

STATE AID 2019 KNOW HOW

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# Introduction

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## Structure of GCR – Know How State Aid

The purpose of GCR – Know How State Aid is to provide elements of information on state aid enforcement at national level. To this end, each national chapter describes state aid enforcement in the member state concerned. This necessarily focuses on the national courts enforcement aspects of EU state aid law only since, at national level, state aid enforcement is ensured by national courts (some national competition authorities, in particular in the member states that acceded the EU in 2004 and 2007, have some limited competence to assist the member state concerned in its notification obligations to the European Commission). As explained below, the European Commission, as a supranational and independent institution, is exclusively competent to assess the compatibility of state aid, which is the substantive enforcement of state aid. GCR Know How State Aid does not address this latter issue.

The present introduction will provide an overview of state aid rules, focusing on private enforcement (actions before national courts). These actions 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 (action by the European Commission). This introduction will, therefore, not describe the detailed procedure rules of enforcement by the European Commission nor the complex rules of aid compatibility assessment. It will rather focus on the notion of aid and on the role of national courts.

The economics overview published in parallel has a different purpose: it provides a detailed description of all economic rules applied to state aid matters, both from the point of view of the notion of aid (in particular of the condition of “advantage”) and from the point of view of state aid compatibility assessment. Although the notion of aid is a purely objective legal concept, for which the European Commission has no discretion, and which is subject to strict judicial review by the Court of Justice of the European Union (CJEU) and the General Court of the European Union, it has recourse to economic concepts when it concerns economic complex measures such as financial investment. For this type of state intervention, economics plays an important role to apply the legal notion of aid in order to compare the state’s behaviour to that of a market economy operator. Conversely, economic principles become central to the compatibility assessment of state aid to determine which types of aid are justified by reasons of general economic development, without unduly restricting competition within the internal market.

### Introduction to state aid private enforcement

Public authorities that grant aid to certain undertakings, even if for sound public policy reasons, potentially affect their business decisions and those undertakings may gain an advantage over their competitors. EU law, therefore, prohibits state aid unless it can be justified by reasons of general economic development.

### Rationale of EU state aid control

State aid rules have formed an integral part of the EU’s internal market objective since the Spaak Report in 1956, which set the groundwork for the 1957 Treaty of Rome (now the Treaty on the functioning of the European Union, TFEU). By increasing competition in the market and prohibiting undertakings from benefitting from undue advantages, an integrated market promotes economic growth and wealth. State aid rules act as a market integration tool by preventing member states from competing in granting subsidies to attract investment; supporting the penetration of their undertakings in other national markets; protecting their national market. It is necessary to distinguish between aid that is in the public interest and the expansion of production from aid with the object or effect, or both, to distort competition.

There is no absolute prohibition of state aid. It is rather about the control of state intervention by a supranational authority that is independent from the member states. State aid control consists of the protection of free market conditions and the prevention of any distortion of competition that may result from state intervention in the economy. State aid control is aimed at guaranteeing that no undertaking obtains an advantage that would be incompatible with the internal market.

#### Article 107(1) TFEU

*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*

## Existence of aid: the notion of aid (article 107(1) TFEU)

Member state measures granting a selective economic advantage to undertakings qualify as state aid provided they distort or threaten to distort competition and affect trade between member states. Article 107(1) TFEU provides a general principle that state measures that qualify as state aid are incompatible with the internal market (subject to possible exemptions granted by the European Commission under article 107(2) and (3) TFEU).

There are five cumulative conditions to be fulfilled before finding that a state measure constitutes state aid within the meaning of article 107(1) TFEU. The measure must:

- (i) grant an economic advantage to an undertaking (**advantage**);
- (ii) be selective, ie, not be a measure of general application to all undertakings (**selective**);
- (iii) involve state resources and be imputable to the state (**transfer of state resources, imputable to the state**);
- (iv) distort or threaten to distort competition (**distortion of competition**); and
- (v) have an actual or potential effect on trade between member states (**affect trade between member states**).

