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Damages Actions and State Aid: Time for Action at EU Level?*

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ABSTRACT: Following the State aid modernisation agenda in 2012, Member States have had more responsibilities than ever in ensuring compliance with State aid rules. The scope of the General Block Exemption Regulation has significantly expanded through increased thresholds and additional categories, marking a steady momentum since then. The idea was to reduce the administrative burden for Member States, increase legal certainty for aid beneficiaries, and allow the Commission to focus on aid which is the most likely to have an impact on competition in the internal market. However, this process does not only bring positive consequences, as the risk of erroneous applications of the law has increased. In theory, private damages actions for failure to comply with State aid rules should gain in importance. In practice, the award of damages is exceptional and represents less than 1% of the private enforcement cases. The low attractivity of such action is likely to have unsatisfactory consequences on third parties' rights, but also on State aid public enforcement and global discipline. This is largely due to the framework in place, which is limited and fragmented at best. After outlining the current system and its shortcomings, this article analyses whether inspiration can be drawn from the antitrust damages directive. Doing so, it formulates building blocks for a future (wider) regulatory initiative in the field of State aid.

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KEYWORDS: State aid law, private enforcement, damages claim, Directive 2014/104/EU, harmonisation

I. Introduction

As a matter of EU law, the granting of State aid is conditional upon approval by the European Commission (EC). According to the prior notification and standstill obligations under Article 108(3) of the Treaty on the Functioning of the European Union (TFEU), Member States (MS) have to suspend and notify their plans to the institution every time the measure to be implemented might constitute new or alter existing State aid. The EC maintains the exclusive competence to assess the compatibility of the aid with the internal market.[1]

More recently, however, as part of a modernisation programme issued in 2012,[2] MS have gained increasing responsibilities in ensuring compliance with State aid rules. One of the main objectives has been for the EC to focus its *ex ante* control on cases with the biggest impact on the internal market. Concomitantly, more exemptions from the requirement to notify aid to the European institution have been created. The de Minimis[3] and General Block Exemption (GBER)[4] regulations are cases in point. By extending MS' responsibilities for designing and implementing aid measures, this process has increased the risk of errors.[5] The EC's monitoring exercise shows many mistakes from MS in the design and implementation of aid schemes in the period ranging from 2009 to 2014.[6] Against that background, the new 2021 EC Notice on the enforcement of State aid rules by national courts (2021

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[1] Judgement of 22 March 1977, *Steinike & Weinlig v. Germany*, Case 78-76, EU:C:1977:52, paragraph 9.

[2] EC, *Communication from the EC to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU State Aid Modernisation (SAM)(COM(2012) 209 final),* May 8, 2012, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0209:FIN:EN:PDF.

[3] E.g. EC 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, OJ L 352, 24.12.2013.

[4] EC 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, OJ L 187, 26.6.2014.

[5] European Court of Auditors, *More efforts needed to raise awareness of and enforce compliance with State aid rules in cohesion policy (Special Report No. 24/2016)*, 2016, 64, https://www.eca.europa.eu/Lists/ECADocuments/SR16_24/SR_STATE_AIDS_EN.pdf.

[6] *Ibidem*.

Notice) highlights the prominent role of national courts in ensuring the compliance with State aid rules and remedying those errors.[7] One way to do so is through the use of private damages actions.

In practice, however, the 2019 Study on the Enforcement of State Aid Rules and Decisions by National Courts states that those damages for violation of State aid rules are considered a "rather theoretical possibility" and are awarded in very rare cases[8]. Those findings suggest that third parties harmed by unlawful aid will not always be compensated. That is problematic, as there is no other option for them to receive compensation. Moreover, the virtual absence of risk for MS to pay damages does not induce them to comply more strictly with State aid law. In view of this, it is timely and useful to revisit the legal framework surrounding actions for damages in the field of State aid law.

This article analyses the limits and possibilities offered by EU law to envisage private State aid damages actions. Within that context, the focus is on cases in which a MS has failed to notify the aid to the EC, in breach of Article 108(3) TFEU. More specifically, we look at the damages claim from the perspective of a competitor/third party[9] in the light of the conditions laid down by the Court of Justice (CJEU) as regards MS liability for breaches of EU law by public authorities.[10] After outlining the existing framework and its limits (II.), we assess whether legal action could be taken, and question more particularly whether it would be possible and

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[7] EC, *Communication from the EC, EC Notice on the enforcement of State aid rules by national courts (2021/C 305/01)*, July 30, 2021, paragraph 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0730(01)&from=ENhereafter.

[8] EC, *Study on the Enforcement of State Aid Rules and Decisions by National Courts (COMP/2018/001)*, August 10, 2019, 90; 81, https://ec.europa.eu/competition/publications/reports/kd0219428enn.pdf.

[9] But not from a beneficiary. In principle, they do not have any remedies available under EU law. See Judgment of 19 March 2015, *OTP Bank Nyrt. v. Magyar Állam and Magyar Államkincstár*, C-672/13, EU:C:2015:185, paragraph 78. However, arguably, beneficiaries could claim damages under EU law in exceptional circumstances. See, e.g., the *Fontanille* and *Salmon Arc-en-ciel* cases, in which French courts awarded damages to beneficiaries, seemingly applying *de facto* EU's extracontractual liability conditions. Administrative Court of Clermont-Ferrand, *SA Fontanille*, 23 September 2004; Administrative Court of Appeal of Paris, *Société Groupe Salmon Arc-en-Ciel*, 21 January 2006.

[10] EU law does not provide for action against beneficiaries since Article 108(3) does not create an obligation for them, but national courts can award damages against them by applying national law, such as national rules governing non-contractual liability. See Judgment of 11 July 1996, *Syndicat français de l'Express international (SFEI) and others v. La Poste and others*, C-39/94, EU:C:1996:285, paragraph 75.

useful to take inspiration from the Damages Directive in the field of antitrust law.[11] Arguing that the Directive only serves as a partial model for a more streamlined State aid damages regime, we use its framework as a starting point to establish building blocks that could potentially improve the ability for third parties to obtain compensation (III.).

