

State aid Private Enforcement

State aid and private enforcement: An overview of EU and national case law

STATE AID, STATE AID RECOVERY, FOREWORD, STATE AID COMPATIBILITY, STATE AID (NATIONAL ENFORCEMENT)

Jacques Derenne | Sheppard, Mullin, Richter & Hampton LLP (Brussels)

Ciara Barbu-O'Connor | Sheppard, Mullin, Richter & Hampton LLP (Brussels)

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I. Introduction

State aid private enforcement continues to develop rapidly with landmark cases that are some of the most important in competition law. This special issue will look at this type of competition law private enforcement which, given the recorded cases, is as developed, if not more developed, than enforcement in antitrust matters.

So much ground has been covered since the adoption of the first Notice on the cooperation with national courts in 1995. [1] The national courts of the EU Member States have continued to experience a surge in State aid cases, in particular in view of the current public and business interest on State aid matters in the recent years as well as the European Commission's ('Commission') role as a strong advocate of private State aid litigation. But, more can be done as concluded below.

State aid private enforcement covers actions before national courts that aim at safeguarding the subjective rights of third parties against the violation of State aid rules by Member States to ensure the public enforcement of rules by the Commission. It also covers actions before national courts against beneficiaries who unlawfully benefit from that violation. Although State aid issues often involve a triangular relationship between the Member State, the beneficiary and the Commission, State aid private enforcement can also lead to disputes taking place only between private parties.

We will not go into the nitty gritty of what constitutes State aid but rather provide an overview of the plethora of case law which makes up State aid private enforcement. This article begins with a brief recap of the main principles as shaped by the Court of Justice of the European Union's ('CJEU') case law before moving on to look more concretely at the types of actions national courts face.

Suffice it to say that under Article 107(1) of the Treaty on the Functioning of the European Union ('TFEU'), State aid granted by Member States is prohibited in principle (exemptions can be exclusively decided by the Commission under Article 107(3) TFEU or Article 106(2) TFEU) and Article 108(3) TFEU requires Member States to notify the Commission any plan to grant new aid that fulfils the conditions of Article 107(1) TFEU.

In their application of Article 108(3) TFEU, Member States are subject to a standstill obligation which prevents them from implementing the aid measure before the Commission has issued a decision following a compatibility assessment of the notified aid. The Commission has exclusive competence to decide whether the aid is compatible subject to exclusive judicial review of the CJEU. Since the CJEU has, under Article 263(1) TFEU, exclusive jurisdiction to review the Commission's decisions, national courts of the Member States cannot review a Commission State aid decision: national courts can only decide whether a State measure constitutes aid within the meaning of Article 107(1) TFEU and protect the subjective rights by drawing all consequences of the violation of the last sentence of Article 108(3) TFEU by the Member State. To this end the CJEU declared that the latter has direct effect as early as 1964 in the *Costa* case. [2] In this respect, the distinction between the concepts of "unlawful aid" and "compatible or incompatible aid" is key: an aid is "unlawful" if it was not notified or was granted prior to the Commission's approval; this is a procedural concept only; an aid is regarded as "compatible" or "incompatible" if the Commission declares it so, following its discretionary compatibility assessment; this is a substantive concept only.

As a consequence, national courts do have a prominent role in the enforcement of State aid rules which has shaped, in particular, the private enforcement of State aid through the enforcement of Article 108(3) TFEU. [3] Moreover, the obligation imposed on national courts to draw all consequences of a violation of Article 108(3) TFEU extends to national authorities in that they too are obliged to recover unlawful aid on their own initiative, even without a Commission decision. [4]

II. Main duties and powers of national courts as shaped by EU case law

It cannot be ignored that, albeit an indisputable field of competition law, State aid is to some the ugly duckling of competition law due to its substantial differences with antitrust law or merger control, not least because the addressees of the legal provisions are the Member States rather than undertakings. Beneficiary undertakings and their competitors are thus not parties to the procedures in place for the assessment of an aid measure's lawfulness and/or compatibility, but are merely third parties, who have, for instance, no access to the Commission's file.

In following sections the general principles State aid private enforcement will be covered before moving on to case law which deals with specific issues.

a) Key principles developed by the EU case law

As already mentioned above, it is a long standing principle that Article 108(3) TFEU (last sentence) has direct effect. [5] Article 108(3) TFEU gives rise to directly effective individual rights of affected parties (such as the competitors of the beneficiary of the aid but also any third party affected by the aid measure in question even if they not directly competitively linked to the beneficiary). [6] These affected parties can enforce their rights by bringing legal action before the competent national courts, which have a duty to ensure that the "*effet utile*" of Article 108(3) TFEU is respected especially by ensuring that State aid rules have primacy over national procedural rules (see *Scott* and *Mineralölsteuer* cases where respectively the CJEU ruled that a French national court should

set aside national administrative law providing suspensive effect to an appeal of a national recovery order and the financial court of Hamburg ruled that EU law supersedes German tax law), [7] against the granting Member State and the beneficiary.

According to EU case law, the validity of a State aid measure is affected if national authorities act in breach of Article 108(3) TFEU. In such circumstances, *"national courts must offer to individuals in a position to rely on such breach the certain prospect that all necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision and possible interim measures"*. [8]

In its settled case law, the CJEU has established the distinct, but complementary, roles of the Commission on the one hand, and of the national courts on the other, in the area of State aid: with the Commission lies the substantive assessment; with the national court lies the protection of the subjective rights of third parties by ensuring the regularity of the obligation to notify which allows the Commission to fully exercise control of compatibility with the internal market. [9]

National courts are obliged to enforce the notification and standstill obligations thereby protecting the rights of individuals against unlawful State aid. In principle, national procedural rules apply to such proceedings. However, based on general principles of EU law, the application of national law in these circumstances (interim relief – suspensive recovery orders) is subject to two essential conditions: (i) the **principle of equivalence** (situations under EU law and under national law cannot be treated differently) and (ii) the **principle of effectiveness** (national rules apply provided that they do not render too difficult or impossible the application of the EU law, which has primacy over national law). [10] In certain cases, national law should be set aside in order for EU law to be applied in full.

Under its *CELFA* case law, [11] the CJEU clarifies the powers and obligations of national courts with regard to the role of the Commission in State aid control. In light of a Commission decision declaring the aid in question compatible despite it having been granted unlawfully ('unlawful aid' due to lack of notification to the Commission), Union law does not oblige the national judge to order recovery of the unlawful aid but only of the payment of interest for the period during which the aid had been unlawfully granted. By contrast, if the Commission's decision on compatibility is annulled when the national court is seized, it cannot stay proceedings pending a possible new positive decision. In that case, the national court is obliged to rule immediately and order the recovery, with interest, of the unlawful aid even if that aid is subsequently declared compatible by the Commission. However, if the formal investigation procedure is initiated: the judge is bound by the qualification of aid by the Commission. [12]

State aid rules grant extensive powers to national judges in the event of an infringement of Article 108(3) TFEU. National courts' competences are not subject to discussion with the parties. The EU case law has always been very clear in that respect. Indeed, *"the objective of the national courts is therefore to pronounce measures appropriate to remedy the unlawfulness of the implementation of the aid, in order that the aid does not remain at the free disposal of the recipient during the period remaining until the Commission makes its decision"*. [13]

The CJEU requires the national courts to draw *"all necessary inferences"* under national law from a violation of Article 108(3) TFEU *"as regards the validity of the measures giving effect to the aid, the recovery of financial support granted [...] and possible interim measures"*. [14] In addition, in its *Eesti Pagar* judgement, [15] the CJEU confirmed that this obligation also extends, within the context of the application of the General Block Exemption Regulation, to the national authorities in that they too are obliged to recover unlawful aid on their own initiative, even without a national court or a Commission decision.

b) Application of the principles in specific situations

► *Powers of inquiry – Burden of proof*

On the whole, national courts' powers of inquiry remain limited as far as State aid matters are concerned. A national court has to judge a case on the basis of the facts presented to it by the parties. State aid cases are often complex and involve economic considerations (in particular for the qualification of aid in the event of an application of the market investor test or of the *Altmark* principles on the notion of aid when a State measure aims at compensating the discharge of obligations of services of general economic interest) [16] for which national courts often lack the appropriate means to establish the factual information necessary for their decision. The burden of proof, therefore, is often a hurdle that leads to the claimant being unsuccessful.

Claimants are often unable to present sufficient evidence to support the view that the State aid criteria have been fulfilled. In the *AirOne* case in Italy, [17] the court of first instance in Sassari rejected the applicant's request on the ground that AirOne had not proved that the alleged State aid met the criteria of selectivity and that the disputed measures constituted an undue advantage. In the *P1 Holding* case in the Netherlands, [18] the district court of Maastricht held that the claimant had failed to provide sufficient evidence to prove an effect on trade between Member States (see also *Thomas Svensson* case in Sweden [19]).

The *Boiron* case, [20] however, simplified the situation for claimants, in particular in complex cases where the question involved verifying whether the *Altmark* criteria had been fulfilled. The French Civil Supreme Court applied the CJEU case law, according to which the principle of effectiveness requires national courts to set aside national requirements rendering the production of evidence impossible or excessively difficult.

