Survey

Key Developments in State Aid Law

Jacques Derenne, Jan Blockx, Sofia Doudountsaki, and Jaime Rodriguez-Toquero*

I. Introduction

Following a previous contribution in this Journal,[1] this survey covers the main developments in European State aid law over the last 12 months. Given the large number of developments over the last 12 months, the description below is necessarily selective as it was impossible to cover all developments in detail.

The first part of this survey focuses on the main new legislation and guidance prepared by the European Commission in 2014 as part of its State aid modernisation programme. This programme aims (i) to foster growth in a strengthened dynamic and competitive internal market; (ii) to focus enforcement on cases with the biggest impact on the internal market; and (iii) to streamline rules and enable faster decisions.

The second part of this survey discusses some of the most interesting judgments rendered by the European Courts during the period covered. These concern mostly judgments of the Court of Justice of the European Union (CJEU) but also a judgment of the General Court. Again, the judgments covered are necessarily a selection of the output of the last year but, as will be shown, the selection below concerns some of the most fundamental notions underpinning State aid enforcement in Europe.

Key Points

- In addition to the revised General Block Exemption Regulation, the European Commission has adopted various new guidelines as part of its State aid modernisation programme.
- Another major innovation of the last 12 months is the notice on State aid, which is due to be adopted formally at the beginning of 2015.
- In terms of case law, the developments in the last 12 months are an evolution rather than a revolution but with some interesting and elucidating rulings on aspects of the notion of State aid and its enforcement.

II. State aid modernisation

As part of the State aid modernisation programme, the Commission in 2014 adopted a revised General Block Exemption Regulation as well as revised guidelines in a whole number of areas. Below we discuss the revised guidelines on environmental and energy aid, rescue and restructuring, and aviation. The Commission also published a draft notice on the notion of State aid for public consultation: although not formally adopted at the time of writing (20 December 2014), this important document should also be briefly discussed below.

A number of other legislative developments, such as the new framework for research, development and innovation as well as the revised rules on risk finance, which the Commission also adopted in 2014, are not discussed below, given the limited scope of this survey. For the reader's convenience, a table at the end of this article contains the list of the new legislation (soft law as guidelines or notices and new regulations) enacted within the framework of this 2013–2014 State aid modernisation process.

A. Revised general block exemption regulation

The Commission adopted on 21 May 2014 a revised General Block Exemption Regulation (GBER).[2] The revised GBER entered into force on 1 July 2014, and will apply until 31 December 2020.

When compared with the previous GBER,[3] the revised GBER includes new categories of aid which are block

* Jacques Derenne is a partner at Hogan Lovells, Brussels, and an associate professor at the *Université de Liège* where he lectures State aid law in the LLM on Competition and IP Law; he also teaches State aid law at the *Brussels School of Competition*. Jan Blockx is a counsel and Sofia Doudountsaki and Jaime Rodriguez-Toquero are stagiaires at Hogan Lovells, Brussels.

1 Jacques Derenne and others, 'Recent Developments in State Aid Law' (2014) 5:1 Journal of European Competition Law & Practice 53.

2 Commission Regulation 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.6.2014, p. 1.

3 Commission Regulation 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L 214, 9.8.2008, p. 3.

exempted (such as aid for broadband infrastructures and aid schemes to make good the damage caused by natural disasters) and also broadens the categories of aid previously block exempted (a wider scope for risk finance aid as well as a wider definition of the notion of disadvantaged workers for employment aid to the youngest are some examples). In addition, higher notification thresholds and higher permitted aid intensities have been included, only reserving the largest amounts of aid to prior scrutiny by the Commission. For instance, the notification threshold for R&D projects has been doubled. The Commission has announced that this new GBER will dramatically expand the number of aid dispensed from notification, focusing the *ex ante* control on the most important and distortive State aid (according to evidence collected for the 2014 State aid scoreboard,[4] over 80% of compatible aid measures are now going through the GBER, and can therefore be implemented by Member States immediately, without having to seek prior approval by the Commission).

The Commission has also taken the opportunity to put in place several safeguard mechanisms in order to check the compliance of Member States with the GBER, for example by increasing the transparency requirements to allow for an *ex post* review. In particular, the GBER foresees that, within 6 months of the granting of individual aid measures, Member States will have to publish on the Internet those measures, which purportedly fulfil the conditions of the GBER, if these measures exceed €500,000. To implement this, the Commission has adopted a Communication on transparency requirements[5] that foresees that these publication mechanisms need to be set up by Member States within the next 2 years (ie by 1 July 2016).