Before briefly describing the above elements, one must note from the outset that state aid rules only apply where the beneficiary of a measure is an “undertaking”. Undertakings are defined as entities engaged in an economic activity regardless of their legal status and the way they are financed.<sup>1</sup>

## Advantage

The first condition for a measure to qualify as state aid is that it grants an advantage to certain undertakings. Only the effect of the measure on the undertaking is relevant, and not the cause or the objective of the state intervention.<sup>2</sup> According to settled case law, the advantage corresponds to an economic advantage that an undertaking would not have obtained under normal market conditions (the market economy operator test), that is to say in the absence of state intervention.<sup>3</sup> To evaluate the existence or not of an advantage, the financial situation of the undertaking after the introduction of the measure has to be compared with its financial situation had the measure not been taken. The economics overview provides details on the application of this concept. The notion of advantage covers both the granting of positive economic benefits and any relief from charges that normally burden an undertaking’s budget.

A measure can grant a direct advantage to the recipient or an indirect advantage to other beneficiaries. A direct advantage is granted when a measure has the immediate effect of favouring one undertaking or a group of undertakings to the exclusion of other undertakings. An indirect advantage exists if the measure is designed to direct its side effects to identifiable undertakings or groups of undertakings and must be distinguished from the mere secondary effects that are inherent in almost all state measures.

## Selectivity

Not all measures that favour economic operators necessarily fall within the scope of state aid. Only those that confer a selective advantage with regard to the objective pursued by the measure to certain undertakings or categories of undertakings or to certain economic sectors qualify as state aid under article 107(1) TFEU. It should be noted that neither the large number of eligible undertakings nor the diversity and size of the sectors to which those undertakings belong are grounds for concluding that a state measure does not constitute aid. Selectivity raises very complex questions that are beyond the scope of this introduction. In very broad terms, we can distinguish material (de jure or de facto) and regional selectivity. Tax (or similar) measures raise specific selectivity questions; in short, such measures must normally be assessed by means of a three-step analysis:

- first, the system of reference must be identified;
- second, it must be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators that, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation; and
- third, it needs to be established whether the derogation is justified by the nature or the general scheme of the (reference) system.

<sup>1</sup> Judgment of 10 January 2006, Cassa di Risparmio di Firenze SpA a.o., C-222/04, EU:C:2006:8, paragraph 107.

<sup>2</sup> Judgment of 2 July 1974, Italy v Commission, 173/73, EU:C:1974:71, paragraph 13; judgment of the Court of Justice of 15 November 2011, Commission and Spain v Government of Gibraltar and United Kingdom, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraph 87

<sup>3</sup> Judgment of 11 July 1996, SFEI a.o., C-39/94, EU:C:1996:285, paragraph 60.

Although this methodology has been criticised, including by Advocate Generals of the EU Court<sup>4</sup>, it has been confirmed by the Court of Justice, most recently in the Finanzamt B and A-Brauerei case<sup>5</sup>.

### **State resources and imputability to the state**

This condition covers two distinct and cumulative criteria: the measure must be granted by means of state resources and must be attributable to the state.

Concerning the former, only measures granted directly or indirectly through state resources are capable of being state aid. The measure must entail a financial burden on the public authority that can range from direct grants, subsidies, loans, guarantees, direct investment of capital to tax cuts and other tax benefits or any other measure foregoing state revenue.

Concerning imputability, if a measure is granted directly by the state or by a public authority, it will be imputable to the state. But, even if the public authority granting the aid enjoys a certain degree of autonomy, the measure can still be imputable to the state. In cases where the advantage is granted more indirectly, through intermediate bodies or through state-owned undertakings, it is necessary to establish whether the public authorities can be regarded as having been involved in the adoption of the measure.<sup>5</sup>

### **Distortion of competition and effect on trade between member states**

Public aid is prohibited by article 107(1) TFEU only insofar as it distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods and only insofar as it affects trade between member states. Even though these two elements are formally distinct they are often treated jointly in the assessment of state aid as they are considered inextricably linked.<sup>6</sup>

The European Commission and the EU courts have taken a broad approach towards the question of distortion of competition: a measure granted by the state is considered to distort or threaten to distort competition when it is liable to improve the competitive position of a firm in competition with other firms.