II. Damages claims in State aid: EU law and its limits

It is settled case law that individuals have an EU right to obtain compensation from MS in case of unlawful acts or conduct of national authorities. Following the seminal judgments of *Francovich*,[12] *Brasserie du Pêcheur*[13] and *Köbler*,[14] three conditions are to be met: (1) the infringed EU law rule must be intended to confer rights on individuals, (2) the breach must be sufficiently serious, and (3) there must be a direct causal link between the breach of the obligation resting on the State and the damage suffered. Subject to these conditions and absent harmonisation, national rules apply to any damages claim, provided that the principles of equivalence and effectiveness are respected. The first two conditions are easily met, since Article 108(3) confers rights to individuals[15] and the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach when the national authority has no (or considerably reduced) discretion in the field.[16] This is the case for State aid; MS are, in principle,

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[11] 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, OJ L 349, 5.12.2014. See Niamh Dunne, "Courage and compromise: The Directive on Antitrust Damages", *European Law Review* 40, no. 4 (2015): 581-597; Sebastian Peyer, "Compensation and the Damages Directive", *European Competition Journal* 12, no. 8 (2016): 87-112; Magnus Strand, Vladimir Bastidas and Mario C Iacovides (eds.), *EU Competition Litigation, Transposition and First Experiences of the New Regime* (Oxford: Hart Publishing, 2019).

[12] Judgment of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, C-6/90 and C-9/90, EU:C:1991:428, paragraph 40.

[13] Judgment of 5 March 1996, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland* and *The Queen v. Secretary of State for Transport, ex parte Factortame and Others*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 51.

[14] Judgment of 30 September 2003, *Gherard Köbler v. Republik Österreich*, C-224/01, EU:C:2003:513, paragraph 52.

[15] Judgment of 5 March 2019, *Eesti Pagar AS v. Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, C-349/17, EU:C:2019:172, paragraph 88.

[16] Judgment of 25 January 2007, *Carol Marilyn Robins and Others v. Secretary of State for Work and Pensions*, C-278/05, EU:C:2007:56, paragraph 71.

under the absolute obligation to notify any measure prior to its implementation.[17] This part of the article will therefore zoom in on the infringement (A.), the causal link (B.), and the damage quantification (C.) difficulties inherent in State aid damages actions.[18]

A. Infringement of Article 108(3) TFEU

There must be a State aid under Article 107(1) TFEU for Article 108(3) to be infringed. Its existence often requires a complex assessment, and it can be very difficult for the claimant to substantiate its claim, especially where they do not possess the necessary documents.[19] In this regard, in *Boiron*, the CJEU held that in order to comply with the principle of effectiveness, if the national court finds that the fact of requiring the claimant to prove that a measure amounts to State aid is likely to make it impossible or excessively difficult for such evidence to be produced, the national court is required to use all procedures available to it under national law to give the claimant access to the evidence, including ordering the necessary measures of inquiry, in particular the production by one of the parties or a third party of a particular document.[20] This case law applies to the claim in general and, thus, is also useful to prove the causal link or the quantification of the damage. Surprisingly, it is no longer mentioned in the 2021 Notice, whereas it was referenced in paragraph 76 of the 2009 Notice. We find this choice, or omission, regrettable. Even if its mention does not condition its applicability, it would have been only logical to retain it in the 2021 version. As an important contribution to improving the possibilities of State aid private enforcement, it should be made as accessible as possible for national courts seeking guidance.

Another element potentially in favour of the claimant is Article 29 of Regulation 2015/1589,[21] which organises cooperation between national

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[17] EC, *2021 Notice*, paragraph 91.

[18] EC, *Study on the Enforcement of State Aid Rules*, 92.

[19] Joanna Goyder and Margot Dons, "Damages claims based on State aid law infringements", *European State Aid Law Quarterly* 16, no. 3 (2017): 422.

[20] Judgment of 7 September 2006, *Laboratoires Boiron SA v. Union de recouvrement des cotisations de sécurité sociale et d'allocations familiales (Urssaf) de Lyon, assuming the rights and obligations of the Agence centrale des organismes de sécurité sociale (ACOSS)*, C-526/04, EU:C:2006:528, paragraphs 55-57.

[21] Council Regulation (EU) 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, OJ L 248, 24 September 2015.

judges and the EC. The former can ask the EC to transmit them information in its possession or its opinion on questions concerning the application of State aid rules when enforcing Articles 107(1) and 108 TFEU. This includes whether a measure qualifies as State aid and issues related to the calculation of the damage suffered. The EC can even make submissions as *amicus curiae* to the national courts.[22] Since 2014, judges have submitted at least ten requests for information to the EC. The latter has provided at least twenty-six opinions at the request of national courts since 2009, often related to the existence of State aid.[23] Finally, the EC has intervened in at least nine cases as *amicus curiae* and provided observations to other courts (e.g. arbitration courts) in ten cases since 2014.[24]

Lastly, the CJEU held in *Lufthansa* and confirmed in *Lübeck* that national judges are bound to consider a measure as State aid as soon as the EC has initiated a formal investigation regarding such measure.[25] It was well accepted in relation to final decisions of the EC, but was perceived as a novelty for provisional decisions.[26] This case law has been criticised by various scholars for the excessive application of *effet utile*, the problem of the right to efficient judicial review or the impinging upon the independence[27] of the

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[22] EC, *2021 Notice*, paragraphs 115, 120.

[23] EC, *Study on the Enforcement of State Aid Rules*, 109; EC, *EC Staff Working Documents accompanying the Reports from the EC to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on Competition Policy from 2018 to 2020 (SWD(2019) 297 final/2, SWD(2020) 126 final, SWD(2021) 177 final)*, October 14, 2019, http://aei.pitt.edu/102017/1/cp.14.corr.pdf, July 9, 2020, https://ec.europa.eu/competition/publications/annual_report/2019/part2_en.pdf, July 7, 2021, https://ec.europa.eu/competition-policy/system/files/2021-07/annual-competition-report_2020_report_part2_swd_en.pdf.

[24] See https://ec.europa.eu/competition-policy/state-aid/national-courts/amicus-curiae-observations_en.