B. Revised environmental and energy guidelines

On 9 April 2014, the European Commission adopted new environmental and energy guidelines (the EEAG),[6] which have as their main objective to establish an updated legal framework of compatibility of State aid measures within the EU's horizon 2020 programme.

To this end, the EEAG promote the use of renewable energy sources while addressing the market distortions likely to arise from public support granted for this purpose. The new EEAG foresee the gradual introduction of competitive bidding processes to allocate public support but also aim to allow Member States' flexibility to take account of national circumstances. Moreover, they foresee the gradual replacement of feed-in tariffs by feed-in premiums.

Contrary to the 2008 Guidelines for State aid for environmental protection,[7] the EEAG explicitly cover aid measures in the energy field, in particular State aid to energy infrastructure projects, carbon capture and storage, generation adequacy measures, and energy-intensive users. Aid for nuclear energy is, however, excluded from the EEAG. A number of State aid measures such as funding for cleaning up contaminated sites have been removed from the scope of the EEAG, and now fall under the revised GBER (and therefore no longer need to be notified). Since both the GBER and the EEAG have been revised in parallel and are intrinsically linked, their entry into force and applicability has been harmonised (from 1 July 2014 to 31 December 2020).

Finally, in line with the Commission's State aid modernisation initiative, the EEAG aim to provide simpler assessment criteria for State aid measures as well as higher notification thresholds for individual aid projects. When Member States select projects through a competitive bidding process as defined in the EEAG, no notification is required, allowing the Commission to focus on those cases with a higher potential to distort competition.

C. Revised guidelines on rescue and restructuring (non-financial undertakings in difficulty)

The European Commission adopted revised guidelines on rescue and restructuring aid (R&R Guidelines)[8] on 9 July 2014; these are applicable since 1 August 2014. Since the banking communication of July 2013[9] specifically applies to banks and other financial institutions, unlike the previous rescue and restructuring guidelines,[10] the R&R Guidelines only concern measures to rescue and restructure non-financial companies in difficulty.

4 See http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html.

5 Communication from the Commission C(2014) 3349/2, amending the Communications from the Commission on EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, on Guidelines on regional State aid for 2014–2020, on State aid for films and other audiovisual works, on Guidelines on State aid to promote risk finance investments, and on Guidelines on State aid to airports and airlines.

6 Guidelines on State aid for environmental protection and energy 2014–2020, OJ C 200, 28.6.2014, p. 1.

7 Community Guidelines on State Aid for Environmental Protection, OJ C 82, 1.4.2008, p. 1.

8 Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJ C 249, 31.7.2014, p. 1.

9 Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'), OJ C 216, 30.7.2013, p. 1.

10 Community Guidelines on State aid for rescuing and restructuring firms in difficulty, OJ C 244, 01.10.2004, p. 2.

The R&R Guidelines are meant to simplify the rules, accelerate the decision-making procedure, and focus enforcement on aid measures with the biggest impact on the internal market, in line with the State aid modernisation objectives. For example, the R&R Guidelines have simplified the definition of 'undertaking in difficulty' by reference to objective criteria linked to financial ratios normally used by financial analysts.

Another innovation is that the R&R Guidelines allow for temporary measures for SMEs consisting of loans or guarantees for a maximum period of 18 months and requiring the undertakings to present only a simplified restructuring plan.

In order to increase transparency, the R&R Guidelines foresee that Member States have the obligation to publish on a website exhaustive information regarding the granting of rescue and restructuring aid.

D. Revised aviation guidelines

On 20 February 2014, the Commission adopted a new set of guidelines on Member States' support to airports and airlines under the EU State aid rules.[11] These guidelines replace the 2005 guidelines on financing of airports and start-up aid to airlines departing from regional airports[12] and the 1994 aviation sector guidelines.[13]

Under the new guidelines, operating aid to regional airports with less than 3 million passengers per year will be allowed for a transitional period of 10 years under certain conditions, and subject to a concise business plan. Special provisions ensuring higher aid intensities and a reassessment of the situation after 5 years are applicable to airports with annual traffic of less than 700,000 passengers. The new guidelines also foresee that start-up aid to airlines to launch a new air route is permitted under conditions adapted to recent market developments, provided it remains limited in time.