The effect on trade has been applied in a similar manner. It is not necessary to establish that the aid has an actual effect on trade between member states but only whether the aid is liable to affect trade. This occurs when aid strengthens the position of a company as compared with other companies active in intra-Union trade. Public aid can also affect trade between member states even if the recipient is not directly involved in cross-border trade, for instance, the aid may make it more difficult for operators in other member states to enter the market.

### **Compatibility of the aid (article 107(2) and (3) TFEU and article 106(2) TFEU)**

The prohibition of state aid contained in article 107(1) TFEU is neither absolute nor unconditional. State aid may be compatible with the internal market and therefore permissible. Pursuant to article 107(2) TFEU, certain types of aid are considered compatible with the internal market and, pursuant to article 107(3) TFEU, the European Commission is given discretion to consider certain types of aid compatible with the internal market. The assessment of compatibility of a measure under article 107(3) TFEU is the exclusive competence of the European Commission and subject to review by the EU courts, which ensure the consistent application of state aid rules throughout the EU.

Other exceptions to the general prohibition on state aid are set out in the General Block Exemption Regulation (GBER)<sup>7</sup>, which sets out the conditions for the exemption of certain categories of aid from the prior notification obligation. This allows state aid to be lawfully awarded without the need to apply for prior approval by the Commission provided the aid falls within one of the specific aid categories and fulfils the relevant compatibility conditions.

State aid control also comes into play when Services of General Economic Interest (SGEI) are provided by an undertaking and financed through public resources. These services cover a wide range of activities and effective performance of these services is considered an important economic principle of the EU. State aid in the form of a SGEI is, however, subject to specific rules (article 106(2) TFEU). The CJEU has also set out four

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4 See, eg, opinion of Advocate General Saugmandsgaard Øe of 19 September 2018, Finanzamt B/A-Brauerei, C-374/17, EU:C:2018:741, in particular, paragraphs 9, 73 and 77.

5 Judgment of 19 December 2018, Finanzamt B and A-Brauerei, C-374/17, EU:C:2018:1024.

6 Judgment of 16 May 2002, France v Commission (Stardust), C-482/99, EU:C:2002:294, paragraph 52.

7 Judgment 15 June 2000, Alzetta, Joined Cases T-298/97, T-312/97 & others, EU:T:2000:151, paragraph 81.

cumulative conditions that, if fulfilled, entail that compensation for a public service would not constitute state aid (Altmark case):<sup>8</sup>

- the recipient must have public service obligations that are clearly defined;
- the parameters for calculating the compensation must be objective, transparent and established in advance;
- the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit; and
- where the undertaking concerned is not chosen pursuant to a public procurement procedure the level of compensation must be determined on an analysis of the costs of a typical well-run company.

The De Minimis Regulation<sup>9</sup> is another mechanism for the granting of aid without the need for the European Commission's approval. This is based on the European Commission's view that small amounts of aid are unlikely to distort competition or affect intra-state trade. The De Minimis Regulation allows amounts of aid that are less than €200,000 over the course of three years to be granted by public authorities. There are specific de minimis rules for small SGEIs (social welfare, airports, ports) and in the agriculture sector.