[25] Judgment of 21 November 2013, *Deutsche Lufthansa AG v. Flughafen Frankfurt/Hahn GmbH*, C-284/12, EU:C:2013:755, paragraphs 34-35; 42-43; Order of 4 April 2014, *Flughafen Lübeck GmbH v. Air Berlin plc & Co. Luftverkehrs KG*, C-27/13, EU:C:2014:240, paragraphs 25-27.

[26] See, *contra*, Viktor Kreuschitz and Hanns Peter Nehl, "Part V.3 Decentralized judicial review and enforcement of EU State aid rules", in *State Aid Law of the European Union*, ed. Herwig C.H. Hofmann and Claire Micheau (Oxford: Oxford UP USA-OSO, 2016), 456.

[27] According to Lubbig and Morgan, EC's mere doubts, from a lack of sufficient information or time for scrutiny, lead it to initiate formal proceedings, which bind national judges until the final decision. Deference to the EC should have its limits, and national courts should be able to diverge from preliminary findings in accordance with the principle of the separation of powers. See Thomas Lubbig and Tom Morgan, "State aid, national courts and the separation of powers: Should judges be bound to the European Commission's unfinished State aid business?", *Journal of European Competition Law & Practice* 5, no. 5 (2014): 256-260.

national judiciary.[28] In this regard, it seems relevant to recall that a national judge who does not agree with the nature of the controversial measure can always refer a question to the CJEU under Article 267 TFEU. In any case, this case law strengthens the position of the competitors of the aid beneficiary, who will not need to prove that the measure at issue constitutes State aid. It is therefore to be welcomed that it has been included in the 2021 Notice under the title "Following an opening decision by the Commission". Nevertheless, one can doubt whether there will be any concrete results on the award of damages if the case is simultaneously undergoing a compatibility assessment before the EC. National courts are usually reluctant to order such remedies until the EC has issued a final decision. In such situation, they are more open to order interim measures.[29] The latter constitute a safer option (now enshrined in paragraph 53 of the 2021 Notice), as the EC may still conclude in its final decision that the measure is no aid. On the other hand, even a positive decision declaring the compatibility of the aid is useful for the claimant. Lawfulness and compatibility are independent, and the compatibility of a measure does not retroactively regularise its illegality. By stating the compatibility of the aid, the EC acknowledges the State aid nature of the measure. Besides, it is recognised that competitors can be affected by a compatible aid.[30] They are entitled to damages when they have suffered the implementation of such aid earlier than what they would have had to. In conclusion, national courts must adopt all the necessary measures with a view to drawing the appropriate conclusions from an infringement of Article 108(3) when the EC has initiated a formal investigation for a measure which is being implemented,[31] and it is likely that the claimant will only (if at all) obtain damages after a final decision, as national courts tend to order interim remedies during parallel proceedings.

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[28] See Ulrich Soltész, "*Effet utile* taken to extremes", *European State Aid Law Quarterly* 12, no. 4 (2013): 635-645; Lucyne Ghazarian, "Binding effect of opening decisions – Lufthansa AG v. FFH", *European State Aid Law Quarterly* 13, no. 1 (2014): 108-114; Phedon Nicolaides, "Are national courts becoming an extension of the EC?", *European State Aid Law Quarterly* 13, no. 3 (2014): 409-413.

[29] Viktor Kreuschitz and Nuria Bermejo, "The role of national courts in the enforcement of the European State aid rules", in *EU Competition and State Aid Rules: Public and Private Enforcement*, ed. Vesna Tomljenović et al. (Berlin Heidelberg: Springer-Verlag, 2017), 240.

[30] Judgment of 12 February 2008, *Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v. Société internationale de la diffusion et d'édition (SIDE)*, C-199/06, EU:C:2008:79, paragraph 50.

[31] Judgment of 21 November 2013, *Deutsche Lufthansa AG v. Flughafen Frankfurt/Hahn GmbH*, C-284/12, EU:C:2013:755.

B. Causal link

Under EU law, the causal link must be direct. This concept is interpreted in accordance with national standards of causation. The 2021 Notice recognises the causal link between the harm and the unlawful aid as a major obstacle for claimants, as is the quantification of the damage.[32] Honoré and Jensen explain that the requirement to prove it is particularly complicated because, except in few specific situations,[33] the link is twofold. Claimants have to prove upstream and downstream causation. Upstream causation is the causal link between the grant of the aid and the damaging behaviour of the recipient. Downstream causation is the causal link between the damaging behaviour and the damage suffered by the claimant.[34] The 2021 Notice identifies a case where it would be easier to prove the link and the amount of the damage, i.e. where the unlawful aid enabled the beneficiary to win over a contract or a specific business opportunity from the claimant. Even then, the obstacle of upstream causation remains, as it must be proven that the aid enabled the competitor to win the contract. Despite rare cases where the causal link requirement has been overcome,[35] claimants will face hurdles at each step of the causality assessment.

Concerning upstream causation, the defendants (MS and aid beneficiary) are likely to argue that nothing proves that the aid specifically financed the alleged damaging behaviour. The beneficiary would and could have acted similarly even without the aid. Hence, it is up to the claimant to demonstrate that the aid recipient could not have financed its behaviour by other means.[36] This burden of proof can be an obstacle, as it means accessing financial information that is almost never in the hands of the claimant. Fortunately, following *Boiron*, the beneficiary could be ordered to make financial documents available to the claimant. Furthermore, Honoré and Jensen identify a supporting (but not necessary) factor for the applicant: the EC's adoption of a positive decision on the aid compatibility in which it states the incentive effect of the aid. In such situation, it implies that the aid recipient would not have behaved in the way they did without the aid, or

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[32] EC, *2021 Notice*, paragraph 92.

[33] Michael Honoré and Nanna Eram Jensen, "Damages in State aid cases", *European State Aid Law Quarterly* 10, no. 2 (2011): 277-280.

[34] *Ibidem*, 271-272.

[35] See Administrative Court of Appeal of Marseilles, *Collectivité de Corse*, 22 February 2021; Italian Court of Cassation, *Traghetti del Mediterraneo*, 16 October 2020.

[36] *Ibidem*, 272.

at least the behaviour would have taken place in a more restricted manner. Consequently, one can consider that there is upstream causation.[37]

Regarding downstream causation, the main obstacle for the claimant is the existence of exogenous factors that could also possibly justify the loss suffered.[38] Defendants may invoke, e.g., the competitive structure of the market, the fluctuations in terms of demand and supply, or even a poor management from the competitor. Linked to the downstream causation is the need to quantify the damage, which is discussed in the next section.