E. Notice on the notion of State aid

On 17 January 2014, the Commission launched a public consultation on a draft notice on the notion of State aid.[14] This notice is an integral part of the Commission's State aid modernisation programme, and intends to provide practical guidance in order to identify State aid measures that have to be notified to and approved by the Commission before being lawfully implemented. In doing so, the notice aims to cover all the constitutive elements of the notion of State aid: existence of an undertaking, imputability of the measure to the State, financing through State resources, granting of an advantage, selectivity, and effect on trade and competition. The aim of the notice is to consolidate the Commission's interpretation of the case law on Article 107(1) TFEU. The notice does not concern the compatibility of State aid with the internal market pursuant to Article 107(2) and (3) TFEU. It will be formally adopted in early 2015.

II. European court cases

This section discusses some of the most important judgments of the European courts of the last year (until the beginning of December, at the time of writing the present survey). The judgments covered the following concerns:

- the private investor principle;
- the notion of advantage more generally; and
- State aid procedure.

The judgments issued by the European Courts clarify and confirm previous case law, and do not present a revolution but rather an evolution when compared with established precedents. Several of them nevertheless contain interesting and elucidating rulings on aspects of the notion of State aid and its enforcement.

A. Private investor principle

1. Case C-224/12 P *Commission v Netherlands and ING Groep NV*

On 3 April 2014, the CJEU dismissed all six grounds of appeal brought by the European Commission against the judgment of the General Court on 2 March 2012 relating to the State aid granted by the Netherlands to the financial institution ING.[15] It confirmed that the General Court had been correct to hold that the Commission cannot avoid its obligation to assess the economic rationality of an amendment to repayment terms in the light of the private investor test solely on the ground that the capital injection subject to repayment itself already constitutes State aid.

At the start of the financial crisis in 2008, the Netherlands had boosted ING's capital by €10 billion in exchange for newly created ING securities, which foresaw specific repayment terms. Following notification of this measure, the Commission concluded that it constituted State aid, which was compatible under Article 107(3)(b) TFEU as it sought

11 Guidelines on State aid to airports and airlines, OJ C 99, 4.4.2014, p. 3.

12 Community guidelines on financing of airports and start-up aid to airlines departing from regional airports, OJ C 312, 9.12.2005, p. 1.

13 Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector, OJ C 350, 10. 12. 1994, p. 5.

14 http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf.

15 Case C-224/12 P *Commission v Netherlands and ING Groep*, EU:C:2014:213.

to remedy a serious disturbance in the Netherlands' economy. It therefore approved the aid for a period of 6 months with the potential for an extension if the Netherlands submitted a restructuring plan during that time.

When the Netherlands submitted its restructuring plan in 2009, it foresaw an alteration to the repayment terms. The Commission decided that this amendment constituted additional State aid, which it again declared compatible with the common market. The Netherlands and ING brought an application for annulment against the qualification of the amendment as additional aid on the basis that the Commission had not assessed whether a private investor would have accepted such an alteration of the repayment terms.

The General Court and now the CJEU have upheld the position of the Netherlands and ING. The CJEU commented in its judgment that any holder of securities, in whatever amount and of whatever nature, may wish to agree to renegotiate the conditions of their redemption. It is, consequently, meaningful to compare the behaviour of the State in that regard with that of a hypothetical private investor in a comparable position.[16] It held that the decisive factor was whether the amendment satisfied an economic rationality test, ie whether a private investor who held the securities would have accepted the amendment that the Netherlands accepted.

The CJEU therefore confirmed that the private investor test always needs to be applied to assess whether a measure constitutes aid, even if the measure merely constitutes an amendment to a previous aid measure.

2. Joined cases C-533/12 P and C-536/12 P *SNCM and France v Corsica Ferries France*

On 4 September 2014, the CJEU dismissed the appeals by Société Nationale Maritime Corse Méditerranée (SNCM), a French maritime transport company, and France against the partial annulment by the General Court of the decision of the Commission regarding certain measures linked to the privatisation of SNCM, which provides regular crossings to Corsica from continental France.[17]

In 2002, 20% of SNCM was held by the Société nationale des chemins de fer (SNCF), and 80% by the Compagnie générale maritime et financière (CGMF), which themselves were wholly owned by the French State. When the company was privatised in 2006, 66% of SNCM was taken up by private companies (Butler Capital Partners and Veolia Transport), whereas 25% of its capital was retained by CGMF and 9% was reserved for the employees.