► *Recovery*

The national courts can also act in the process of recovering aid. [21] Once seized either by the State following a Commission decision or by a third party affected by the unlawful granting of aid, the national court has extensive obligations with regard to the recovery of unlawful aid. Unlike the Commission, it has no power to assess the compatibility of the aid with the internal market. It can, and must, be limited to noting the unlawful nature of the aid despite having all powers (and duties) to order its recovery and its cessation and any other appropriate measure to restore competition distorted by this unlawful grant. In the *Residex* case (NL), [22] the national court concerned accepted the principle that State aid rules could be applied *ex officio* (even if in casu the public authorities had raised the issue themselves) and ordered recovery of unlawfully granted State aid (the court of appeal of The Hague did not rule on the *ex officio* point explicitly). Of course, the national court is also called upon to intervene after a negative decision by the Commission in support of the Member State concerned, which would fail to fulfil its obligation to recover unlawful and incompatible aid.

► *Liability – Damages*

In liability cases, courts have confirmed the Member State's liability vis-à-vis the beneficiary's competitor or third party affected by the unlawfully granted aid based on the violation of Article 108(3) TFEU. However, French courts have rejected arguments based on the violation of Article 107(3) TFEU whilst, further to a Commission decision (as was the case in the *Borotra* case [23]) it was obvious that the State had infringed Article 107(3) TFEU and not only Article 108(3).

Private enforcement of State aid by the national courts takes on different dimensions and develops in a more unpredictable manner to other areas of competition law specifically because undertakings are not the addressees of the legal provisions nor any ensuing decisions. The Damages Directive for antitrust actions, [24] which formally sets out the right to full compensation, excludes from its scope any harm caused by the anticompetitive behaviour of a Member State. Article 1 of the Damages Directives provides that *“anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association.”* Private enforcement of State aid therefore evolves in different directions since there are various possible defendants and claimants before the national courts of Member States.

It is regrettable that the harmonisation of private enforcement is divided in this way between antitrust private enforcement, covered by the Damages Directive, and State aid private enforcement for which there have been no legislative initiatives. It is clear that under antitrust rules, the Member States are willing to harmonise the rules whereas the same is not true for State aid where there is a clear reluctance from the Member States. This can arguably be put down to the Member States blatantly protecting themselves against the potential efficiency of State aid private enforcement where claims can be brought against them.

III. Private Enforcement in EU State aid: cases before the National Courts

In their role in the private enforcement of State aid, national courts can face claims from three categories of persons: (i) the Member State against the beneficiary; (ii) the competitors of the beneficiary and directly affected third parties against both the Member State and the beneficiary; and (iii) the beneficiaries against the Member State.

a) Cases introduced by Member States

In view of the importance for the proper functioning of the internal market in respect of the prior notification procedure for State aid measures, the national courts must, in principle, enforce a recovery order of any aid paid in breach of Article 108(3) TFEU. Indeed, it is tantamount to *“erasing the advantage”* on the part of the beneficiary to restore the competitive situation.

By this recovery, the beneficiary loses the advantage which it had enjoyed on the market compared to its competitors, and the situation prior to the payment of the aid is restored. Nonetheless, a theoretically valid obligation to return unlawful state aid, or the theoretical correctness of recovery decisions by national authorities, will not necessarily contribute significantly to restoration of competitive conditions on the internal market if the practical effects of the relevant obligations would be very minor. [25] Also the Commission has, in its Recovery Notice, [26] recognised that in the case of an insolvent beneficiary complete restoration of the pre-aid situation on the market may in practice be impossible to achieve.

The recovery process is put into motion by the relevant administration, in the same way as the State would proceed to obtain the repayment of any other debt. A recovery order is therefore delivered to the beneficiary of the unlawful aid and requires the latter to repay the unlawful aid to the public authority concerned. This extends to obliging an undertaking in receivership to include a State authority in the list of creditors to be paid on liquidation of the company and this because a State's right to recover the State aid should be considered as a debt of the company payable with priority over other debts in the event of liquidation. [27]

Since the public authorities can rely directly on Article 108(3) TFEU in order to serve a letter of formal notice as a recovery order, should the beneficiary fail to comply with the order, the public authorities must go before the national court to enforce the recovery order. In the *Ryanair* case, [28] the Member State concerned (the Walloon region in Belgium) even sought aid recovery before foreign jurisdiction (in Ireland). In another case involving Ryanair, it is clear that national authorities will go to sometimes quite severe lengths in order to execute a decision. Following a negative aid decision ordering the recovery of the aid in 2014, [29] a Ryanair plane was grounded and seized by the French authorities at Bordeaux airport in November 2018. The amount of the aid in question was recovered in a matter of hours... In a series of cases before the French Administrative Court of Nancy, the Minister of Economy and Finances in France sought the annulment of the administrative tribunal of first instance's decision allowing the defendants restitution of the payment of taxes on advertising expenses paid for the year 2002. [30]

The last sentence of Article 108(3) TFEU entails an obligation for the national courts to ensure that procedural rules for the enforcing the recovery of aid do not infringe the principles of equivalence and effectiveness. When an aid measure is implemented in infringement of Article 108 (3) TFEU, national courts have the duty to uphold the rights of the individuals, drawing all necessary consequences under national law as regards both the validity of decisions giving effect to aid measures and the recovery of the financial support granted. In the *Boiron* case, [31] the CJEU found that a rule of national law on the level of proof should be set aside as it did not comply with the principle of effectiveness and made it impossible or excessively difficult for evidence of the existence of an overcompensation to be produced. The CJEU judged that the national court is required to use all procedures available to it under national law to render the claim of the party effective. On the basis of these principles, the national rule of procedure should have been set aside. [32]

b) Cases introduced by competitors and directly affected third parties

Competitors may seek the recovery of any aid measure implemented in breach of the standstill obligation, regardless of the Commission's compatibility assessments and competitors may seek damages as a result of the implementation of unlawful aid. [33] Dealing with such legal actions and thus protecting competitor's rights under Article 108(3) TFEU is undeniably one of the most important roles of national courts in the field of State aid.

There have been an increasing number of cases where competitors (and directly affected third parties) have claimed for the recovery of unlawfully granted State aid or for the national judge to order injunctive measures to prevent or suspend the granting of unlawful aid. National courts have ordered interim measures in several cases (see for example *Federchemica* case in Italy [34]). However, should *Streekgewest* be interpreted broadly, the path to private enforcement of the State aid rules could be extended beyond competitors and directly affected third parties. [35]

Notwithstanding, the (in)famous cases of some German courts between 2006 and 2010, relating to aid measures granted to Ryanair by German airports, which were contested by Ryanair's competitors, are unfortunate examples of instances where the EU case law (*SFEI* and *Streekgewest* cases) [36] was incorrectly applied by national courts, and eventually restored by the relevant German Supreme Court. [37]

When it comes to cases introduced by the competitors of beneficiaries (or by the directly affected third parties) of an aid measure the claims can be two-fold. Claims may be introduced by the directly harmed competitors of the beneficiaries (or by the directly affected third parties), on the one hand, against the Member State, and, on the other hand, against the beneficiaries.

► *Against the Member State*

Damages actions against the Member State remain limited, in fact there has only been one case, to the writers knowledge, in which competitors have actually been awarded monetary compensation (and this case is under appeal on the exact quantum of damages). [38] It is often said that the main obstacle to damages actions brought by private parties, based on a violation of State aid law is the lack of a clear legal basis under national law. However, the *Francovich* EU case law on the liability principles enshrined in EU law directly could amply suffice for State aid cases. Member States differ in their treatment of this question. Moreover, the requirement to prove causation between a breach of Article 108(3) TFEU and the economic loss sustained by the claimant remains a major problem, as this requires the claimants to show how its market share would have developed had the aid not been granted to its competitor. However, this does not appear to be different from the classic issue of the counterfactual in damages cases, which raises issues generally in antitrust matters.

The State's responsibility can be best invoked under Union law by virtue of the *Francovich* case on State liability (in the present context, the breach of the obligation to notify is a material infringement and the conditions of that case law appear to be easily fulfilled) [39], or it can be invoked under national law depending on the national rules regarding State liability. [40]

In *Corsica Ferries*, [41] the French Administrative Court of Bastia, awarded damages based on the Commission's decision on the unlawfulness and incompatibility of the aid. However, the national court also based its decision on another French case, that of the Administrative Court of Marseille of 6 April 2016 which had annulled the local authority's decision to award the public service delegation and the contract relating thereto on the grounds that the financial compensation provided for in the latter constituted unlawful State aid. And it was in reference to that judgment, and not the Commission's decision, that the Administrative Court found that the unlawfulness was such as to engage the responsibility of the State. While this is grounds for a damages claim since the Commission had already established the unlawfulness of the aid, such a claim may only be introduced at the end of the Commission's investigation, which may take two or more years. [42] This only goes further in showing the necessity for harmonisation with regard to State aid damages, as is the case in antitrust, as it would clarify the rules on private enforcement of State aid and ensure harmonious application across the Member States.

► *Against the beneficiary*

The other way of introducing damages claims before national courts is to bring the action against the beneficiary directly when that undertaking becomes aware (or should have been aware) as a diligent economic operator that aid is being granted without having been notified to the Commission, or where the aid has been notified but is being implemented prior to the Commission's approval decision.