C. Damage and its quantification

Damage under EU law includes *damnum emergens* and *lucrum cessans*. Quantifying it can be difficult for the claimant because of the exogenous factors mentioned above. Except for the 2021 Notice, which provides very limited guidance, there is no specific document about economic techniques concerning damage estimation in State aid cases. Moreover, the 2021 Notice is less precise than the old one, which is regrettable. It takes up the two scenarios set out in the 2009 Notice, but fails to give the guidance that was described precisely in the first scenario. The first case concerns aid that enabled the beneficiary to win over a contract or a specific business authority.[39] The second case is about aid that merely leads to a loss of market share.[40] The 2021 Notice confines itself to saying that determining the actual amount of loss profit is easier in the first scenario, while the 2009 instrument suggested to calculate the revenue which was likely to be generated under the missed opportunity, taking into account the actual profit generated if the contract had already been fulfilled by the beneficiary. This recommendation may seem obvious to some, but we do not see clear reasons for depriving national non-specialised courts of clear guidelines. Concerning the second scenario, the two versions are similar. Damage quantifications get more complicated, and one possible way for the claimant is to compare its actual income situation with the hypothetical income situation had the unlawful aid not been granted. Such counterfactual technique leaves room for uncertainty, and especially for the

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[37] *Ibidem*, 272.

[38] EC, *Study on the Enforcement of State Aid Rules*, 92.

[39] EC, *2021 Notice*, paragraph 93(b); EC, *EC Notice on the enforcement of State aid Law by national courts (2009/C 85/01)*, April 9, 2009, paragraph 49(b), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:085:0001:0022:EN:PDF.

[40] EC, *2021 Notice*, paragraph 93(c); EC, *2009 Notice*, paragraph 49(c).

defendants to contest the hypothetical situation. They are likely to argue that this it is not the granting of the aid, but other circumstances that led to the loss of profit and/or market share, and that these external factors would have had the same impact had the unlawful aid not been granted. Hence, the hypothetical income situation is wrongly assessed by the claimant and should be corrected downwards.

Once again, *Boiron* could help the claimant by obliging the national judge to order the defendants to make the necessary documents available to the claimant (if provided for under national law), e.g. to find out the real profit generated by a contract obtained through illegal State aid. Moreover, the EC gives national courts the possibility to rely on reasonable estimates for the purpose of determining the actual damages to be compensated,[41] which alleviates the burden of proof of the applicant. Finally, national judges can use the cooperation tools[42] between them and the EC to request assistance on issues of damages calculation. The most relevant mechanism is the request for an opinion, which can directly cover how to quantify the damage incurred, but national courts may also ask the EC to transmit documents in its possession such as statistics, market studies and economic analyses. Therefore, national courts can choose between calculation from established facts, reasonable estimation in the light of the evidence, and assistance from the EC.[43] Yet, the damage quantification remains a major obstacle for third parties.[44]

The State aid damages framework largely explains the low number of successful actions. Even if additional factors exist,[45] the difficulties to prove the existence of State aid, the causal link and the quantification of the damage are doomed to persist without modification of the current regime. The last two elements especially constitute major hurdles because of the need to prove upstream and downstream causation and to isolate the damage from exogenous factors. Moreover, the absence of guidance in relation to the estimation of the damage and the standard of causation, which is left to national law, are other potential obstacles for claimants. All these findings lead us to look for solutions in the third part of this article, notably by

[41] EC, *2021 Notice*, paragraph 94.

[42] Section 5 of the 2021 Notice.

[43] Adam Scott, "Co-operation and good faith: State aid rules and national courts – Procedural and interpretive consequences", *European State Aid Law Quarterly* 16, no. 3 (2017): 359.

[44] EC, *Study on the Enforcement of State Aid Rules*, 92.

[45] *Ibidem*, 8.

taking inspiration from the Damages Directive, but also through a better national system of *ex ante* control of State aid.

III. Time for action at EU level?

Unless national rules allow claims against the beneficiary, actions for damages under Article 108(3) TFEU are directed against the State. Hence, it is doubtful that national authorities are keen to help damages claimants by adopting national rules. Yet a better private enforcement of State aid rules leads to better State aid control and discipline, which in turn lead to economic efficiency and budgetary discipline.[46] It is therefore relevant to consider the possibility of action at EU level. Citing this option, Honoré and Jensen draw a parallel between the fields of State aid law and public procurement law, in which the Revised Remedies Directive[47] created new remedies to certain types of breaches, although this was not in the (short-term) interest of MS.[48] We are well aware of the sensitivity of the State aid field and the current low possibility that Member States will agree to the adoption of an EU legislative instrument. But however small the chance may be, it does exist. It therefore seems useful to explore it by considering legally sound options.

The Damages Directive may appear as an interesting first framework for reflection. After explaining the essential paradigm differences between the field of State aid and that of competition law, section A will review the relevant provisions of the Directive. It will then offer an overview of the Directive's impact on damages actions before national courts (A.). We will see that a literal transposition is not the solution, due to both shortcomings of the Directive and the particularities of State aid law, which will lead us to propose building blocks for a remedial framework better tailored to this sub-field of EU competition law (B).

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[46] Kelyn Bacon, *European Union Law of State Aid*, Third Edition (Oxford: Oxford University Press, 2017), 10.

[47] Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts. See Honoré and Eram Jensen, "Damages", 282.

[48] However, the Revised Remedies Directive contains very few provisions on actions for damages.