The Commission has carried out a thorough modernisation of state aid rules and with it the focus has shifted from an ex ante assessment of state aid measures by the European Commission to an ex post self-assessment of compatibility by the member states. Up to 95 per cent of state measures are now exempted under the GBER and will therefore not require notification to the European Commission. Additionally, there are those measures that fall within the scope of SGEI or de minimis. This allows the European Commission to be more effective and prioritise those measures that are likely to have an impact on competition whilst not wasting time assessing measures that are unlikely to have such an impact. This recent development means that only a few aid measures are still notified to the European Commission, but these concern the most distortive ones and the most complex ones. The most important issues arise also when the question whether the state measure constitutes aid or not, in particular in tax measures.

### **State aid administrative procedures (European Commission) – article 108(1-2) TFEU**

The European Commission is responsible for the enforcement of article 107 TFEU pursuant to procedural rules provided for by article 108 TFEU. As mentioned, state aid control requires prior notification by the member states of all new aid measures to the European Commission unless they are covered by the aforementioned exceptions and the member state must respect a standstill obligation before they can put the measure into effect. The European Commission is exclusively competent to decide on the compatibility of a measure under these rules. This is in stark contrast with the role of national competition authorities in the field of antitrust rules (articles 101 & 102 TFEU).

Notification to the European Commission triggers a “preliminary examination” during which the European Commission may request information from the notifying member state. After its preliminary examination, the European Commission can decide that there is no aid, that the aid is compatible with the state aid rules or that it has serious doubts as to its qualification or its compatibility. In the latter case, the European Commission is prompted to open an in-depth investigation, the “formal investigation”. This is an obligation on the European Commission when it is confronted with such serious difficulties. The European Commission has a number of tools at its disposal during this formal investigation such as the possibility to request or require (subject to possible fines) information from third parties, in addition to the member state concerned, ie, other member states and undertakings (the beneficiary and competitors or third parties affected by the measure). The initiation of this formal investigation takes the form of a formal decision, notified to the member state concerned, and published in the Official Journal, inviting third parties to provide their observations. On the basis of its formal investigation, the European Commission adopts a final decision, which can be a positive decision, a conditional decision (“aid declared compatible”) or a negative decision (“aid declared incompatible”). When a negative decision is issued, the European Commission, in principle, is obliged to order the member state to recover the aid that has already been paid to beneficiaries (ie, when the aid was granted in violation of article 108(3) TFEU – “unlawful aid”).

<sup>8</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of articles 107 and 108 of the Treaty, OJEU (2014) L 187/1.

<sup>9</sup> Judgment of 24 July 2003, Altmark Trans, C-280/00, EU:C:2003:415, paragraphs 87 to 95.

## **Role of the national courts (safeguard of the subjective rights of anyone affected by the violation of state aid control rules) – article 108(3) TFEU**

Under article 108(3) TFEU, the member states are obliged to notify to the European Commission any project of aid measure and not to implement the project before the European Commission has approved it under its compatibility assessment under article 107(3) TFEU. National courts have wide powers to control this obligation of the member states.

### Article 108(3) TFEU

*The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. [...] The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.*

The relationship between the European Commission and national courts in the field of state aid is one of necessary cooperation to ensure a consistent and efficient application of EU state aid rules.

National courts can interpret the notion of state aid to identify whether a measure constitutes aid within the meaning of article 107(1) TFEU. This can concern the applicability of the GBER or the De Minimis Regulation. If the national court has any doubt as to the qualification of state aid, it may ask for a European Commission opinion, as will be explained below. This is, of course, without prejudice to the faculty or the obligation for a national court to refer the matter to the CJEU for a preliminary ruling under article 267 TFEU. However, national courts do not have the power to decide whether a state measure is compatible with EU rules. This is an exclusive competence of the European Commission.

