2012:182 at [48]; *Commission v Italy* (“Venice and Chioggia I”) (C-302/09) EU:C:2011:634 at [50]; *Commission v Italy* (“Tremonti bis”) (C-303/09) EU:C:2011:483 at [46]; *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn* (C-143/88 and C-92/89) EU:C:1991:65 at [23]; *Atlanta Fruchthandelsgesellschaft v Bundesamt für Ernährung und Forstwirtschaft* (C-465/93) EU:C:1995:369 at [51].

¹⁶⁸ *A-Fonds* EU:C:2019:352 at [45]–[46]; *Deutsche Lufthansa* EU:C:2013:755 at [38]; see also *Flughafen Lübeck v Air Berlin* (C-27/13) EU:C:2014:240 at [30]–[31] and *Residex Capital IV* EU:C:2011:814 at [27].

¹⁶⁹ *Fallimento Traghetti* EU:C:2019:51 at [59].

¹⁷⁰ See to that end *Deutsche Lufthansa* EU:C:2013:755 at [42]–[43] and *Flughafen Lübeck* EU:C:2014:240 at [25]–[26]. See also *Juan Miguel Iglesias Gutiérrez et al. v Bankia* (C-352/14 and C-353/14) EU:C:2015:691; *CELF* EU:C:2008:79.

¹⁷¹ *OTP Bank* EU:C:2015:185; *Klausner Holz Niedersachsen* EU:C:2015:742 at [40]–[41], [45].

TFEU.¹⁷² The effectiveness of art.108(3) TFEU requires a national court to set such a *res judicata* judgment aside.¹⁷³

Proceedings concerning unlawful state aid can be initiated before the national courts concerning the joint interpretation and application of art.107(1) TFEU and the application of the Block Exemption Regulations, but are in particular initiated in order to determine whether there is an infringement of art.108(3) TFEU.¹⁷⁴ To enforce art.108(3) TFEU in accordance with their national law, the national courts must assess the validity of measures giving effect to the aid, and order the recovery and take all possible interim measures that are necessary to achieve this aim.

26-068

In the *Residex* case the ECJ held that EU law does not impose any specific conclusion that the national courts must necessarily draw with regard to the validity of the acts relating to implementation of the aid.¹⁷⁵ It is for the national court to determine whether cancellation of aid measures may be a more effective means of restoring the competitive situation existing prior to the payment of the aid in question than other measures.¹⁷⁶

26-069

Other remedies include preventing the payment of unlawful aid, recovery of illegality interest and interim measures against unlawful aid.¹⁷⁷ In the *CELF* case the ECJ ruled that after a final positive Commission decision the national court is no longer under an EU law obligation to order full recovery. However, in such circumstances the national court must order the aid recipient to pay interest in respect of the period of unlawfulness.¹⁷⁸

26-070

As is explained in the Notice on the enforcement of State aid law by national courts, recovery is not the only means of guaranteeing the prohibition.¹⁷⁹ The state may also, and independently of any obligation to recover the aid, be subject to claims for damages brought in the national courts on the basis of EU law by competitors who claim damages as a result of unlawfully implementing the aid.¹⁸⁰ Third parties, such as competitors who may be injured by unlawful aid should be able to obtain an injunction from national courts, thus preventing the actual granting of the aid (see Ch.27).

26-071

5. RECOVERY ON THE OWN INITIATIVE OF NATIONAL AUTHORITIES

Article 108(3) TFEU requires that the Member States notify all possible new state aid measures to the Commission and refrain from implementing the aid prior to approval of the Commission's services.¹⁸¹ In its 2019 *State Aid Scoreboard* the Commission highlighted an important trend in state aid notifications. The Commission

26-072

¹⁷² *Klausner Holz Niedersachsen* EU:C:2015:742 at [26].

¹⁷³ *Klausner Holz Niedersachsen* EU:C:2015:742 at [45]. See also *CSTP Azienda* EU:C:2020:150 at [94] and *Buonotourist* EU:C:2020:152 at [94]–[95].

¹⁷⁴ *CSTP Azienda* EU:C:2020:150 at [93].

¹⁷⁵ *Residex Capital IV* EU:C:2011:814 at [29], [44].

¹⁷⁶ *SNCF Mobilités v Commission* (C-127/16 P) EU:C:2018:165 at [104]; *Residex Capital IV* EU:C:2011:814 at [44]–[47].