Indeed, in addition to deploying the full force of the direct effect of Article 108(3) TFEU resulting in the possibility for any affected party to request, before a national court, the recovery of the aid unlawfully granted, *SFEI* also recognises the right for the competitors of beneficiaries to receive compensation from these beneficiaries for the damage caused by the unlawful aid. Although rejecting this right under EU law directly, the CJEU vested this right in national law. [43] However, the problem lies in the fact that this depends on national recourse to the courts for competitors and not all Member States have a clear legal basis for a claim. What is more, due to the national court's autonomy remedies depend on the legal remedies provided under national law. [44]

Such claims are not precluded by the mere fact that the Commission may start to investigate the aid in parallel. Even if the Commission should ultimately consider that the aid is compatible, damages may still be justified due to the fact that the aid was unlawful at the time it was granted. This also applies even if the Commission issues an

approval decision prior to the national court's decision, provided that the claimant can demonstrate that a loss was suffered due to the premature implementation of the aid (*CELF I*). [45]

The lack of a clear legal basis under domestic law can be attributed to the ambiguity of the ruling in the *SFEI* case, whereby the CJEU stated that a breach of EU State aid law should "*trigger the normal consequences of similar breaches under domestic law*". Hence, the CJEU did not require Member States to create a specific damages remedy and therefore left a substantial margin for the national courts. Indeed, since Article 108(3) TFEU does not impose any direct obligations on the beneficiary, there is no sufficient EU legal basis for these claims. But *SFEI* left the door open for claims against the beneficiary when the CJEU held that "*if, according to national law, the acceptance by an economic operator of unlawful assistance of a nature such as to occasion damage to other economic operators may in certain circumstances cause him to incur liability, the principle of non-discrimination may lead the national court to find the recipient of aid paid in breach of Article [108(3) TFEU] liable*". [46]

By way of example, in Belgium, this type of action is based on the principles of actions for unfair competition. Under EU case law, the beneficiary, by claiming any benefit from the violation of Article 108(3) TFEU, commits an act of unfair competition under national legislation. The competitor of such a beneficiary therefore has the right to stop this act of unfair competition by having recourse to an efficient litigation procedure that leads to a definitive decision, even though the latter is adopted by virtue of an interim relief procedure (specific procedure for a 'cease and desist' order under Belgian law). In this case, the Belgian courts have in particular recognised the right to seek a cease and desist order setting aside the offer made in a public bid by an undertaking which was granted unlawful aid. [47] The French *Cour de cassation* also recognised that competitors have the right to bring claims against the beneficiaries of unlawfully granted State aid on the basis that the access to a market with the benefit of such an aid constitutes unfair competition behaviour under the national unfair competition law. [48]

By ruling that *Air Berlin*, as a direct (low cost) competitor of Ryanair in the Hamburg/Lübeck area, was entitled to request recovery of unlawful aid granted to Ryanair by the airport of Lübeck, the Kiel court shows that private enforcement of State aid law at the national level can offer very positive results for third parties confronted with this situation. [49] This judgment together with other German cases regarding aid granted to Ryanair however were quashed on appeal by a series of judgment having the effect of depriving the competitor of any claim under national law against a Member State or a beneficiary of unlawful State aid. This national case law clearly went against EU case law and the principle of effectiveness. [50] As mentioned above, the German Supreme Court corrected this mistaken case law in 2011. [51]

The *Baby Dan* case of the Amsterdam Court of Appeal is also worrying. [52] It concerns an action for damages against competitors which received unlawful aid. The ruling shows that national courts can still have difficulties with concepts as basic as lawful/unlawful aid versus compatible/incompatible aid. This can be surprising since the ruling in *SFEI*, a case which is cited by the Amsterdam Court of Appeal in its ruling.

Things are on the move however and in the aftermath of the CJEU's judgment in *Frucona*, [53] initiated by the Commission against Slovakia for failure to recover unlawful State aid, the Slovak Government prepared an amendment of the Act on State Aid and the Enforcement Code. [54] The amendment expressly inserts a provision into the Act on State Aid whereby a decision of the Commission about an unlawful and incompatible aid is directly enforceable against the beneficiary from the day it is delivered to the Slovak Republic, and provides for the procedure of recovery. If the definition of a determined procedure is very helpful, it was not necessary to provide the former principle in such an Act on State aid. The EU case law was sufficient.

c) Cases introduced by beneficiaries against the Member State

Damages claims introduced by the beneficiary (against the granting authority) before the national courts are based on the same principles. However, the damages for the beneficiary **cannot be** the aid's recovery. This is not a damage, only the logical consequence of the restoration of undistorted competition following the granting of unlawful aid. The damage must be inherently different in nature and in scope: the beneficiary should show specific damage (for example, postponement of a decision to delocalise following the promise of an unlawful aid – the loss from the non-delocalisation could be a damage; the beneficiary would probably have to share the damage owing to his or her obligations of diligence with regard to the State's decisions). [55]

The question is certainly more delicate due to the principle of effectiveness of EU law: damages cannot be a roundabout way of recovering the amount owed to the State in respect of the recovery of unlawful (and possibly incompatible) aid. Thus, the State's responsibility with regard to the recipient of unlawful aid can only be founded on damages that are clearly separated from the recovery of that aid. This is probably the (not good) reasons why the Commission entirely ignored this line of damages cases in its *2009 Enforcement Notice*.

National courts have rejected claims for damages by beneficiaries of unlawful aid for lack of causal link between the fault of the State and the alleged harm. [56] National courts have relied on a principle that a distinction should be drawn with claims for compensation for damage resulting from unlawfulness. In that case, the CJEU held that *"that damages which the national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals do not constitute aid within the meaning of Articles [107] and [107 TFEU]"*. [57] Therefore beneficiaries can only claim damages separately from the recovery of the unlawful aid. [58]

The beneficiary of the aid can also try to contest the recovery order by bringing an action for annulment of the decision ordering the recovery before the competent administrative court. Recipients of incompatible aid can also try to challenge the grounds of recovery before national courts in actions for debt recovery by the authorities. In the cases identified, beneficiaries of the aid have usually resisted returning the aid after the initial request from the Member State. The beneficiary has usually appealed the court orders for repayment of the unlawful aid. Such actions by the beneficiary, although logical, delay the date by which the aid can be fully recovered and cannot *in fine* be successful in law.

National courts, such as the Austrian Constitutional Court, have ruled that beneficiaries of aid cannot rely on their legitimate expectations in order to resist a recovery order. [59] In Germany, the administrative court found that if an aid measure cannot be automatically recovered, that justifies the suspension of any subsequent payments. Moreover, the court found that an expectation to preserve aid despite the Commission's finding that it was unlawfully granted cannot be protected before a national court by contesting a recovery order. [60] More interestingly, a German Court found that the Member State is under an obligation to inform the aid recipient that the aid had been granted in breach of the obligation to notify the Commission and recovery might ensue. [61]

This is in line with the constant EU case law ruling that beneficiaries can never have any legitimate protection in an aid unlawfully granted. The CJEU established in one of its early State aid cases, and repeated ever since, that: *"In view of the mandatory nature of the supervision of State aid by the Commission under Article [108] of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed."* [62] EU case law has moreover clarified that *"three conditions must be satisfied in order for a claim to entitlement to the protection of legitimate expectations to be well founded. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Community [EU] authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the*

person to whom they are addressed. Third, the assurances given must comply with the applicable rules." [63] Hence, assurances given by national authorities about State aid matters are, by definition, incapable of creating any legitimate expectation. [64] The same holds for assurances that are manifestly against the law, such as a promise not to recover a State aid that the Commission has already declared incompatible and to be recovered. Such assurances would manifestly not comply with the applicable rules.

IV. Conclusions

The national courts of the Member States have had a specific role in the private enforcement of State aid for over fifty years, since the CJEU held that Article 108(3) TFEU (last sentence) has direct effect. This role is different to that of the Commission but the powers of the national courts are nonetheless of great importance and are sometimes superior to those of the Commission.

As opposed to antitrust private enforcement which is now shaped by EU legislative harmonisation through the Damages Directive, the duties, obligations and powers of national courts in State aid private enforcement are shaped by the EU case law and soft law (Commission's guidance through the *2009 Enforcement Notice* and the *2019 Recovery Notice*). In the realm of State aid, the Member States play a problematic role by arguably preventing the extension of private enforcement through harmonised rules throughout the EU.

The studies on the enforcement of State aid rules and decisions by national courts, first in 2006 and in 2009, and now in 2019, show that despite progress and a lot of case law, private enforcement is still tricky due mainly to *a)* the players involved – Member States and beneficiaries; *b)* the notion of aid which can be very challenging for national courts in certain circumstances; and *c)* the lack of damages awarded. In fact, it could be said that it would rather be higher awards of damages which could have the highest deterrent value for Member State which consider granting unlawful and/or incompatible State aid and for the beneficiaries of that aid to ensure that they also verify the aid they receive. This is in particular not helped by the lack of a State aid damages directive akin to the existent one for antitrust.

We should favour all means of law to promote deterrence of unlawful State aid. Firstly, the Member States should favour harmonisation for enhanced efficiency not only regarding Member State authorities granting aid but also to push beneficiaries to check the State resources they receive and to also play their part in the due diligence required in implementing State measures.

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

[1] Commission notice on the enforcement of State aid law by national courts, OJEU (2009) C 85/1 (the *2009 Enforcement Notice* which replaces the 1995 Cooperation Notice, OJEU (1995) C 101/54). See also Commission Notice on the recovery of unlawful and incompatible State aid, OJEU

(2019) C 247/1 (the 2019 Recovery Notice which replaces the 2007 Recovery Notice, OJEU (2007) C 272/4).