The European Commission addressed the role of national courts first in the 2007 Recovery Notice, which was replaced by an updated 2019 Recovery Notice adopted on 23 July 2019 to take account of the evolution of the Commission's decisional practice and of the EU case law.<sup>10</sup> The Recovery Notice describes the powers and obligations of national courts with respect to aid recovery issues, together with the powers of the European Commission in this regard. The European Commission also complemented its guidance on the role of national courts in the 2009 Enforcement Notice on cooperation between national courts and the Commission in the state aid field.<sup>11</sup> These two notices followed up to studies mandated by the European Commission on state aid private enforcement in 2006 and 2009.<sup>12</sup> The 2009 Enforcement Notice, in the wake of a previous 2005 notice, introduced mechanisms for cooperation and exchange of information between the Commission and national courts, reinforced by new provisions of the Procedural Regulation<sup>13</sup> (whereby the European Commission acts as an *amicus curiae* to national courts). The 2005 State Aid Action Plan already highlighted the need for better targeted enforcement and monitoring as regards state aid granted by member states. It also stressed that private litigation before national courts could contribute to this aim by ensuring increased discipline in the field of state aid.

The role of the national court depends on the aid measure at issue and whether that measure has been duly notified and approved by the Commission.

**Unlawful aid** – National courts are often asked to intervene in cases where a member state authority has granted aid without respecting the prior notification and/or standstill obligations. The role of national courts in such cases is to protect the rights of individuals affected by the unlawful implementation of the aid.

**Unlawful and compatible aid** – When national courts are involved once the European Commission has already declared the aid compatible with the internal market but that the aid was unlawfully granted (implemented before the approval of the European Commission), then national courts are obliged, under EU law, to recover the

10 Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJEU (2013) L 352/1.

11 Communication from the Commission – Commission Notice on the recovery of unlawful and incompatible State aid, OJEU (2019) C 247/1.

12 Commission notice on the enforcement of state aid law by national courts, OJEU (2009) C 85/1.

13 See [http://ec.europa.eu/competition/state\\_aid/studies\\_reports/studies\\_reports.html](http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html): Study on the enforcement of State aid rules at the national level (I: Application of EC State aid rules by national courts – II: Recovery of unlawful State aid: enforcement of negative Commission decisions by the member states). See also the 2009 update to the 2006 Study and national courts pages on state aid enforcement on DG COMP's website (Jacques Derenne co-directed and co-authored the 2006 study and directed and co-authored the 2009 update as well as the national cases summaries on DG COMP's website pages). See also Enforcement of EU State aid rules at national level – 2010 – Reports from the 27 Member States, J Derenne, A Müller-Rappard, C. Kaczmarek (eds), Lexion, Berlin, 2010, pp. 363.



“unlawfulness” interest of the aid thereby granted by anticipation.<sup>14</sup> However, under EU law, in this case, national courts are not obliged to recover the amount of the aid itself.

**Unlawful and incompatible aid** - National courts also play an important role in the enforcement of European Commission recovery decisions. The involvement of national courts in such cases usually arises from actions brought by beneficiaries for review of the legality of the repayment request issued by national authorities. However, depending on national procedural law, other types of legal action may be possible (such as actions by member state authorities against the beneficiary aimed at the full implementation of a European Commission recovery decision).

### Role of national courts in enforcing article 108(3) TFEU

The standstill obligation laid down in article 108(3) TFEU gives rise to directly effective individual rights of affected parties (such as the competitors of the beneficiary but also any third party affected by the measure in question). These affected parties can enforce their rights by bringing legal action before competent national courts against the granting member state and the beneficiary. Dealing with such legal actions and thus protecting competitor's rights under article 108(3) TFEU is one of the most important roles of national courts in the state aid field.

In this regard, national courts have more powers than the European Commission, which is limited in what it can do to protect competitors and other third parties. Indeed, the Commission is obliged to conduct a full compatibility assessment and cannot adopt a final decision ordering recovery merely because the aid was unlawfully granted (not notified in accordance with article 108(3) TFEU).<sup>15</sup> This compatibility assessment can be time-consuming and the European Commission's powers to issue provisional recovery injunctions are subject to very strict legal requirements.<sup>16</sup>

Consequently, actions before national courts offer an important means of redress for competitors and other third parties affected by unlawful state aid. Remedies available before national courts include:

- preventing the payment of unlawful aid, simply on the basis of the infringement of article 108(3) TFEU;
- recovery of unlawful aid (regardless of compatibility), which can be faster than through a complaint with the Commission (the national court only needs to determine whether the measure constitutes state aid and whether the standstill obligation applies);
  - however, the national court's obligation to order full recovery of unlawful state aid ceases if, by the time the national court renders its judgment, the European Commission has already decided that the aid is compatible with the internal market<sup>17</sup>; in that case, only unlawful interest is recovered;
  - if the Commission has already initiated the formal investigation procedure, national courts must adopt all necessary measures to take it into account<sup>18</sup>;
- damages for competitors and other third parties; such challenges are obviously dependent on national legal rules, but article 108(3) TFEU is a directly applicable rule of EU law that is binding on all member state authorities, including courts; breaches of article 108(3) TFEU can therefore, in principle, give rise to damages claims against both the member state concerned and the beneficiary, based on separate legal grounds:
  - damages actions against the member state - the Francovich<sup>19</sup> and Brasserie du Pêcheur<sup>20</sup> case law confirms that member states are required to compensate for loss and damage caused to individuals as a result of breaches of EU law for which the state is responsible. Such liability exists where:
    - the rule of law infringed is intended to confer rights on individuals (which is the case of article 108(3) TFEU);
    - the breach is sufficiently serious (almost always the case of article 108(3) TFEU, which establishes an obligation without any margin of discretion); and
    - there is a direct causal link between the breach of the member state's obligation and the damage suffered by the injured parties;

14 Council Regulation (EU) No. 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJEU (2015) L 248/9.

15 Judgment of 12 February 2008, CELF I, C-199/06, EU:C:2008:79, paragraphs 45-46.

16 Judgment of 14 February 1990, France v Commission, C-301/87, EU:C:1990:67, paragraphs 17 to 23.

17 Article 13 of Regulation 2015/1589 cited above.

18 Judgment of 12 February 2008, CELF and Ministre de la Culture et de la Communication, C-199/06, EU:C:2008:79, paragraphs 45-46.

19 Judgment of 21 November 2013, Deutsche Lufthansa, C-284/12, EU:C:2013:755, paragraph 42.

20 Judgment of 19 November 1991, Francovich and Bonifaci v Italy, C-6/90 and C-9/90, EU:C:1991:428.

- damages actions against aid beneficiaries – under the EU case law, article 108(3) TFEU does not impose any direct obligations on the beneficiary; there is therefore no sufficient EU law basis for such claims<sup>21</sup>; however, this does not prejudice the possible application of national law concerning non-contractual liability; indeed, the CJEU ruled 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 national court may find the recipient of unlawful aid liable.
- damages claims are, in principle, independent of any parallel European Commission investigation concerning the same aid measure. Such an ongoing investigation does not release the national court from its obligation to safeguard individual rights under article 108(3) TFEU. Therefore, successful damages claims are not ruled out even where the European Commission has not already approved the aid by the time the national court decides.
- interim measures against unlawful aid (suspension or even recovery).

### Role of national courts in the implementation of recovery decisions

Recovery takes place according to the procedures available under national law, provided they allow for immediate and effective execution of the recovery decision. Where a national procedural rule prevents immediate and/or effective recovery, the national court must leave this provision unapplied. The validity of recovery orders issued by national authorities to implement a European Commission recovery decision is sometimes challenged before a national court. The rules governing such actions are set out in detail in the 2007 Recovery Notice.

In particular, national court actions cannot challenge the validity of the underlying European Commission decision where the claimant could have challenged this decision directly before the Community courts. This also means that, where a direct challenge before EU courts under article 263 TFEU would have been possible, the national court may not suspend the execution of the recovery decision on grounds linked to the validity of the European Commission decision.