A. The antitrust Damages Directive

a. The paradigm of the Damages Directive

There are key differences between State aid law and competition law. The latter contains rules prohibiting undertakings from engaging in anticompetitive agreements and abuses of dominant position, under Articles 101(1) and 102 TFEU. The former prohibits the granting of State aid under Article 107(1) TFEU. Exceptions are nevertheless provided for in Article 101(3), as well as 107(2) and (3) TFEU. In these cases, the behaviour is deemed compatible with the internal market. At the outset of the European construction, Regulation 17[49] provided that Article 101(3) would be enforced via a centralised notification and authorisation system. The EC had monopoly over the assessment of the exceptions, and national courts could not apply Article 101 in full. This created a huge workload for the EU institution, and the need for change appeared clearly in light of the planned accession of ten Central and Eastern European countries.[50] As a result, Regulation 1/2003[51] abolished the system and introduced a decentralised *ex post* control scheme, allowing the EC to focus on the most serious competition infringements. Undertakings have now to assess themselves the compatibility of their behaviour. Enforcement of 101(3) TFEU falls not only within the competence of the EC, but also within that of national courts and National Competition Authorities (NCAs), which are allowed to apply both Articles 101 and 102 in their entirety. This legislative evolution marked the beginning of the EC and the NCAs working together in pursuing infringements of competition law. On the contrary, the exclusive competence of the EC as regards the compatibility of State aid is enshrined in the Treaty and cannot be changed through secondary law.

From this, two consequences must be remembered when analysing the Directive. First, national courts facing damages claims appraise the compatibility of the suspected behaviour with the internal market under antitrust law, while they assess the lawfulness of the measure under State aid law. The concept of lawfulness is unnecessary in the antitrust field, since

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[49] Fernando Pastor-Merchante, *The Role of Competitors in the Enforcement of State Aid Law* (Oxford: Hart Publishing, 2017), 76.

[50] Wouter P. J. Wils, "Ten years of Regulation 1/2003 – A retrospective", *Journal of European Competition Law & Practice* 4, no. 4 (2013): 294.

[51] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, 4.1.2003.

there is no standstill obligation. Second, there are additional key players under antitrust law, the NCAs. They could not determine the compatibility of State measures given the specific procedure reserved to the EC. This makes sense given the different stakeholders. On the one hand, the EC and NCAs, forming together the European Competition Network, work in cooperation to enforce rules applying to undertakings. On the other hand, rules apply to States, which can bring in suspicion that a domestic institution would not enforce them as neutrally as the EC. Having noted these two elements, we can focus on the Directive.

In its Recital 7, Regulation 1/2003 underlines the essential role of national courts in applying EU competition rules, and gives the example of awarding damages to the victims of infringements when deciding disputes between private individuals. The *Courage v. Crehan* decision recognised the substantive right to damages in EU competition law cases.[52] With *Manfredi*, the CJEU clarified that the right to full compensation encompasses *damnum emergens*, *lucrum cessans*, plus interest.[53] Yet, the awarding of damages was rare[54] and the EC perceived procedural and substantive deficiencies at national level as inhibitors to the growth of a competition culture within the EU.[55] As a response, the Damages Directive was issued in November 2014, after ten years of efforts from the EU institution. The Directive has two main objectives: enhancing the right to full compensation for an infringement of competition law, and coordinating public (by the EC and NCAs) and private (by national courts) enforcement of competition rules.[56] Many scholars have emphasised the general and vague goal-setting provisions of the Directive,[57] which aim at respecting the national procedural autonomy but could limit its effectiveness.

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[52] Judgment of 20 September 2001, *Courage Ltd v. Bernard Crehan*, C-453/99, EU:C:2001:465, paragraph 26.

[53] Judgment of 13 July 2006, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 95.

[54] Commission of the European Communities, *Green Paper – Damages actions for breach of the EC antitrust rules (COM(2005) 672 final)*, December 19, 2005, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0672&from=EN.

[55] Dunne, "Courage", 582.

[56] Directive 2014/104/EU, Article 1.

[57] See, e.g., Emmanuela Truli, "Will its provisions serve its goals? Directive 2014/104/EU on certain rules governing actions for damages for competition law infringements", *Journal of European Competition Law & Practice* 7, no. 5 (2016): 299-312; Katri Havu, "Causation and damage: What the Directive does not solve and remarks on relevant EU law", in *EU Competition Litigation,*

The right to damages is subject to three cumulative criteria, replicating the conditions entailing State liability. The claimants have to prove (1) a breach of EU competition rules, (2) a quantifiable loss, and (3) a causal link between the breach of law and the loss suffered. Previously, we pointed out the corresponding requirements in State aid law as being major obstacles for damages claimants. We are now going to see whether the Damages Directive provides for specific solutions in order to help antitrust damages claimants fulfil the three conditions.

b. Infringement of Articles 101 or 102 TFEU

Various means to promote damages claims in the antitrust field have been put in place, mainly related to a better access to information.

First, Article 5 addresses the information asymmetry between the claimants and the defendants and provides for court-controlled disclosure of evidence *inter partes* and from third parties. We analyse it in this section, but the provision also applies in relation to the causal link and quantification of damage requirements. Some authors consider this article as one of the most innovative and central provisions of the piece of legislation.[58] It requires MS to ensure that national courts are able to order the disclosure of relevant evidence by defendants or third parties in proceedings relating to damages actions upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of the claim. Moreover, the EU legislator also provides for the disclosure of relevant categories of evidence in addition to specified items of evidence and of evidence containing confidential information where national courts consider it relevant to the action.[59] This broadens the scope of document disclosure in many MS where there is traditionally a need to identify fairly precisely the pieces of evidence to be disclosed, and sometimes no possibility to have access to certain confidential information.

Then, Articles 6 and 7 cover the disclosure of evidence by NCAs. Even without such domestic institutions in the State aid area, it is worth

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Transposition and First Experiences of the New Regime, ed. Magnus Strand et al. (Oxford: Hart Publishing, 2019), 187-200.

[58] See, e.g., Ulrich Classen and Martin Seegers, "The state of private enforcement of competition law: A practitioner's perspective", in *EU Competition Litigation, Transposition and First Experiences of the New Regime*, ed. Magnus Strand et al. (Oxford: Hart Publishing, 2019), 26.