[2] CJEU, 21 January 1964, *Flaminio Costa v ENEL*, Case 6/64, EU:C:1964:66.

[3] 2009 Enforcement Notice. See also studies commissioned by the Commission on the application of State aid rules by national courts: most recently, Spark Legal Network, the European University Institute, Ecorys and Caselex, *Study on the enforcement of State aid rules and decisions by national courts, July 2019* (COMP/2018/001): <https://ec.europa.eu/competition/publications/reports/kd0219428enn.pdf> ↗ - online database: <https://state-aid-caselex-accept.mybit.nl/> ↗ ; see also T. Ottervanger, T. Jestaedt, J. Derenne, *Study on the enforcement of State aid law at national level*, March 2006 (COMP/H4/010): Part I, Application of EC State aid rules by national courts; http://ec.europa.eu/competition/state_aid/studies_reports/study_part_1.pdf ↗ ; Part II, Recovery of unlawful State aid: enforcement of negative Commission decisions by the Member States: http://ec.europa.eu/competition/state_aid/studies_reports/study_part_2.pdf ↗ ; update of the 2006 Study on the Enforcement of State Aid Law at National Level, 2009, Jacques Derenne: http://ec.europa.eu/competition/state_aid/studies_reports/enforcement_study_2009.pdf ↗ ; see also the national court judgments on State aid on DG COMP's website: http://ec.europa.eu/competition/court/state_aid_judgments.html ↗ .

[4] CJEU, 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172; see, **Markus Wellinger**, *The EU Court of Justice provides guidance on the duty of recovery in case of non-compliance with Block Exemption Regulation (Eesti Pagar)*, 5 March 2019, *e-Competitions Bulletin* March 2019, Art. N° 90072. See also, **Jacques Derenne**, *Récupération : La Cour de justice de l'Union européenne clarifie les obligations des autorités nationales en matière de récupération d'aide illégale pour non-respect des conditions du règlement général d'exemption par catégorie (Eesti Pagar)*, 5 mars 2019, *Revue Concurrences* N° 2-2019, Art. N° 90440, pp. 122-125 [fr].

[5] Case *Flaminio Costa v ENEL*, cited above.

[6] Commercial Court of Paris, *Union française de l'express international a.o. v La Poste a.o.*, Case n° RG 96072418, 96082065, 7 December 1999. See **Dimitris Vallindas**, *The Paris Commercial Tribunal rules that a recipient of State aid could not be held liable for not having verified whether the aid had been notified (SFEI/La Poste-Chronopost)*, 7 December 1999, *e-Competitions Bulletin* December 1999, Art. N°13361.

[7] Hamburg Financial Court, *Mineralölsteuer 2*, n°4 V 180/08, 05 September 2009. See **Alix Müller-Rappard**, *The German Financial Court of Hamburg holds it is seriously doubtful whether the duty for national courts under Community law to recover unlawful State aid shall supersede the national procedural laws on prescription (Mineralölsteuer 2)*, *e-Competitions Bulletin* September 2008, Art. N° 28837. See **Anne Fort, Bernadette Willemot**, *The European Court of Justice issues a judgment constituting a major step forward for State aid recovery policy (Scott Paper/Kimberly Clar)*, 5 October 2006, *e-Competitions Bulletin* October 2006, Art. N° 36212.

[8] CJEU, 21 November 1991, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic*, Case C-354/90, para 12, EU:C:1991:440. See also **Dimitris Vallindas**, *The Paris Commercial Tribunal rules that a recipient of State aid could not be held liable for not having verified whether the aid had been notified (SFEI/La Poste-Chronopost)*, 7 December 1999, *e-Competitions Bulletin* December 1999, Art. N°13361.

[9] Commercial Court of Paris, *Union française de l'express international a.o. v La Poste a.o.*, Case n° RG 96072418, 96082065, 7 December 1999. See **Dimitris Vallindas**, *The Paris Commercial Tribunal rules that a recipient of State aid could not be held liable for not having verified whether the aid had been notified (SFEI/La Poste-Chronopost)*, 7 December 1999, *e-Competitions Bulletin* December 1999, Art. N°13361.

[10] CJEU, 12 November 2015, *Klausner Holz Niedersachsen GmbH v Land Nordrhein Westfalen*, C-505/14, EU:C:2015:742. See **Markus Wellinger**, *The EU Court of Justice rules on the application of State aid rules in national court proceedings and the principle of res judicata (Klausner Holz Niedersachsen GmbH / Land Nordrhein Westfalen)*, 12 November 2015, *e-Competitions Bulletin* November 2015, Art. N° 77167. See also, **Jacques Derenne**, *Autorité de la chose jugée : La Cour de justice de l'Union européenne confirme, pour la seconde fois depuis la formulation du principe de primauté du droit européen, qu'en matière d'aides d'État, le principe d'autorité de la chose jugée doit céder le pas à la primauté du droit européen lorsque les compétences exclusives de la Commission européenne sont en jeu (Klausner Holz Niedersachsen / Land Nordrhein-Westfalen)*, 11 novembre 2015, *Revue Concurrences* N° 1-2016, Art. N° 77885, pp. 160-164 [fr]. See also Jacques Derenne, *L'autorité de chose jugée à l'épreuve du droit de l'Union européenne – Du principe d'effectivité en général et des règles spécifiques en matière d'aides d'État en particulier* (res judicata and primacy of EU law in competition cases), in *Contentieux du droit de la concurrence de l'Union européenne : questions d'actualité et perspectives* (V. Giacobbo & Chr. Verdure, éditeurs), Larcier, Bruxelles, 2017, pp. 349 -383. See CJEU, 7 September 2006, *Laboratoires Boiron*, Case C-526/04, EU:C:2006:528, see **Noëlle Lenoir, Dan Roskis**, *The European Court of Justice rules that pharmaceutical laboratories liable to a tax on direct sales of medicines are entitled to claim the reimbursement of the tax where the exemption of wholesale distributors constitute an illegal State aid (Boiron)*, 7 September 2006, *e-Competitions Bulletin* September 2006, Art. N° 12429. See CJEU, 2 September 2010, *Commission v Scott*, Case C-290/07 P, EU:C:2010:480, See **Markus Wellinger**, *The EU Court of Justice quashes General Court's judgment and finds no manifest error in the Commission's assessment of State aid (Scott)*, 2 September 2010, *e-Competitions Bulletin* September 2010, Art. N° 41449.

[11] CJEU, 12 February 2008, Case C-199/06, *CELF and ministre de la Culture and de la Communication*, EU:C:2008:79. See **Markus Wellinger**, *The European Court of Justice rules that a Member State is not required to recover aid that has initially been found unlawful as a result of a failure to notify the aid package to the Commission when this aid has subsequently been declared compatible with the common market (CELF)*, 12 February 2008, *e-Competitions Bulletin* February 2008, Art. N° 44936. See also, **Christophe Giolito**, *Aide illégale : La CJCE clarifie les rôles respectifs de la Commission européenne et du juge national à l'égard des aides versées illégalement (SIDE-CELF)*, 12 février 2008, *Revue Concurrences* N° 2-2008, Art. N° 16671, pp. 140-141 [fr]. See **Till Mueller-Ibold**, *The European Court of Justice rules on two state aids in the books distribution sector holding that their twenty-year duration is not an "exceptional situation" under European law (CELF, SIDE)*, 11 March 2010, *e-Competitions Bulletin* March 2010, Art. N° 35663. See also, **Jacques Derenne**, *Aide illégale - Circonstances exceptionnelles : La Cour de justice rappelle les obligations fondamentales du juge national en présence d'aide illégale et refuse de reconnaître le caractère exceptionnel des circonstances de l'affaire (CELF)*, 11 mars 2010, *Revue Concurrences* N° 3-2010, Art. N° 31998, pp. 129-132 [fr].

[12] CJEU, 21 November 2013, *Deutsche Lufthansa v Flughafen Frankfurt-Hahn*, Case C-284/12, EU:C:2013:755. See **Phedon Nicolaides**, *The EU Court of Justice rules on the matter of non-notified state aid subject to a formal examination procedure initiated by the Commission and the measures to be adopted by the national courts hearing an application for cessation or recovery (Deutsche Lufthansa / Flughafen Frankfurt-Hahn)*, *e-Competitions Bulletin* November 2013, Art. 61467.

[13] CJEU, 21 November 2013, *Deutsche Lufthansa v Flughafen Frankfurt-Hahn*, Case C-284/12, EU:C:2013:755. See **Phedon Nicolaides**, *The EU Court of Justice rules on the matter of non-notified state aid subject to a formal examination procedure initiated by the Commission and the measures to be adopted by the national courts hearing an application for cessation or recovery (Deutsche Lufthansa / Flughafen Frankfurt-Hahn)*, *e-Competitions Bulletin* November 2013, Art. 61467.

[14] CJEU, 12 November 2015, *Klausner Holz Niedersachsen GmbH v Land Nordrhein Westfalen*, C-505/14, EU:C:2015:742. See **Markus Wellinger**, *The EU Court of Justice rules on the application of State aid rules in national court proceedings and the principle of res judicata (Klausner Holz Niedersachsen GmbH / Land Nordrhein Westfalen)*, 12 November 2015, *e-Competitions Bulletin* November 2015, Art. N° 77167. See also, **Jacques Derenne**, *Autorité de la chose jugée : La Cour de justice de l'Union européenne confirme, pour la seconde fois depuis la formulation du principe de primauté du droit européen, qu'en matière d'aides d'État, le principe d'autorité de la chose jugée doit céder le pas à la primauté du droit européen lorsque les compétences exclusives de la Commission européenne sont en jeu (Klausner Holz Niedersachsen / Land Nordrhein-Westfalen)*, 11 novembre 2015, *Revue Concurrences* N° 1-2016, Art. N° 77885, pp. 160-164 [fr].