Granting interim relief in such circumstances is subject to the very strict legal requirements defined in the *Zuckerfabrik*<sup>22</sup> and *Atlanta*<sup>23</sup> jurisprudence: a national court may only suspend recovery orders under the following conditions:

- the court has serious doubts as regards the validity of the Union act. If the validity of the contested act is not already in issue before the CJEU, it must itself refer the question to the CJEU;
- there must be urgency in the sense that the interim relief is necessary to avoid serious and irreparable damage to the party seeking relief; and
- the court has to take due account of the EU interest. In its assessment of all those conditions, the national court must respect any ruling by the EU courts on the lawfulness of the European Commission decision or on an application for interim relief at EU level.

National courts are obliged to enforce the notification and standstill obligations and protect 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 is subject to two essential conditions: the principle of equivalence (situations under EU law and under national law cannot be treated differently) and 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). In certain cases, national law should be set aside for EU law to apply in full.

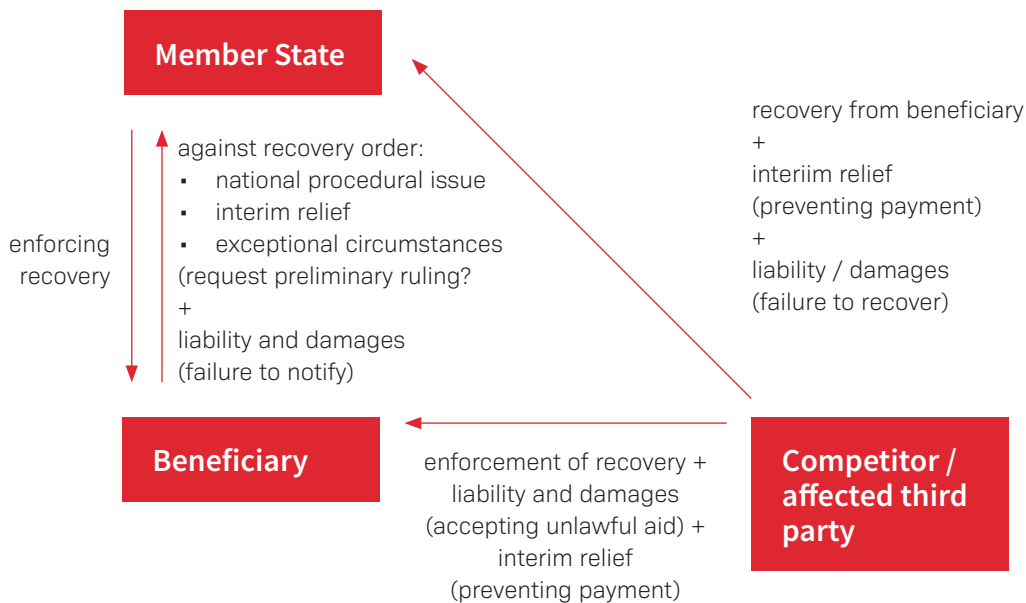
<sup>21</sup> Judgment of 5 March 1996, *Brasserie du Pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79.

<sup>22</sup> Judgment of 11 July 1996, *SFEI a.o.*, Case C-39/94, EU:C:1996:285, paragraphs 72–75.

<sup>23</sup> Judgment of 21 February 1991, *Zuckerfabrik*, C-143/88 and C-92/89, EU:C:1991:65, paragraph 33.



The following is a schematic presentation of the typology of state aid actions before national courts:



According to article 4(3) TEU, the institutions of the EU and member states have a mutual duty of loyal cooperation with a view to attaining the objectives of the Treaty. Article 4(3) TEU thus implies that the European Commission must assist national courts when they apply EU law. Conversely, national courts may be obliged to assist the European Commission in the fulfilment of its tasks.

#### European Commission support for national courts

When supporting national courts, the European Commission must respect its duty of professional secrecy and safeguard its own functioning and independence. In fulfilling its duty under article 4(3) TEU towards national courts, the European Commission is therefore committed to remaining neutral and objective. The support offered to national courts is voluntary and without prejudice to the possibility or obligation for the national court to ask the CJEU for a preliminary ruling regarding the interpretation or the validity of EU law.