[59] Directive 2014/104/EU, Article 5(2) and (4).

analysing this mechanism because the establishment of related institutions through European legislative initiative will be discussed later in this article. National courts must be able to order disclosure of evidence included in the file of a NCA, but this tool is "purely residual in nature",[60] as it only applies where no (third) party is reasonably able to provide that evidence. The provisions reflect the desire to preserve public enforcement, as certain types of evidence can be disclosed only after the closure of the proceedings (e.g. settlement submissions subsequently withdrawn), while leniency statements and settlement submissions can never be disclosed.[61]

Finally, Article 9 provides that final decisions of NCAs resulting in a finding of infringement of competition law have binding effects on national courts. Where the decision is taken in another MS, it constitutes at least *prima facie* evidence. Recital 34 specifies that the binding effect in follow-on actions covers only the nature of the infringement, and its material, personal, temporal and territorial scope as determined by the NCA. Article 9 refers to NCAs, but partly replicates Article 16 of Regulation 1/2003, according to which national courts cannot take decisions running counter to the decision adopted by the EC. The latter provision nonetheless has broader effects because, contrarily to Article 9, the decision of the EC does not need to be final to have binding effects. Furthermore, national courts must also avoid giving decisions that would conflict with a decision contemplated by the EC in proceedings it has initiated. Notwithstanding the fact that national courts are allowed to stay proceedings in that case, we can compare Article 16 of Regulation 1/2003 with *Lufthansa* in State aid law. Nevertheless, the opposition of some scholars against the binding effect of the EC's provisional decisions in the State aid area did not occur in relation to the codification of the *Masterfoods* case[62] in Article 16.

c. Causal link

In EU competition law, the claimant must prove the causal link between the anticompetitive behaviour and the loss suffered, which amounts to the demonstration of the "downstream causation" and remains a challenge. Article 5 is likely to relieve the claimant a little bit, but there is no real provision on causation in the Directive. The only occurrences of the "causal

[60] Dunne, "Courage", 586.

[61] It reverses *Pfleiderer*, in which the CJEU refused such a blanket prohibition.

[62] Judgment of 14 December 2000, *Masterfoods Ltd v. HB Ice Cream Ltd*, C-344/98, EU:C:2000:689, paragraphs 48-52.

relationship" are to be found in Recital 11, which reaffirms the CJEU case law. National rules govern the notion of causal relationship, in accordance with the principles of effectiveness and equivalence. Hence, national standards of causation could be hurdles for victims, notably where the harm is a remote one. If both CJEU case law and Article 1 of the Directive make it clear that any individual can claim damages for harm suffered as a result of a breach of EU competition law, national courts can still dismiss claims they consider have no standing (e.g. stakeholders) through the lens of the causal link, employing notions such as foreseeability, remoteness, or predominant cause.[63]

d. Damage and its quantification

Claimants have the right to obtain full compensation. Pursuant to Article 3, full compensation covers actual loss, loss of profit and the payment of interest, but cannot lead to overcompensation.

The rules and standard of proof for the quantification of harm caused by a competition law infringement remain national. However, acknowledging that the quantification of harm is a very fact-intensive process that may require the application of complex economic models and constitute a substantial barrier for damages claimant,[64] the Directive puts limits on the procedural autonomy of MS. These limits are provided for in Article 17, called "Quantification of harm". According to Article 17(1), neither the burden nor the standard of proof required for the quantification of harm can be set at a level that would render the exercise of the right to damages practically impossible or excessively difficult. In such a case of adversity, national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that there was harm. Another relevant development, provided for in Article 17(3), is that an NCA may, upon request of a national court, assist that court with respect to the quantification of damages where the NCA considers such assistance to be appropriate. In this regard, Iacovides outlines that what

[63] Assimakis P Komninos, "Damages actions in Article 102 TFEU case: The new frontier for private enforcement", in *EU Competition Litigation, Transposition and First Experiences of the New Regime*, ed. Magnus Strand et al. (Oxford: Hart Publishing, 2019), 158.

[64] Directive 2014/104/EU, Recital 45.

was an obligation for the NCA at the beginning of the legislative process eventually turned into a mere opportunity.[65]

Finally, no method of calculation is to be found in Article 17 of the Directive, but more detailed guidance on economic approaches was issued in the non-binding Practical Guide on Quantifying Harm.[66]

e. The Damages Directive's impact

The EC published a report on the implementation of the Damages Directive in December 2020.[67] The document includes initial indications on the effects of the Directive, but is limited in this regard due to the lack of available evidence, as the institution is now waiting for judgements of national courts implementing national rules to appraise the impact of the Directive. These proceedings can take several years, and the whole process can even be longer when claimants count on an NCA's finding of infringement to bring a follow-on action.

The first results are nevertheless encouraging. Several studies showed that the number of damages actions before national courts has significantly increased after the Proposal for the Directive's adoption. According to the EC, the cumulative number of cases by date of first judgement rose from approximately 50 at the beginning of 2014 to 239 in 2019 in thirteen MS, whereas this type of proceedings was concentrated in only three MS before. It concludes from the evidence provided that the piece of legislation has enhanced the awareness of victims of their right to claim damages in case of a breach of EU competition law.[68] These findings shed light on the importance of informing EU citizens of their rights, and the adoption of a legislative instrument can be an effective tool to achieve that. The training

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[65] Marios C Iacovides, "Article 17(3) of the Damages Directive and the interaction between the Swedish Competition Authority and Swedish courts", in *EU Competition Litigation, Transposition and First Experiences of the New Regime*, ed. Magnus Strand et al. (Oxford: Hart Publishing, 2019), 218-220.

[66] EC, *EC staff working document, Practical Guide on Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty of the Functioning of the European Union (SWD(2013) 205),* June 11, 2013, https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf.

[67] EC, *EC staff working document on the implementation of Directive 2014/104/EU on 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 (SWD(2020) 338 final),* December 14, 2020, https://ec.europa.eu/competition/antitrust/actionsdamages/report_on_damages_directive_implementation.pdf.

[68] *Ibidem*, 4.

of judges is important, but victims of breach of EU competition law or of State aid law should be conscious of their legal possibilities. In this regard, it is worth noting that Regulation 1/2003 already mentioned the possibility for victims of infringement to be awarded damages by national courts in its Recital 7. On the contrary, there is no explicit reference to the granting of damages in Regulation 2015/1589.