[15] CJEU, 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172. See, **Markus Wellinger**, *The EU Court of Justice provides guidance on the duty of recovery in case of non-compliance with Block Exemption Regulation (Eesti Pagar)*, 5 March 2019, *e-Competitions Bulletin* March 2019, Art. N° 90072. See also, **Jacques Derenne**, *Récupération : La Cour de justice de l'Union européenne clarifie les obligations des autorités nationales en matière de récupération d'aide illégale pour non-respect des conditions du règlement général d'exemption par catégorie (Eesti Pagar)*, 5 mars 2019, *Revue Concurrences* N° 2-2019, Art. N° 90440, pp. 122-125, www.concurrences.com [fr].

[16] CJEU, 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht*, C-280/00, EU:C:2003:415. See **Nicolas Pesaresi**, **Sandro Santamato**, *The EU Court of Justice delivers a judgment on the notion of State aid, addressing the issue of the compensation for services of general economic interest (Altmark)*, 24 July 2003, *e-Competitions Bulletin* July 2003, Art. N° 38406.

[17] Court of First instance of Sassari, 26 January 2009, *AirOne S.p.A. v. Ryanair Ltd e Sogear S.p.A.*, 3863/2008 RGAC (Order). See **Gianluca Belotti**, *An Italian Court holds that the decision of the EC Commission to open a formal investigation procedure on the same State aid measure at stake before national courts, is not per se sufficient to prove the fumus boni iuris to grant interim relief (AirOne)*, 26 January 2009, *e-Competitions Bulletin* January 2009, Art. N° 28523.

[18] Rechtbank Maastricht, *P1 Holding B.V. v Municipality of Maastricht*, LJN BF 7031, 8 October 2008. See **Mariëtte Swart**, *A Dutch District Court rules that an agreement between a municipality and a company for the use of car parks is not contrary to Art. 87 EC (P1 Holding)*, 8 October 2008, *e-Competitions Bulletin* October 2008, Art. N° 27195.

[19] Kammarrätten I Stockholm, *Thomas Svensson v Stockholms stad*, 4514-07, 16 February 2009. See **Jakob Lundström**, **Ulf Öberg**, **Ida Otken Eriksson**, *The Swedish Administrative Court of Appeal finds investment by the City Council of Stockholm in expansion of broadband to be illegal State aid that should have been notified to the Commission according to Art 88.3 EC (Thomas Svensson)*, 16 February 2009, *e-Competitions Bulletin* February 2009, Art. N° 27183.

See also, **Fredrik Lindblom, Jakob Lundström**, *A Swedish Court applies the market economy investor principle in a State aid case (Thomas Svensson / City of Stockholm)*, 16 February 2009, *e-Competitions Bulletin February 2009*, Art. N° 25122 and **Jakob Lundström, Emma Mähler**, *A Swedish Court rules on alleged illegal State aid from the City of Stockholm to promote local broadband infrastructure (Thomas Svensson)*, 25 May 2007, *e-Competitions Bulletin May 2007*, Art. N° 21526.

[20] Cour de Cassation (CC) - Chambre commerciale, *Société Laboratoires Boiron / Union de recouvrement des cotisations de sécurité sociales et d'allocations familiales (URSSAF) de Lyon, venant aux droits de l'Agence centrale des organismes de sécurité sociale (ACOSS)*, N°Z-02-31.241, 26 June 2007. See **Jacques Derenne, Cédric Kaczmarek**, *The French Supreme court rules that national courts have an obligation to take all the necessary measures when national procedural rules are not sufficiently favorable for a claimant wishing to demonstrate the existence of overcompensation for public service obligations (Laboratoires Boiron)*, 26 June 2007, *e-Competitions Bulletin June 2007*, Art. N° 28057. See also French Commercial Supreme Court (Cour de Cassation, Chambre commerciale), 14 December 2004, *Boiron v. ACOSS*, Case n° 02-31241, see **Jacques Derenne, Alix Müller-Rappard**, *The French court refers questions to the EU Court of Justice relating to social security exemptions for French laboratories (Laboratoires Boiron)*, 14 December 2004, *e-Competitions Bulletin State Aid Private Enforcement*, Art. N° 29872, see **Elias Berkani**, *The French Supreme Court refers to the ECJ for a preliminary ruling concerning (i) the repayment of a mandatory contribution based on the turnover of pharmaceutical laboratories and (ii) national rules of procedure leading to State aid classification (Laboratoires Boiron)*, 14 December 2004, *e-Competitions Bulletin December 2004*, Art. N° 13, see **Noëlle Lenoir, Dan Roskis**, *The French Civil Supreme Court requested a preliminary ruling from the ECJ with regards to the implementation of the Ferring case law : Advocate General Tizzano supports the reimbursement of the tax on direct sales paid by French pharmaceutical laboratories (Boiron/ACOSS)*, 14 December 2004, *e-Competitions Bulletin December 2004*, Art. N° 537.

[21] See, among others, E Righini, *Godot Is Here : Recovery as an Effective State Aid Remedy in Le droit des aides d'État dans la CE Liber Amicorum Fransisco Santaolalla Gadea* (The Hague, Kluwer Law International, 2008) ; and J-P Keppenne and K Gross, *Quelques considérations sur le rôle du juge national dans le contrôle des aides d'État in Le droit des aides d'État dans la CE Liber Amicorum Fransisco Santaolalla Gadea* (The Hague, Kluwer Law International, 2008). See also Jacques Derenne and Cédric Kaczmarek, *La récupération des aides illégales: le rôle du juge national dans le "private enforcement" du droit des aides d'État (Recovery of unlawful State aid: the role of national courts in the private enforcement of State aid rules)* (2009) 10 ERA Forum 251. See also, Joanna Goyder and Margot Dons, *Damages Claims Based on State Aid Law Infringements*, *European State Aid Law Quarterly* 3/2017.

[22] The Netherlands, Court of Appeal The Hague, *Gerechtshof Den Haag*, July 10, 2007, LJN BD 6981, *Residex Capital IV C.V. v. Municipal Rotterdam*. See **Mariëtte Swart**, *The Dutch Court of Appeal qualifies guarantees issued by a port as a form of State aid that should have been notified to the European Commission (Residex Capital)*, 10 July 2007, *e-Competitions Bulletin July 2007*, Art. N° 27190. See also CJEU, 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814. See **Markus Wellinger**, *The EU Court of Justice clarifies that Dutch court must cancel an illegal guarantee covering a loan when such measure is the least onerous (Residex)*, 8 December 2011, *e-Competitions Bulletin December 2011*, Art. N° 58922 and **Jacques Derenne, Cédric Kaczmarek**, *Récupération - Garantie : La Cour de Justice considère que, afin d'assurer la récupération d'une aide illégale, le juge national peut annuler une garantie étatique notamment lorsque, en l'absence de mesures procédurales moins contraignantes, cette annulation est de nature à entraîner ou à faciliter le rétablissement de la situation concurrentielle antérieure à l'octroi de cette garantie (Residex Capital IV)*, 16 février 2012, *Revue Concurrences* N° 1-2012, Art. N° 42236, pp. 168-169 [fr].

[23] Cour administrative d'appel de Douai, *Blanchisserie industrielle du marais*, N°07DA00071, 29 March 2008. See **Jacques Derenne, Cédric Kaczmarek**, *The French Court of appeal of Douai rejects the claim of a tax payer contesting a tax adjustment and the reintegration of the sums perceived in the context of the "Borotra plan", on the ground that there was no uncertainty concerning the repayment of the unlawful aid (Blanchisserie industrielle du marais)*, 29 March 2008, *e-Competitions Bulletin State Aid Private Enforcement*, Art. N° 28065.

[24] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349/1.

[25] Finnish Supreme Administrative (*Korkein hallinto-oikeus*), 13 January 2015, *Osuuskunta Karjaportti*, Case n° KHO 2015:7. See **Katri Havu**, *The Finnish Supreme Administrative Court rules that deciding on recovery of unlawful State aid was required by the Commission decision regarding that aid and EU law even though the recipient of the aid was in restructuring proceedings (Osuuskunta Karjaportti)*, 13 January 2015, *e-Competitions Bulletin January 2015*, Art. N° 73451.

[26] Commission Notice on the recovery of unlawful and incompatible State aid, OJEU (2019) C 247/1.

[27] Tribunal Supremo, 7 July 2008, Case n° Appeal in cassation 4139/2001, *Temporary receivership*. See **Casto Gonzalez-Paramo, Sonia Perez Romero**, *The Spanish Supreme Court confirms recovery of a State aid granted by way of a central Government subscription in the shares of the beneficiary (Mediterráneo Técnica Textil)*, 7 July 2008, *e-Competitions Bulletin July 2008*, Art. N° 26975. See also, Finnish Supreme Administrative (*Korkein hallinto-oikeus*), 13 January 2015, *Osuuskunta Karjaportti*, Case n° KHO 2015:7. See **Katri Havu**, *The Finnish Supreme Administrative Court rules that deciding on recovery of unlawful State aid was required by the Commission decision regarding that aid and EU law even though the recipient of the aid was in restructuring proceedings (Osuuskunta Karjaportti)*, 13 January 2015, *e-Competitions Bulletin January 2015*, Art. N° 73451.