In a decision of 8 July 2008, the Commission found that a 2002 capital investment of CGMF in SNCM of €76 million was compatible with the common market. Similarly, the Commission considered that several State measures accompanying the 2006 privatisation plan did not constitute State aid. Those measures included a recapitalisation of SNCM by CGMF at a negative price of €158 million, an additional capital investment by CGMF in the amount of €8.75 million and, finally, an advance on a current account in the amount of €38.5 million aimed at financing a possible social plan put in place by the purchasers.

A competitor of SNCM, Corsica Ferries France, brought an application for annulment against the Commission decision of 8 July 2008 and in 2012, the General Court found that the Commission had committed several errors of assessment with regard to both the capital contribution and the privatisation plan of SNCM, and annulled the respective parts of its decision. SNCM brought an appeal against this judgment to the CJEU.

In its judgment, the CJEU held that, so far as concerns the disposal of SNCM at a negative price of €158 million, the General Court correctly determined the necessary criteria for applying the private investor test with regard to the public undertaking in question, namely CGMF, a state-owned company holding 80% of the shares of SNCM. In particular, the CJEU confirmed that the General Court was entitled to find that the State's long-term economic rationale, as part of the private investor test, has not been demonstrated to the required legal standard, since it is established case law that when contributions of capital by a public investor disregard any prospect of profitability, even in the long term, such contributions must be regarded as aid.

The CJEU also confirmed that the General Court was right to find, with relation to the capital contribution from CGMF, that the Commission should have conducted a thorough analysis of the economic impact of that contribution, and that the mere fact that the contribution was made jointly and concurrently with private investors did not automatically exclude it from being classified as State aid. As regards the aid to individuals, finally, the CJEU held that the General Court had not distorted the content of the Commission decision in its judgment.

B. Advantage

1. Case C-262/12 Association Vent de Colère!

On 19 December 2013, the CJEU handed down a judgment on a preliminary reference from the French Supreme

16 Paras 35–37 of the case cited above.

17 Joined cases C-533/12 P and C-536/12 P *SNCM and France v Corsica Ferries France* EU:C:2014:2142.

Court as to whether a mechanism for offsetting in full the additional costs imposed on undertakings because of an obligation to purchase wind-generated electricity at a price higher than the market price and the financing of this by final consumers must be regarded as an intervention by the State and through State resources within the meaning of Article 107(1) TFEU.[18]

In particular, French legislation provided that undertakings that produce wind-generated electricity in the national territory can avail themselves of an obligation on electricity distributors to purchase the electricity so generated. Following an amendment of the legislation, the additional costs arising from the obligation to purchase were to be offset in full by charges payable by the final consumers of electricity located in France.

The CJEU held that since the offset mechanism was established by law, it must clearly be regarded as attributable to the State. With regard to the condition that the advantage must be granted directly or indirectly through State resources, the CJEU recalled that in addition to advantages granted directly by the State, those granted through a public or private body appointed or established by that State to administer the aid could be qualified as State aid. The CJEU pointed out that Article 107(1) TFEU covers all the financial means by which public authorities might actually support undertakings, irrespective of whether or not those means were permanent assets of the public sector. Therefore, even if the sums corresponding to the measure in question were not permanently held by the French treasury, the fact that they constantly remained under public control, and therefore available to the competent national authorities was sufficient for them to be categorised as State resources.

The CJEU's judgment therefore confirms that the French mechanism for offsetting the additional costs through charges imposed on final consumers of electricity in the national territory constituted an intervention by the State and through State resources.

2. Case T-461/12 Hansestadt Lübeck

By the judgment of 9 September 2014, the General Court set aside a decision of the Commission to open a formal investigation regarding the airport fees charged by Lübeck-Blankensee Airport.[19]

The 2006 fees regulation set by the manager of Lübeck-Blankensee Airport provided for exemptions from the payment of landing charges for certain passenger aircraft, new business, and new carrier discounts depending on the volume of passengers. In a decision in 2012, the Commission considered that these arrangements might constitute State aid since the measures conferred on airlines operating from Lübeck-Blankensee Airport a competitive advantage compared with their competitors flying from other airports.

The General Court held that the fact that the fee regulations set by the manager of Lübeck-Blankensee Airport applied solely to airlines operating at the Lübeck-Blankensee Airport was not by itself a decisive factor to establish that the fees were selective, since pursuant to national law, each airport had to set the fees applicable to airlines using its facilities. Therefore, the carriers operating at the Lübeck-Blankensee Airport and those operating in other airports were not in a comparable legal and factual situation.