B. Building blocks for a tailored remedial State aid damages framework

We will now analyse whether it is possible to adapt the Damages Directive provisions in the field of State aid law in order to reduce the three identified obstacles, i.e. the burden of proof of the existence of State aid, the causal link, and the quantification of the damage. We will see that a legislative instrument limited to this does not seem sufficient. We will therefore examine the additional establishment of national State aid authorities (NSAAs), which would operate in full complementarity with the other proposed provisions. But, before we do all that, it is necessary to look at the legal basis for our proposals.

a. Legal basis

Legislative action at the EU level requires a Treaty basis. The first one that comes to mind is Article 109 TFEU, stating that "[t]he Council, on a proposal from the EC and after consulting the European Parliament (EP), may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure". A parallel can be drawn with Article 103 TFEU, which served as the co-basis for the adoption of the Damages Directive. It provides for the adoption of "appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 [TFEU]". Those two articles differ, however, on two points. First, Article 103 TFEU obliges the Council to act ("shall"), whereas Article 109 TFEU only authorises it to do so. An obligation was not considered necessary for Article 109 TFEU since Articles 107 and 108 TFEU contain relatively complete substantial and procedural rules.[69] Second, and more importantly, the authorisation of Article 109 TFEU is limited to regulations. The latter makes any secondary legislation

[69] Franz-Jürgen Säcker and Frank Montag, *European State aid law: A commentary* (München: C.H. Beck – Hart Publishing – Nomos, 2016), 1663.

project a little more complicated. From a political point of view, hoping for the approval of a qualified majority of the Council to enact a regulation addressing all the obstacles to obtaining damages that we have mentioned seems at present difficult to envisage. This is particularly true when one accounts for the compromises the EC had to make to pass the Damages Directive, facing questions and concerns about the necessity or effectiveness of private enforcement of competition law, the interference in the MS' domestic legal systems, their fragmentation, and the lack of EU competence with respect to national procedural rules.[70] This led to narrowing the scope of the legislative instrument. Enacting a regulation instead of a directive would further reduce MS' room for manoeuvre. This requires that fairly precise provisions be agreed during the legislative process, and that MS accept to give up more of their national procedural autonomy, which currently seems complicated. In this respect, we would like to point out that neither Article 19(1) TEU ("[…] MS shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law") nor the principle of national procedural autonomy should be understood as precluding the adoption of secondary EU law on private enforcement-related matters. According to Wilman, the principle applies only in the absence of (specific) EU rules on these matters, and these matters do not fall within a domain reserved for MS. Hence, any "autonomy" would be a consequence of inactivity on the side of the EU legislature in relation to the private enforcement of EU law, and the EU can in principle adopt secondary law on these matters provided that there is a sufficient legal basis.[71] Finally, knowing that the Directive only covers damages claims brought against undertakings and associations of undertakings,[72] one can expect even stronger opposition from MS in the State aid law area, regardless of the nature of the proposed legislative instrument.

Therefore, one might think of the other legal co-basis used to enact the Damages Directive, Article 114 TFEU. This provision enables the EP and the Council to act in accordance with the ordinary legislative procedure for internal market purposes. The EC used it as a complementary legal

[70] Truli, "Will its provisions", 300.

[71] Folkert G. Wilman, "The end of the absence? The growing body of EU legislation on private enforcement and the main remedies it provides for", *Common Market Law Review* 53, no. 4 (2016): 892, 928. See also Judgment of 16 December 1976, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftkammer für das Saarland*, Case 33/76, EU:C:1976:188, paragraph 5.

[72] Directive 2014/104/EU, Article 1.

basis given the uneven level of protection existing for victims' rights to compensation in the various MS.[73] According to Recital 8 of the Damages Directive, "[…] This uneven enforcement of the right to compensation in Union law may result not only in a competitive advantage for some undertakings which have infringed Article 101 or 102 TFEU but also in a disincentive to the exercise of the rights of establishment and provision of goods or services in those MS where the right to compensation is enforced more effectively. As the difference in the liability regimes applicable in the MS may negatively affect both competition and the proper functioning of the internal market, it is appropriate to base this Directive on the dual legal bases of Article 103 and 114 TFEU". Reading this, it looks like the enforcement of competition law is only linked to Article 103 TFEU, and the internal market (and thus Article 114 TFEU) requires passing through the freedoms of movement. In fact, the EC artificially splits competition law and the proper functioning of the internal market, whereas the former is a condition (along with the freedoms of movement) of the latter.[74] This can be seen in *Tobacco Advertising I*, according to which a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms *or* of distortions of competition is in itself insufficient for the EU to act under Article 114 TFEU.[75] In that case, after holding that the Community legislature cannot rely on the free movement of products and services to adopt the alleged unlawful Directive under [114 TFEU], the CJEU goes on to say it is necessary to verify whether the alleged unlawful directive actually contributes to eliminate appreciable distortions of competition.[76] In our opinion, a State aid damages directive would be such a directive. MS still make many mistakes in the design and implementation of aid schemes, which can lead to significant distortions of competition. It could be argued that increasing the attractivity of damages

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[73] Barry J Rodger, Miguel Sousa Ferro and Francisco Marcos, *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford: Oxford University Press, 2018), 29.

[74] This way of presenting things can perhaps be explained in light of the legislative procedure used. As Wilman explains, the EP had long insisted on being involved as a co-legislator with the Council. Under Article 103 TFEU, the EP has only a consultative role. Hence, adding Article 114 TFEU as a co-basis provided a justification for using the ordinary legislative procedure. See Folkert G. Wilman, *Private Enforcement of EU Law before National Courts: The EU Legislative Framework* (Cheltenham: Edward Elgar Publishing, 2015), 225.

[75] Judgment of 5 October 2000, *Federal Republic of Germany v. European Parliament and Council of the European Union* (*Tobacco Advertising I*), C-376/98, EU:C:2000:544, paragraph 84.

[76] *Ibidem*, paragraph 108.

claims would act as a strong deterrent to the misapplication of State aid rules by MS. In addition, it would help the EC to detect cases that have not been noticed. Therefore, such a directive would make a real contribution to eliminating appreciable distortions of competition.