¹⁷⁷ Commission Notice on the enforcement of State aid law by national courts, para.26.

¹⁷⁸ *CELF* EU:C:2008:79 at [52].

¹⁷⁹ Commission Notice on the enforcement of State aid law by national courts, paras 26 and 43 and following.

¹⁸⁰ *Mory* EU:C:2015:609 at [74]; *Fallimento Traghetti* EU:C:2019:51 at [60]–[62].

¹⁸¹ *Dilly's Wellnesshotel* EU:C:2016:174 at [31] and [32]; *Eesti Pagar* EU:C:2019:172 at [56].

declared that since the State Aid Modernisation of 2013 the predominant part of state aid measures are block exempted (97 per cent in 2018).¹⁸²

26-073 Since 2013 the Commission has shifted the ex ante enforcement of block exemptions predominantly to the Member States, requiring Member States to set up effective mechanisms for applying the horizontal and sectoral categories of aid that fall within the scope of art.107(2) and (3) TFEU (especially under the GBER—see Ch.7).¹⁸³ At the same time, the Commission has strengthened ex post control of compliance with the conditions for exemption. The block exemptions exempt under strict conditions certain categories from prior notification and the standstill obligation of art.108(3) TFEU. Tailor-made block exempted state aid may be considered to be compatible with the internal market.¹⁸⁴ Member States are required to inform the Commission by means of an electronic notification via SANI that they have respected all the procedural and substantive provisions of the block exemptions. Under the important General Block Exemption Regulation (“GBER”) Member States are required to do this within 20 working days. These block exemptions are directly applicable in litigation before the national courts.¹⁸⁵

26-074 The ECJ clarified the obligation of ordering recovery after unlawful block exempted aid at the national level in *Eesti Pagar*.¹⁸⁶ In this case the Estonian authorities determined, after an ex post investigation, that in contravention of art.6 of the then applicable GBER (Commission Regulation (EC) 800/800) a block exempted measure lacked incentive effect. In *Eesti Pagar*, the ECJ had to answer the question whether art.108(3) TFEU requires Member States to order recovery of presumed block exempted state aid on their own initiative, in circumstances where the granting authority in hindsight discovered that the aid measure did not satisfy all the criteria of the GBER.

26-075 The ECJ ruled, in line with its judgment in *Dilly’s Wellnesshotel*, that any misapplication in substance or procedural form of the GBER constitutes a breach with art.108(3) TFEU.¹⁸⁷ As a consequence, Member States are required to order full recovery immediately on their own initiative, without awaiting a Commission initiating recovery procedures.¹⁸⁸ This is a consequence of the direct effect of art.108(3) TFEU. In a situation where a block exempted aid measure is notified, but is subsequently declared as unlawful due to a misapplication of the conditions of the applied block exemption, an aid recipient cannot rely on the principle of legitimate expectations before the national court (or indeed before the EU Courts).¹⁸⁹

26-076 The obligation to initiate recovery proceedings applies to unlawful aid in general, including block exempted aid and is applicable to the national courts, “but also all administrative bodies, including decentralised authorities, and those authorities are

¹⁸² European Commission, *State Aid Scoreboard* 2019, website DG Competition: https://ec.europa.eu/competition/state_aid/scoreboard/index_en.html [Accessed 26 January 2021].

¹⁸³ See T. Ottervanger and M. Aalbers in P. Kuiper, F. Ambtenbrink, D. Curtin, B. De Witte, A. McDonnell and S. Van den Bogaert (eds), *The Law of the European Union* (Alphen aan den Rijn: Kluwer, 2018), pp.780–781.

¹⁸⁴ *Bayerische Motoren Werke* EU:C:2019:634.

¹⁸⁵ See case *Dilly’s Wellnesshotel* (C-493/14) EU:C:2016:174.

¹⁸⁶ *Eesti Pagar* EU:C:2019:172. National authorities may refer to the Commission for guidance on the application of the GBER, see Opinion AG Wathelet in *Eesti Pagar* (C-349/17) EU:C:2018:768 at [96].

¹⁸⁷ *Dilly’s Wellnesshotel* EU:C:2016:174 at [99]; *Bayerische Motoren Werke* EU:C:2019:634 at [138].

¹⁸⁸ *Eesti Pagar* EU:C:2019:172 at [94].