The General Court furthermore held that all airlines operating at Lübeck-Blankensee Airport were in a comparable situation. Since the fee regulations set by the manager of Lübeck-Blankensee Airport applied to all airlines using the airport, the General Court considered that they were not selective.

C. Procedure

1. Case C-284/12 Deutsche Lufthansa

On 24 January 2014, the CJEU issued a preliminary ruling in a case brought by Deutsche Lufthansa before the German courts against the German airport Frankfurt-Hahn concerning the cessation and recovery of allegedly unlawful State aid to Ryanair.[20] This aid would have taken the form of 'marketing support' for the opening of new routes between 2002 and 2005 and a reduction in airport fees from which Ryanair had benefitted in 2003.

While the case was proceeding in first instance and under appeal before the national courts in Germany, the Commission in June 2008 decided to initiate a formal investigation procedure regarding possible State aid granted by Germany to Frankfurt-Hahn and Ryanair. In its decision regarding the opening of the investigation, the Commission's preliminary view was that each of the measures at stake was selective, and constituted State aid within the meaning of Article 107(1) TFEU.

The *Oberlandesgericht Koblenz* (Koblenz Higher Regional Court), before which the case was pending at the time, therefore decided to stay proceedings and refer a number of questions to the CJEU for a preliminary ruling, including whether a national judge was bound by the Commission's legal opinion that a measure constitutes

18 Case C-262/12 *Vent De Colère and Others* EU:C:2013:851.

19 Case T-461/12 *Hansestadt Lübeck v Commission* EU:T:2014:758.

20 Case C-284/12 *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH* EU:C:2013:755.

State aid, even though this was contained in the Commission's decision to initiate a formal investigation.

The Court first of all distinguished the situation at hand from the situation where the Commission has not yet initiated the formal examination procedure and has therefore not yet adopted a decision as to whether the measures under consideration are capable of constituting State aid. In line with the case law of *SFEI*,[21] national courts are then required to interpret and apply the concept of aid with a view to determining whether those measures should have been notified to the Commission.[22] If that is the case, it is for the national courts to verify whether the measure constitutes an advantage and whether it is selective within the meaning of Article 107(1) TFEU.

If, on the other hand, the Commission has already initiated the formal examination procedure, the situation is different, according to the Court: while the assessments carried out in the decision to initiate the formal examination procedure are indeed preliminary in nature, that does not mean that the decision lacks legal effects.[23] The Court went on to say that the effectiveness of Article 108(3) TFEU would be frustrated if a national court would hold that a measure does not constitute State aid while the Commission states in its decision initiating the formal examination that the measure is capable of being considered as State aid. According to the Court, the fact that the Commission might take a different view in its final decision at the end of the formal investigation procedure does not change this: the preventive aim of the State aid control system established by the TFEU requires that, following the doubt raised in the decision to initiate the formal examination procedure as to the aid character of that measure and its compatibility with the internal market, its implementation should be deferred until that doubt is resolved by the Commission's final decision.[24]

In conclusion, the Court ruled that when the Commission has initiated a formal investigation procedure in relation to a measure that may constitute State aid, has not been notified, and is being implemented, a national court seized in order to stop those measures being implemented is required to adopt all necessary steps with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend the implementation of that measure.[25] Moreover, the national court may decide to suspend the implementation of the measure and order the recovery of payments already made, or order provisional measures to safeguard the interests of the parties concerned as well as the Commission's decision to initiate the formal investigation. The Court also takes the occasion to remind national courts that when in doubt as to (i) whether the measure may be State aid or (ii) the validity or interpretation of a decision by the Commission to initiate the formal examination procedure, they may always ask the Commission for clarification or refer the matter to the CJEU for a preliminary ruling.

2. Case C-69/13 Mediaset

With the aim of speeding up the process of digital switchover of television signals, Italy offered State subsidies to Mediaset as part of an aid scheme for digital terrestrial broadcasters offering pay-TV services and cable pay-TV operators.

In 2007, the Commission declared that the aid scheme in question was illegal and incompatible with the internal market. This was so because in the Commission's view, the objective pursued by Italy—ie the diffusion of open standards for digital television—was reached by causing a disproportionate distortion of competition and an unnecessary infringement of the principle of technological neutrality.[26] After the adoption of the decision, a series of letters were exchanged between the Commission and Italy in order to ensure the immediate and effective execution of that decision. Among the exchange of letters, the recipient of the aid at hand (Mediaset) and the exact amount of aid to be recovered from it (€4,926,543.22 without interest) were determined.