[28] High Court of Ireland, *Kingdom of Belgium v Ryanair Limited*, 2005 998S, 3 June 2006. See **Katherine Hastie-Oldland**, *The Irish High Court Refuses an application for a stay in proceedings seeking recovery of State aid as a lowcost air carrier had failed to demonstrate that it would suffer irreparable harm if the stay was not granted (Ryanair)*, 30 June 2006, *e-Competitions Bulletin June 2006*, Art. N°28031.

[29] Commission Decision, 23 July 2014, *Aéroport d'Angoulême*, SA.33963 (confirmed by judgment of 13 December 2018, *Ryanair DAC, formerly Ryanair Ltd and Airport Marketing Services Ltd v Commission*, T-111/15 EU:T:2018:954 (under appeal: C-202/19 P)).

[30] French Administrative Court of Nancy (Cour administrative d'appel de Nancy), *Ministre de l'économie, des finances et de l'industrie v. SAS Fagnières Distribution*, Case N°07NC00445, 20 March 2008. See **Jacques Derenne, Cédric Kaczmarek**, *The French Administrative Court of Nancy annuls a judgement having declared admissible the order for repayment of the tax on advertisement expenses constituting unlawful State aid (Fagnières Distribution; Pierrydis; Chamdis; Sodichamp; Eperdis)*, 20 March 2008, *e-Competitions Bulletin March 2008*, Art. N° 28064.

[31] CJEU, 7 September 2006, *Laboratoires Boiron*, Case C-526/04, EU:C:2006:528. See **Noëlle**

Lenoir, Dan Roskis, *The European Court of Justice rules that pharmaceutical laboratories liable to a tax on direct sales of medicines are entitled to claim the reimbursement of the tax where the exemption of wholesale distributors constitute an illegal State aid (Boiron)*, 7 September 2006, *e-Competitions Bulletin* September 2006, Art. N° 12429. See also, Cour de Cassation (CC) - Chambre commerciale, *Société Laboratoires Boiron / Union de recouvrement des cotisations de sécurité sociales et d'allocations familiales (URSSAF) de Lyon, venant aux droits de l'Agence centrale des organismes de sécurité sociale (ACOSS)*, N°Z-02-31.241, 26 June 2007. See **Jacques Derenne, Cédric Kaczmarek**, *The French Supreme court rules that national courts have an obligation to take all the necessary measures when national procedural rules are not sufficiently favorable for a claimant wishing to demonstrate the existence of overcompensation for public service obligations (Laboratoires Boiron)*, *e-Competitions Bulletin* June 2007 N° 28057.

[32] See also Administrative Court of Grenoble (*Tribunal administratif de Grenoble*), 15 October 2003, *Sté Stéphane Kélian*, Case n° 0102341, Administrative Court of Clermont-Ferrand (*Tribunal administratif de Clermont-Ferrand*), 23 September 2004, *SA Fontanille*, Case n° 0101282, Cour administrative d'appel de Paris, *Société Groupe Salmon Arc-en-Ciel*, N°04PA01092, 21 January 2006. See **Jean-Yves Chérot**, *Three French Courts acknowledged State's liability towards aid recipients for not having granted un-notified State aid (Kélian, Fontanille, Salmon Arc-en-ciel)*, 15 October 2003, *e-Competitions Bulletin* October 2003, Art. N° 13362. See **Jacques Derenne, Alix Müller-Rappard**, *The Administrative Court rejects claim for damages for failure to prove the alternative course of action that would have been adopted in the absence of State aid (Kélian)*, 15 October 2003, *e-Competitions Bulletin* October 2003, Art. N° 29890. See **Jacques Derenne, Alix Müller-Rappard**, *The Administrative Court awards compensation for losses caused by nullity of contract resulting from authorities' failure to consider State aid rules (Fontanille)*, 23 September 2004, *e-Competitions Bulletin* State Aid Private Enforcement, Art. N° 29888. See **Jacques Derenne, Cédric Kaczmarek**, *The French Administrative Court of appeal of Paris rejects a claim for damages brought by the beneficiary of an unlawful State aid (Salmon Arc-en-Ciel)*, 21 January 2006, *e-Competitions Bulletin* January 2006, Art. N° 28052 and **Elias Berkani**, *The Paris Administrative Court condemned the French State for the anticipated implementation of State aid in breach of Art. 88.3 EC (Salmon Arc-en-Ciel)*, 23 January 2006, *e-Competitions Bulletin* January 2006, Art. N° 593.

[33] CJEU, 12 February 2008, Case C-199/06, *CELF and ministre de la Culture and de la Communication*, EU:C:2008:79. See **Markus Wellinger**, *The European Court of Justice rules that a Member State is not required to recover aid that has initially been found unlawful as a result of a failure to notify the aid package to the Commission when this aid has subsequently been declared compatible with the common market (CELF)*, 12 February 2008, *e-Competitions Bulletin* February 2008, Art. N° 44936.

[34] *Italian Council of State, Federchimica v. Ministero delle Politiche Agricole e Forestali*, 4692, 30 09 2008. **Gianluca Belotti**, *The Italian Council of State annuls a Ministerial Decree providing for annual contributions in favour of traders of fertilisers on the grounds that it constitutes unlawful State aid, non notified, and for which the EC Commission opened the formal investigation procedure (Federchimica, Confagricoltura, Compag)*, 30 September 2008, *e-Competitions Bulletin* September 2008, Art. N° 28528.

[35] CJEU, 13 January 2005, *Streekgewest Westelijk Noord-Brabant*, Case C-174/02, EU:C:2005:10. See **Jacques Derenne**, *Interdiction de mise à exécution : La CJCE décide que l'interdiction de mise à exécution ne s'applique à une taxe que s'il existe un lien d'affectation contraignant entre le produit de cette taxe et la mesure d'aide en question (Streekgewest)*, 13 janvier 2005, *Revue Concurrences* N° 2-2005, Art. N° 1286, pp. 82-83 [fr]. See also CJEU, *Laboratoires Boiron*, 7 September 2006, Case C-526/04, EU:C:2006:528. See **Noëlle Lenoir**,

Dan Roskis, *The European Court of Justice rules that pharmaceutical laboratories liable to a tax on direct sales of medicines are entitled to claim the reimbursement of the tax where the exemption of wholesale distributors constitute an illegal State aid (Boiron)*, 7 September 2006, *e-Competitions Bulletin* September 2006, Art. N° 12429.

[36] CJEU, 11 July 1996, SFEI a. o., Case C-39/94, EU:C:1996:285; CJEU, 13 January 2005, *Streekgewest Westelijk Noord-Brabant*, Case C-174/02, EU:C:2005:10.

[37] German High Court, 10 February 2011, *Lufthansa, Ryanair*. See **Thomas Jestaedt, Johannes Zöttl, Carsten Gromotke**, *The German High Court rules that companies have standing to sue against illegal State aid to competitors (Lufthansa, Ryanair)*, 10 February 2011, *e-Competitions Bulletin* February 2011, Art. N° 50722. Oberlandesgericht Koblenz, 2. Zivilkammer, “*Ryanair 4*”, 4 U 759/07, 25 February 2009. See **Rainer Wessely, Alix Müller-Rappard**, *A German Regional Court rules that an EC Commission decision ordering recovery of an illegal aid measure must first be issued before a German court may deal with a request brought by a competitor (“Ryanair 4”)*, 25 February 2009, *e-Competitions Bulletin* February 2009, Art. N° 26919. Higher Regional Court Schleswig-Holstein, “*Ryanair 2*”, 6 U 54/06, 20/05/2008. See **Alix Müller-Rappard**, *A German higher regional court quashes the 2006 ruling of a lower regional court and rejects an air carrier claims on grounds of inadmissibility and on the merits, holding that Art. 87 and 88 EC as the related national provisions cannot be construed as supporting claims of competitors (Ryanair 2)*, 20 May 2008, *e-Competitions Bulletin* May 2008, Art. N° 28798. Bad Kreuznach Regional Court, “*Ryanair 3*”, 2 O 441/06, 16/05/2007. See **Alix Müller-Rappard**, *A German regional court holds that Art. 88.3 EC does not confer any specific protection to a competitor and does not entitle the latter to challenge the award of State aid; therefore, the payment of so-called marketing support from an airport operator to an airline company does not constitute an unlawful action to the detriment of a competitor, even if the payment is inadmissible according to EC State aid law (Ryanair 3)*, 16 May 2007, *e-Competitions Bulletin* May 2007, Art. N° 28804. District Court Bad Kreuznach (*Landgericht Bad Kreuznach*), 16 May 2007, Case 2 O 441/06. See **Daniel von Brevern**, *A German regional Court refuses to order recovery of unlawful State aid granted by Frankfurt airport to a low cost carrier (Ryanair / Lufthansa)*, 16 May 2007, *e-Competitions Bulletin* May 2007, Art. N° 17565. Kiel District Court, *Ryanair*, 28 July 2006. See **Alix Müller-Rappard**, *A German district court holds that the difference of terms between two airlines operator concerning the use of Lübeck airport amounts to unlawful State aid (Ryanair 1)*, 28 July 2006, *e-Competitions Bulletin* July 2006, Art. N° 28796. District Court of Kiel (*Landgericht Kiel*), 28 July 2006, Case 14 O Kart. 176/04. See **Daniel von Brevern**, *The German Kiel District Court finds that a low cost airplane company received unlawful State aid (Ryanair)*, 28 July 2006, *e-Competitions Bulletin* July 2006, Art. N° 12620.