¹⁸⁹ *Eesti Pagar* EU:C:2019:172 at [120]; *Bayerische Motoren Werke* EU:C:2019:634 at [145].

required to apply (EU state aid law)).¹⁹⁰ This can be considered as a consequence of loyal co-operation between the EU and the Member States according to art.4(3) TFEU.¹⁹¹

In its *BMW* and *Eesti Pagar* judgments, the ECJ emphasised that the application of the GBER by the Member States cannot be seen as a conferral of “any decision-making power on the national authorities with respect to the extent of the exemption from notification”, since the ECJ considers the appraisal made by national authorities and national courts under the GBER to be “conditional” and not comparable to a compatibility appraisal by the Commission.¹⁹² In its *BMW* judgment, the ECJ made clear that only the Commission can provide an unconditional compatibility appraisal based on art.107(3) TFEU by means of a decision. Therefore, the ECJ underlined that the application by national administrative authorities and national courts of the block exemption regulations cannot provide legal certainty or raise legitimate expectations.¹⁹³

26-077

In *Eesti Pagar*, the ECJ ruled that both the administrative authorities and the national courts must give full effect to the provisions of the GBER and art.108(3) TFEU, within the exercise of their respective powers.¹⁹⁴ The ECJ ruled that “where a national authority finds that aid which it has granted pursuant to Regulation 800/2008 does not satisfy the conditions laid down to qualify for the exemption provided for by that regulation, it is the duty of a national authority to recover on its own initiative the aid that was unlawfully granted”.¹⁹⁵

26-078

Within the national applicable procedural rules, the national courts and national authorities must pursue the same objectives as the Commission, with due respect for the principles of the effectiveness and equivalence of EU law.¹⁹⁶ The ECJ ruled that “the main objective pursued in recovering unlawfully paid state aid is to eliminate the distortion of competition caused by the competitive advantage which such aid affords. By repaying the aid, the recipient loses the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored”.¹⁹⁷ This requires national authorities to effect recovery by including a claim of interest from the beneficiaries of unlawful aid.¹⁹⁸ Consequently, a national authority is obligated under art.108(3) TFEU to order the beneficiary of the aid to pay interest in respect of the period of unlawfulness.¹⁹⁹ The method of calculating the interest falls within the national procedural autonomy of the Member States, in the absence of EU legislation on this matter.²⁰⁰ The effectiveness and equivalence of art.108(3) TFEU require national authorities, on their own initiative, to initiate national recovery procedures in which the beneficiary “must be ordered to pay, inter alia, interest for the whole of the period over which it benefited from that aid and at a rate equivalent to that which would have been applied if the

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¹⁹⁰ *Eesti Pagar* EU:C:2019:172 at [90], [142]; *Bayerische Motoren Werke* EU:C:2019:634 at [139].

¹⁹¹ See Opinion AG Wathelet in *Eesti Pagar* EU:C:2018:768 at [109]; see *CSTP Azienda della* EU:C:2020:150 at [89]–[90].

¹⁹² *Eesti Pagar* EU:C:2019:172 at [102]; *Bayerische Motoren Werke* EU:C:2019:634 at [149]–[153].

¹⁹³ *Bayerische Motoren Werke* EU:C:2019:634 at [137]–[138], [141], [144]–[147].

¹⁹⁴ *Eesti Pagar* EU:C:2019:172 at [90]–[91].

¹⁹⁵ *Eesti Pagar* EU:C:2019:172 at [92].

¹⁹⁶ *Eesti Pagar* EU:C:2019:172 at [137]–[140].

¹⁹⁷ *Eesti Pagar* EU:C:2019:172 at [132].

¹⁹⁸ *Eesti Pagar* EU:C:2019:172 at [133]–[134].

¹⁹⁹ *Eesti Pagar* EU:C:2019:172 at [134].

²⁰⁰ *Eesti Pagar* EU:C:2019:172 at [135].

beneficiary had had to borrow the amount of the aid at issue on the market within that period”.²⁰¹

26-080 The limitation period applicable to the recovery of the unlawful aid in such a situation is, according to the ECJ, the period laid down by the applicable national law, unless a specific limitation follows from applicable EU legislation.²⁰²

²⁰¹ *Eesti Pagar* EU:C:2019:172 at [141]–[142].

²⁰² *Eesti Pagar* EU:C:2019:172 at [128].