In parallel to the proceedings before the EU courts, Mediaset also filed an appeal before the *Tribunale civile di Roma* (Civil District Court, Rome) in order to seek annulment of the Order of the Italian authority which required Mediaset to grant back the aid received. Mediaset invoked the incorrect application of the quantification criteria laid down in the original Commission decision and the inaccuracy of the calculations to determine the additional profit generated by the aid in question. In this context, the *Tribunale civile di Roma* stayed the proceedings before it, and referred the matter to the CJEU for a preliminary ruling.

By its first question, the referring court asked whether a national court is bound not only by a Commission decision, but also by the positions adopted by the Commission in the execution of that decision which, for their part and as opposed to the Commission decision, state the

21 Case C-39/94 *Syndicat français de l'Express international (SFEI) and others v La Poste and others* EU:C:1996:285.

22 Case C-284/12 *Deutsche Lufthansa AG v Flughafen Frankfurt-Hahn GmbH* EU:C:2013:755, para 34.

23 Ibid, para 37.

24 Ibid, para 40.

25 Ibid, para 45.

26 See paragraph 36 of Commission decision 2007/374/EC.

exact amount of aid to be recovered. In replying to the question, the CJEU recalls that the Commission is not required, when ordering the restitution of incompatible aid to be reimbursed, to establish the exact amount of such aid. It is enough that the decision includes enough information for the recipient of the aid to determine itself, and without much difficulty, what is the precise amount. However, the CJUE added that the exchange of letters between the Commission and Italy did not constitute decisions in the sense of Article 288 TFUE, and therefore were not binding on the national judge.

However, the Court pointed out that according to the principle of sincere cooperation enshrined in Article 4 TEU, national courts should take into account the position adopted by the Commission as a factor in their assessment and state reasons on the basis of all documents in the file submitted to them.

As regards the other questions raised by the national court, these sought guidance on whether the court could conclude that the amount of aid to be reimbursed was equal to zero, where that follows from taking into account the calculations made on the basis of all the relevant information the court was aware of. In response to this, the CJEU first recalled that the recovery of aid should take place following the procedures established by national law, as far as these do not render impossible the restitution of the aid and the recovery of the aid. Should the national judge have any doubt regarding the enforcement, on the basis of the principle of sincere cooperation as mentioned above, it may always consult the Commission. The CJEU's reply to the referring court's question is that, if the national court has taken into account all the relevant information of which it has been aware, including the exchanges taken place between the Commission and national authorities, it cannot be excluded that the calculations made by the national court as regards the quantification of the amounts of aid to be repaid result in an amount equal to zero.[27]

3. Case C-184/11 *Commission v Spain*

On 11 July 2001, the Commission adopted six decisions declaring aid granted by three provinces of the Basque Country (Álava, Vizcaya, and Guipúzcoa) to certain undertakings in the form of a reduction in the tax base and a 45% tax credit for investments incompatible with the internal market. The decisions also ordered Spain to recover the aid from the recipients. However, since Spain had not recovered all the aid granted, the Commission brought actions before the CJEU for Spain's failure to fulfil its obligations under EU law. The Court then upheld the Commission's position in its judgment of 14 December 2006 (Joined Cases C-485/03 to C-490/03) and found that Spain had indeed breached its obligations.

Five years later, in 2011, the Commission considered that Spain had still not fully complied with the 2006 judgment and therefore decided to bring a new action before the CJEU for Spain's failure to fulfil its obligations. It requested that Spain be ordered to make a lump sum payment as well as periodic penalty payments pending its compliance with the 2006 judgment. However, while this case was pending before the Court, the Commission found out that Spain had fully complied with the 2006 judgment by recovering the entirety of the aid and therefore dropped its application for an order for a periodic penalty payment while maintaining its request for a lump sum payment of around €65 million.

By its judgment of 13 May 2014,[28] the Court recalled that it is for the national authorities to determine the exact amounts to be repaid, and that the Commission may merely, during an aid recovery proceeding, insist on the obligation to repay the amounts of aid at issue. In addition, the CJEU was of the opinion that Spain has not complied with the 2006 judgment because as of 27 August 2008 (date on which the period required by the Commission in a reasoned opinion for Spain to comply with the 2006 judgment expired), the aid had not been fully recovered by the Spanish authorities.