[38] Conseil d’Etat, CMN, 25 October 2017, n°403335 ; Tribunal administratif de Bastia, *Corsisa Ferries*, 23 February 2017, n°1500375 ; Tribunal Administratif de Bastia, *Corsisa Ferries*, 23 February 2017, n°1501123. See **Raphael Vuitton**, *Délégation de service public : Le Conseil d’État français confirme l’annulation de la délégation de service public pour la desserte maritime de la Corse pour la période 2014-2023 au motif qu’elle constitue une aide d’État illégale, tandis que le Tribunal administratif de Bastia indemnise le concurrent du délégataire pour le manque à gagner relatif à la période 2007-2013 (CMN ; Corsica Ferries)*, 25 October 2017, Art. N° 85928 [fr].

[39] There are three conditions : (i) the EU rule infringed should confer rights to individuals (the violation of Article 108(3) TFEU perfectly complies with that requirement; it is even of direct effect); (ii) the violation of EU law should be sufficiently serious or manifest (Member States do not enjoy any discretion in complying with Article 108(3) TFEU); (iii) the damage should be in direct causal link with the violation, pursuant to national rules on causal link (this is the difficult point to show in liability cases)

[40] CJEU, 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, Cases C-6/90 and C-9/90, EU:C:1991:428. See **Jacques Derenne**, *Aides d'Etat - Rôle des juridictions nationales : La Commission européenne publie une série d'orientations sur le rôle des juridictions nationales dans l'application des règles sur les aides d'État et leur coopération avec la Commission*, 25 février 2009, *Revue Concurrences* N° 2-2009, Art. N° 26041, pp. 149-150 [fr].

[41] Conseil d'Etat, *CMN*, 25 October 2017, n°403335 ; Tribunal administratif de Bastia, *Corsisa Ferries*, 23 February 2017, n°1500375 ; Tribunal Administratif de Bastia, *Corsisa Ferries*, 23 February 2017, n°1501123. See **Raphael Vuitton**, *Délégation de service public : Le Conseil d'État français confirme l'annulation de la délégation de service public pour la desserte maritime de la Corse pour la période 2014-2023 au motif qu'elle constitue une aide d'État illégale, tandis que le Tribunal administratif de Bastia indemnise le concurrent du délégataire pour le manque à gagner relatif à la période 2007-2013 (CMN ; Corsica Ferries)*, 25 October 2017, Art. N° 85928 [fr]. See also, Joanna Goyder and Margot Dons, 'Damages Claims Based on State Aid Law Infringements', *European State Aid Law Quarterly* 3/2017.

[42] See also CJEU, 12 February 2008, Case C-199/06, *CELF and ministre de la Culture and de la Communication*. See **Markus Wellinger**, *The European Court of Justice rules that a Member State is not required to recover aid that has initially been found unlawful as a result of a failure to notify the aid package to the Commission when this aid has subsequently been declared compatible with the common market (CELF)*, 12 February 2008, *e-Competitions Bulletin* February 2008, Art. N° 44936. EU Court of Justice, *Presidenza dei Consiglio dei Ministri / Fallimento Traghetti del Mediterraneo SpA*, C 387/17, 23 January 2019. See **Phedon Nicolaides**, *The EU Court of Justice holds that the EU rules does not impose time limitation rules when national courts deal with claim for damages arising from non-notified aid (Fallimento Traghetti del Mediterraneo)*, 23 January 2019, *e-Competitions Bulletin* January 2019, Art. N° 89736 and **Faustine Viala, Sylvain Petit**, *The EU Court of Justice clarifies the concept of "existing aid" in a private enforcement case and holds that unlawful aid cannot be retroactively legalised by virtue of a limitation period that has lapsed (Fallimento Traghetti del Mediterraneo)*, 23 January 2019, *e-Competitions Bulletin* January 2019, Art. N° 90591.

[43] Commercial Court of Paris, *Union française de l'express international a.o. v La Poste a.o.*, Case n° RG 96072418, 96082065, 7 December 1999. See **Dimitris Vallindas**, *The Paris Commercial Tribunal rules that a recipient of State aid could not be held liable for not having verified whether the aid had been notified (SFEI/La Poste-Chronopost)*, 7 December 1999, *e-Competitions Bulletin* December 1999, Art. N°13361.

[44] CJEU, 5 October 2006, *Transalpine Ölleitung in Österreich GmbH (TAL) e. a. c/ Finanzlandesdirektion für Tirol e. a.*, Case C-368/04, EU:C:2006:644. See **Fabien Zivy**, *Régularisation d'un acte d'exécution : La CJCE considère qu'une décision de compatibilité n'a pas pour effet de régulariser les actes d'exécution d'une aide illégale (Transalpine Ölleitung in Österreich)*, 5 octobre 2006, *Revue Concurrences* N° 4-2006, Art. N° 12504, p. 124 [fr] and **Alain Ronzano**, *Aide d'Etat : La Cour de Justice rend un arrêt sur des mesures d'aide autrichiennes (Transalpine Ölleitung in Österreich)*, 5 octobre 2006, *Revue Concurrences* N° 1-2007, Art. N° 54339 [fr].

[45] **Jacques Derenne, Cédric Kaczmarek**, *The French Council of State refers to the ECJ for preliminary ruling on the extent of the recovery obligation of an unlawful aid later declared compatible by the Commission (CELF I)*, 29 March 2006, *e-Competitions Bulletin* March 2006, Art. N° 26635.

[46] CJEU, 11 July 1996, *SFEI a. o.*, Case C-39/94, EU:C:1996:285, para. 75.

[47] President of Commercial court of Brussels, 13 February 1995, *Breda Fucine Meridionali v. Manoir Industries*, J.T.dr.eur., 1995, p. 72. For a more recent application, see also Brussels Court of Appeal, 28 February 2019, UGBN, case 2018/AR/1416, see T.B.H.-R.D.C., 2019/7 – note Jacques Derenne, pp. 915-927). See **Jacques Derenne, Cédric Kaczmarek**, *The Belgium Court of Commerce of Brugge rules that the implementation of a State aid measure must be postponed until the EC Commission has finished its investigations (Oostende fish market - AGVO)*, 12 February 2009, *e-Competitions Bulletin February 2009*, Art. N° 28458 and **Jacques Derenne**, *Récupération d'aide : Une cour d'appel allemande déclare irrecevable, en l'absence de décision de la Commission européenne déclarant des mesures d'aide incompatibles, le recours d'un opérateur aérien qui demandait la récupération par un aéroport d'aides octroyées à un concurrent (Lufthansa / Flughafen Frankfurt)*, 25 février 2009, *Revue Concurrences N° 2-2009*, Art. N° 26084, pp. 171-174 [fr].

[48] French Cour de cassation, *R. Ducros v. Société Métallique Finsinder Sud*, 15 June 1999 (n°1236). See however, French Administrative Supreme Court (*Conseil d'État*), 31 May 2000, *Société Pantochim*, Case n° 192006, not published, n° 13357 ; French Administrative Supreme Court (*Conseil d'État*), 27 February 2006, *Company Ryanair Limited*, Case n° 264406 ; **Elias Berkani**, *The French Administrative Supreme Court decides that the contracts signed by Ryanair with the Strasbourg airport are State aids subjected to the obligation of prior notification to the EC Commission (Strasbourg Chamber of Commerce and Industry/ Ryanair)*, *e-Competitions*, April 2006-I, n° 531 ; French Administrative Supreme Court (*Conseil d'État*), 29 March 2006, *Centre d'Exportation du Livre Français (CELF)*, Case n° 274923 ; **Elias Berkani**, *The French Administrative Supreme Court confirms the classification as State aid of the subsidies granted for handling small orders of French-language books but refers to the ECJ for a preliminary ruling concerning the range of the obligation of restitution of an unnotified aid (CELF)*, *e-Competitions*, June 2006-I, n° 1130 ; French Commercial Supreme Court (*Cour de Cassation, Chambre commerciale*), 16 November 2004, *Magasins Galeries Lafayette (Galeries de Lisieux)*, Case n° 03-12565 : **Elias Berkani**, *The French Supreme Court refers to the ECJ for a preliminary ruling concerning the qualification as State aid of the French mutual assistance tax for the benefit of traders and craftsmen (Magasins Galeries Lafayette)*, *e-Competitions*, April 2005, n° 209.

[49] District Court of Kiel (Landgericht Kiel), 28 July 2006, Case 14 O Kart. 176/04. See **Daniel von Brevern**, *The German Kiel District Court finds that a low cost airplane company received unlawful State aid (Ryanair)*, 28 July 2006, *e-Competitions Bulletin July 2006*, Art. N° 12620.

[50] Higher Regional Court Schleswig-Holstein, 20 May 2008, Case n° 6 U 54/06, *Ryanair 2*. See **Alix Müller-Rappard**, *A German higher regional court quashes the 2006 ruling of a lower regional court and rejects an air carrier claims on grounds of inadmissibility and on the merits, holding that Art. 87 and 88 EC as the related national provisions cannot be construed as supporting claims of competitors (Ryanair 2)*, 20 May 2008, *e-Competitions Bulletin May 2008*, Art. N° 28798.