European Commission support to national courts can take different forms (*amicus curiae*)<sup>24</sup>:

- the national court may ask the European Commission to transmit to it relevant information in its possession: is there an ongoing procedure, has a measure been notified, when is a decision likely to be adopted, etc. The European Commission will endeavour to provide the national court with the requested information within one month from the date of the request. The European Commission can provide information covered by professional secrecy, provided that the national court can guarantee the protection of such confidential information and business secrets. On the other hand, the European Commission may refuse to transmit information to a national court where such transmission would interfere with the functioning and independence of the EU;
- the national court may ask the European Commission for an opinion concerning the application of the state aid rules. Such European Commission opinions may, in principle, cover all economic, factual or legal matters that arise in the context of the national proceedings. Matters concerning the interpretation of EU law can obviously also lead the national court to ask for a preliminary ruling of the CJEU. Where no further judicial remedy exists against the court's decision under national law, the use of this preliminary reference procedure is, in principle, mandatory. When giving its opinion, the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification sought, without considering the merits of the case pending before the national court. Moreover, unlike the authoritative interpretation of EU law by the EU courts, the opinion of the European Commission does not legally bind the national court. The European Commission will endeavour to provide the national court with the requested opinion within four months from the date of the request;

<sup>24</sup> Judgment of 9 November 1995, Atlanta, C-465/93, EU:C:1995:369, paragraph 51.

- where the coherent application of article 107(1) or article 108 TFEU so requires, the European Commission, acting on its own initiative, may submit written observations to the national court; with its permission, the European Commission may also make oral observations; in order to prepare its observations, the European Commission may request the national court to transmit documents necessary for the European Commission's assessment of the matter.



## **Jacques Derenne**

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Jacques Derenne is the global co-practice group leader, antitrust and competition, of Sheppard Mullin. He is a partner, member of the Brussels and Paris Bars. He has 30 years of EU competition law experience across all areas, including mergers, cartels, abuses of dominance and state aid. Jacques Derenne regularly appears at competition hearings before the European Commission, and pleads cases before the General Court and the Court of Justice of the European Union, national competition authorities, the Belgian and French courts and various regulatory bodies.

Jacques Derenne' state aid experience spans three decades, during which time he has acted for beneficiaries, competitors and member states before the European Commission, EU courts and national courts. He co-directed and co-authored studies for the European Commission on the enforcement of State aid rules at the national level (2006 and 2009), which contributed to the Commission's Recovery and Enforcement Notices in 2007 and 2009 respectively. He co-edited a book on the Enforcement of EU State aid law at national level – 2010 – Reports from the 27 member states (Lexxion, October 2010), and has written quarterly comments on State aid case law in the journal *Concurrences* since 2004 (together with EU officials).

Jacques Derenne is also a professor at the University of Liège and at the Brussels School of Competition, teaching state aid law. He is a founding member of the Global Competition Law Centre (College of Europe, Scientific Council and Executive Committee). He graduated from the University of Liège (Belgium, 1987) and from the College of Europe (Bruges, 1988).



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Sheppard Mullin is a full-service international law firm handling corporate, antitrust/competition and technology matters, high stakes litigation and complex financial transactions. With over 750 lawyers from 15 offices in North America, Europe and Asia, Sheppard Mullin offers global solutions to its clients around the world, providing seamless representation in multiple jurisdictions.

At Sheppard Mullin, antitrust and competition law has been a premier practice for decades, as one of the firm's name partners co-founded the Antitrust Section of the American Bar Association. With a strong anti-trust and competition practice in San Francisco, Los Angeles, Washington, Brussels, London, China and Seoul, Sheppard Mullin provides its clients with a true one-stop-shop for sophisticated global antitrust and competition needs.

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