Regarding the request for a lump sum payment, the Commission argued, in line with its own communications on infringement proceedings, that such a penalty should apply as a deterrent to avoid future similar infringements of EU law.

In its judgment, the CJEU first analysed the recovery procedure of the unlawful aid, and pointed out that it lasted for over 5 years following the 2006 judgment. The Court paid particular attention to the fact that the Spanish authorities, despite alleging difficulties in the recovery of aid due to diverging views with the Commission and a lack of relevant precedent, did not contact the Commission nor transmit the problems encountered until 2 years after the 2006 judgment.

Secondly, the Court referred to the harmful effects to competition caused by the aid especially because of the size of the amount (€179.1 million at the date of delivery of the 2006 judgment) and the unusual high number of recipients.

Thirdly, the Court noted that Spain had already been condemned a number of times for failure to fulfil its

27 Case C-69/13 *Mediaset SpA v Ministero dello Sviluppo economico* EU:C:2014:71, para 37.

28 Case C-184/11 *Commission v Spain* EU:C:2014:316.

obligations because of a lack of immediate and effective recovery of aid previously declared unlawful and incompatible with the internal market.

For all the above-mentioned reasons, the Court considered that Spain should be required to pay a lump sum of €30 million.

4. Case C-547/11 *Commission v Italy*

On 5 June 2014, the CJEU ruled on infringement proceedings brought by the Commission against Italy for the latter's failure to take all necessary measures, within the prescribed time limits, to recover aid declared unlawful and incompatible with the internal market under two Commission decisions which concerned the exemption from excise duty on mineral oils used as fuel for alumina production in Gardanne, in the Shannon region, and in Sardinia implemented by France, Ireland, and Italy, respectively.[29]

With regard to the first Commission decision, the CJEU dismissed the argument raised by the Italian State that the delay in recovery was justified because a national court had ordered the suspension of the enforcement of the payment notice issued to recover the aid. The CJEU pointed out that Italy had failed to provide adequate evidence of the order for suspension of recovery by the national courts, and that, in any event, the order seemed to have been issued after the 4-month period established by the Commission decision to recover the aid in question.

As regards the second Commission decision, the CJEU considered that the Italian State had waited 5 months after notification of the decision to start the process of recovery and the national judicial order which suspended the execution of the payment that had been issued more than 10 months after notification. Since the unlawful aid should have already been recovered before the order on which the Italian State relied was issued, that order could not justify the delay.

Finally, the Court pointed out that Italy had also failed to comply with the additional obligation of informing the Commission within the 2-month period established in the decisions of (i) the measures taken or planned to comply with the decisions and (ii) the total amount of aid to be recovered accompanied by the documents proving that the Member State had ordered the beneficiary its reimbursement.

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Appendix. List of the new State aid modernisation legislation: 2013–2014

1. Broadband guidelines, 18 December 2012
2. Regional aid guidelines, 19 June 2013
3. Procedural Regulation, Council Regulation (EU) No 734/2013 of 22 July 2013
4. Enabling Regulation, Council Regulation (EU) No 733/2013 of 22 July 2013
5. De minimis Regulation, Commission Regulation of 18 December 2013
6. Risk Finance guidelines, 15 January 2014
7. Aviation guidelines, 20 February 2014
8. Implementing Regulation, Commission Regulation (EU) No 372/2014 of 9 April 2014
9. Environmental and Energy aid guidelines, 9 April 2014
10. Communication on the transparency of State aid awards, 21 May 2014
11. Research & Development & Innovation framework, 21 May 2014
12. Commission Staff Working Document on a common methodology for State aid evaluation, January 2014—Policy brief of June 2014
13. General Block Exemption Regulation, Commission Regulation (EU) N° 651/2014 of 17 June 2014
14. Communication on Promotion of important projects of common European interest—Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, 20 June 2014
15. Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, 9 July 2014
16. *16.* Revision of State aid rules relating to agriculture and forestry: *de minimis* Regulation, 18 December 2013; Agricultural Block Exemption Regulation of 25 June 2014; Guidelines for State aid in the agriculture and forestry sector and in rural areas 2014 to 2020, July 2014 *To be adopted soon.*
17. Commission's notice on the notion of State aid (draft, 17 January 2014)

29 Case C-547/11 *Commission v Italy* EU:C:2014:1319.