[51] German High Court, 10 February 2011, *Lufthansa, Ryanair*. See **Thomas Jestaedt, Johannes Zöttl, Carsten Gromotke**, *The German High Court rules that companies have standing to sue against illegal State aid to competitors (Lufthansa, Ryanair)*, 10 February 2011, *e-Competitions Bulletin February 2011*, Art. N° 50722. Oberlandesgericht Koblenz, 2. Zivilkammer, "Ryanair 4", 4 U 759/07, 25 February 2009. See **Rainer Wessely, Alix Müller-Rappard**, *A German Regional Court rules that an EC Commission decision ordering recovery of an illegal aid measure must first be issued before a German court may deal with a request brought by a competitor ("Ryanair 4")*, 25 February 2009, *e-Competitions Bulletin February 2009*, Art. N° 26919. Higher Regional Court Schleswig-Holstein, "Ryanair 2", 6 U 54/06, 20/05/2008. See **Alix Müller-Rappard**, *A German higher regional court quashes the 2006 ruling of a lower regional*

court and rejects an air carrier claims on grounds of inadmissibility and on the merits, holding that Art. 87 and 88 EC as the related national provisions cannot be construed as supporting claims of competitors (*Ryanair 2*), 20 May 2008, *e-Competitions Bulletin May 2008*, Art. N° 28798. Bad Kreuznach Regional Court, "*Ryanair 3*", 2 O 441/06, 16/05/2007. See **Alix Müller-Rappard**, A German regional court holds that Art. 88.3 EC does not confer any specific protection to a competitor and does not entitle the latter to challenge the award of State aid; therefore, the payment of so-called marketing support from an airport operator to an airline company does not constitute an unlawful action to the detriment of a competitor, even if the payment is inadmissible according to EC State aid law (*Ryanair 3*), 16 May 2007, *e-Competitions Bulletin May 2007*, Art. N° 28804. District Court Bad Kreuznach (*Landgericht Bad Kreuznach*), 16 May 2007, Case 2 O 441/06. See **Daniel von Brevern**, A German regional Court refuses to order recovery of unlawful State aid granted by Frankfurt airport to a low cost carrier (*Ryanair / Lufthansa*), 16 May 2007, *e-Competitions Bulletin May 2007*, Art. N° 17565. Kiel District Court, *Ryanair*, 28 July 2006. See **Alix Müller-Rappard**, A German district court holds that the difference of terms between two airlines operator concerning the use of Lübeck airport amounts to unlawful State aid (*Ryanair 1*), 28 July 2006, *e-Competitions Bulletin July 2006*, Art. N° 28796. District Court of Kiel (*Landgericht Kiel*), 28 July 2006, Case 14 O Kart. 176/04. See **Daniel von Brevern**, The German Kiel District Court finds that a low cost airplane company received unlawful State aid (*Ryanair*), 28 July 2006, *e-Competitions Bulletin July 2006*, Art. N° 12620.

[52] See **Tristan Baumé, Sally Janssen**, The Amsterdam Court of Appeal refused to recognise the tortious liability of recipients of State aids that have not been notified to the EC Commission in accordance with Art. 88.3 EC (*Baby Dan*), n° 12739.

[53] CJEU, 22 December 2010, *Commission v Slovakia*, C-507/08, EU:C:2010:802. See National Council of the Slovak Republic (*Národná rada Slovenskej republiky*), 23 March 2011, *Amendment to the Act No. 231/1999 Coll. on state aid and to the Act No. 233/1995 Coll. Code of Enforcement*. See **Zuzana Hodonova, Bruno Stefanik**, The Slovak Republic parliament adopts an amendment enabling that an EU Commission's decision on the recovery of state aid be directly enforceable against the beneficiary, 23 March 2011, *e-Competitions Bulletin March 2011*, Art. N° 35307. See also, CJEU, 20 September 2017, *Frucona Košice*, C-300/16 P, EU:C:2017:706. See **Alfonso Lamadrid De Pablo**, The EU Court of Justice and General Court render two judgements on State aid showing how the Courts approach judicial review of complex economic assessments when the burden of proof is on the Commission (*Frucona Kosice - Fútbol Club Barcelona*), 26 February 2019, *e-Competitions Bulletin February 2019*, Art. N° 90042.

[54] National Council of the Slovak Republic (*Národná rada Slovenskej republiky*), 23 March 2011, *Amendment to the Act No. 231/1999 Coll. on state aid and to the Act No. 233/1995 Coll. Code of Enforcement*. See **Zuzana Hodonova, Bruno Stefanik**, The Slovak Republic parliament adopts an amendment enabling that an EU Commission's decision on the recovery of state aid be directly enforceable against the beneficiary, 23 March 2011, *e-Competitions Bulletin March 2011*, Art. N° 35307. See also, EU Court of Justice, *Frucona Košice*, C-300/16 P, 20 September 2017. See **Alfonso Lamadrid De Pablo**, The EU Court of Justice and General Court render two judgements on State aid showing how the Courts approach judicial review of complex economic assessments when the burden of proof is on the Commission (*Frucona Kosice - Fútbol Club Barcelona*), 26 February 2019, *e-Competitions Bulletin February 2019*, Art. N° 90042.

[55] See the series of "Borotra" cases (judgment of 5 May 1999, *Commission v France*, C-251/97, EU:C:1999:480) in France: for instance, Administrative Court of Grenoble, 15 October 2003, *Société Stéphane Kélian*, n° 010241, not published (rejection for lack of direct causal link); Administrative Court of Clermont-Ferrand, *Fontanille*, 23 September 2004, n° 0101282, A.J.D.A., 2005, p. 385; Administrative Court of Appeal of Paris, *Société Groupe Salmon Arc-en-Ciel*, 21

January 2006, n° 04PA01092. See **Jacques Derenne, Cédric Kaczmarek**, *The French Administrative Court of appeal of Paris rejects a claim for damages brought by the beneficiary of an unlawful State aid (Salmon Arc-en-Ciel)*, 21 January 2006, *e-Competitions Bulletin January 2006*, Art. N° 28052. See also : Mathieu Disant, *Le juge administratif et l'obligation communautaire de récupération d'une aide incompatible*, R.F.D.A., 2007, p. 547 ; Joanna Goyder and Margot Dons, *Damages Claims Based on State Aid Law Infringements*, *European State aid Law Quarterly*, 2017/3, pp. 418 to 430.

[56] Ibid.

[57] CJEU, 27 September 1988, *Asteris v Greece*, Case 106-120/87, EU:C:1988:457, para. 24.

[58] Administrative Court of Appeal of Paris, *Société Groupe Salmon Arc-en-Ciel*, N°04PA01092, 21 January 2006. See **Jacques Derenne, Cédric Kaczmarek**, *The French Administrative Court of appeal of Paris rejects a claim for damages brought by the beneficiary of an unlawful State aid (Salmon Arc-en-Ciel)*, 21 January 2006, *e-Competitions Bulletin January 2006*, Art. N° 28052.

[59] Verfassungsgerichtshof (VfGH), 26 June 2008, Case n° G263/07, *ÖkostromG*. See **Thomas Jaeger, Peter Thyri**, *The Austrian Constitutional Court rules that the beneficiaries of unlawful aid cannot rely on a legitimate of expectations to resist the recovery (ÖkostromG)*, 26 June 2008, *e-Competitions Bulletin June 2008*, Art. N° 27216.

[60] Verwaltungsgericht Potsdam 3. Kammer, 26 August 2008, Case n° 3 K 3343/03, *Betriebsstätte des Tourismusgewerbes Berlin-Potsdam*. See **Rainer Wessely, Alix Müller-Rappard**, *A German Administrative Court decides that if an aid measure that is found to formally infringe EC law cannot automatically be challenged for recovery then the infringement justifies the suspension of any further payment of that aid to the beneficiary (Betriebsstätte des Tourismusgewerbes)*, 26 August 2008, *e-Competitions Bulletin August 2008*, Art. N° 26928.

[61] Federal Court of Justice, 6 November 2008, Case n° III ZR 279/07, *Investitionsförderung des Landes Brandenburg*. See **Rainer Wessely, Alix Müller-Rappard**, *The German Federal Court of Justice holds that the authority granting State aid must advise the guarantor of the aid recipient when allocating non notified aid and that, if the granting authority has omitted to do so, the guarantor is entitled to oppose an action for damages against the recovery (Landes Brandenburg)*, 6 November 2008, *e-Competitions Bulletin November 2008*, Art. N° 28795. See also Administrative court of Grenoble, 15 October 2003, Stéphane Kélian; Administrative court of Clermont-Ferrand, 23 September 2004, Fontanille; and Administrative appeal court of Paris, *Salmon Arc-en-ciel*.

[62] CJEU, 20 March 1997, *Land Rheinland-Pfalz v A*, Case C-24/95, EU:C :1997:163, para. 25. This settled case-law originates from CJEU, 20 March 1990, *Commission v Germany*, Case C-5/89, EU:C:1990:320, paras 13-15.

[63] General Court of the EU, 20 March 2011, *Regione Autonoma della Sardegna v Commission*, Joined Cases T-394/08, T-408/08, T-453/08 and T-454/08, EU:T:2011:493, para. 273 and the case-law cited therein.

[64] Ibidem, para 281.