However, if the Treaties contain a more specific provision that is capable of constituting the legal basis for the measure in question, the measure must be founded on that provision.[77] Hence, it is not possible to circumvent Article 109 TFEU through Article 114 TFEU in order to issue a State aid damages directive instead of a regulation.[78] This makes the task of envisaging a (at least more) harmonised damages actions framework more complicated, but not impossible. In fact, a regulation might even be more appropriate. Where harmonisation by regulation seems politically impossible at present, it can also take place through other mechanisms, more or less coercive, which we will consider where appropriate.

b. Infringement of Article 108(3) TFEU

The first obstacle for damages claimants to overcome is to prove the existence of unlawful State aid. Could the provisions of Directive 2014/104 make it easier?

A similar provision to Article 5 of the Damages Directive on disclosure of evidence might not be so effective in practice, due to its wording and conditions. Andersson points out several elements which give great discretion to national judges and pose the risk that some national courts may tend to interpret the new rules in light of their (potentially more stringent) legal culture. First, MS must ensure that national courts are *able* to order the disclosure of relevant evidence. There is no obligation upon national judges to do so. Second, the organisation of pre-trial disclosure has been left outside the scope of Article 5. Third, the requirement to present "reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim" may, as it is framed, discourage some victims from initiating legal proceedings and may be interpreted

[77] Judgment of 12 February 2015, *European Parliament v. Council of the European Union*, C-48/14, EU:C:2015:91, paragraph 36.

[78] It would be possible to use Article 114 TFEU as a co-basis if the legislative instrument goes beyond the application of Articles 107 and 108, e.g. if it extends to horizontal legal relationships or if the EC finds a way to present freedoms of movement as an equally important goal of the proposal (which seems unlikely). However, even then, Article 109 being a co-basis, it should remain a regulation unless provisions based on Article 114 TFEU are isolated and adopted in a directive, which would make no sense.

in various ways by national courts. Fourth, the relevant categories of evidence must be circumscribed as precisely and as narrowly as possible on the basis of reasonable available facts. Again, this leaves a broad margin of discretion to national courts and may discourage victims that do not know which documents to request. Finally, national courts are requested to carry out a proportionality assessment under Article 5(3). This is appropriate and necessary but, once more, national courts are left with a certain room for manoeuvre.[79] Consequently, one could wonder how to transpose Article 5 into the State aid area without replicating the potential obstacles for claimants. The least one can say is that it does not seem possible to eliminate all of them. Indeed, the needs for the victim to present justification containing reasonably available facts and evidence and for the courts to carry out a proportionality assessment are totally legitimate. They prevent "fishing expeditions", i.e., non-specific or overly broad searches for information that is unlikely to be relevant in the proceedings.[80]

Despite this, a comparable provision in a damages regulation in the field of State aid would be beneficial. In our view, it has real added value compared to the *Boiron* case law, especially regarding the categories of evidence and evidence containing confidential information, which are not always provided for in national procedural law. Of course, the Damages Directive safeguards would also exist in the State aid regulation, which would leave national judges a large room for manoeuvre. Harmonisation will not be fully achieved, as national legal traditions will surely influence the way the safeguards are interpreted. However, adopting such a provision is to set in motion a process favourable to claimants that can be reinforced through other mechanisms, such as training provided by the EC or questions to the CJEU on its interpretation. As regards the nature of the legislative instrument containing this provision, a regulation appears to be entirely appropriate. This is evidenced by the (almost) literal implementation of Article 5 of the Damages Directive in most of the MS.[81]

We can now turn to Articles 6 and 7 of Directive 2014/104/EU, which concern the disclosure of evidence by NCAs. If such authorities are established in the field of State aid (see III.B.e), so should the ability for national

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[79] Helene Andersson, "The quest for evidence – Still an uphill battle for cartel victims?", in *EU Competition Litigation, Transposition and First Experiences of the New Regime*, ed. Magnus Strand et al. (Oxford: Hart Publishing, 2019), 137-138.

[80] Directive 2014/104/EU, Recital 23.

[81] EC, *EC staff working document on the implementation of Directive 2014/104/EU*, 6.

courts to order the disclosure of evidence included in their file. NSAAs could not play a similar role to the EC at the national level, given the exclusive competence of the European institution to assess the compatibility of State aid measures. Even without leniency programmes in the State aid area, the protection of confidential information, including business secrets, should also be ensured, especially since the undertakings are not responsible for the breach of Article 108(3). Moreover, the residual nature of this tool should be maintained so as not to directly overload the authorities. Replicating these ideas in a regulation makes sense, since they are deeply linked to those expressed in Article 5 of the Damages Directive.

Finally, equivalent provisions to Articles 9 of the Damages Directive and 16 of the Regulation 1/2003 could be helpful in determining the State aid nature of a measure. As we previously wrote, Article 16 of Regulation 1/2003 can be compared to *Lufthansa* in State aid law. Hence, its transposition in a future State aid regulation is not necessary since it is already applicable law. Moreover, it has been included in the 2021 EC Notice. But it would centralise all important rules facilitating claims for damages and may add legitimacy to the deference required from national judges to the European institution, as MS would formally approve this rule through the qualified majority of the Council. On the other hand, a provision building on Article 9 of the Damages Directive would create a completely new tool for damages claimants. Obviously, given the exclusive competence of the EC regarding the compatibility assessment, the idea contained in Article 9 must be completely readapted to State aid law. Where the national authorities issue non-binding opinions on the compatibility of the aid (as already is the case in several countries)[82] or simply pronounce on the State aid nature of the measure, the statement about the existence of State aid could be binding for national courts. This would relieve claimants from the burden of proving the existence of State aid and would allow courts to rely on a specialised authority. However, it is important to note that, as is the case when the EC gets involved, national courts could not stay proceedings pending an opinion from the national authorities. This mechanism is therefore only possible if the national authority has already pronounced itself. It may be more politically sensitive to enshrine such a rule in a regulation. One thinks directly of the outcry from some specialists over the *Lufthansa* case, and in particular the argument of loss of independence

[82] EC, *Study on the Enforcement of State Aid Rules*, 106.

of judges, which may seem even more disturbing in relation to national rather than European authorities. However, the opposition was directed at the binding nature of decisions to initiate a formal investigation and thus *non-final* decisions. Here, deference to the NSAAs would be limited to their final findings of the existence of State aid. Lack of information or time for scrutiny would not be part of the equation, contrary to the EC's decisions to initiate formal proceedings.

In short, it is possible to reduce the burden of proof on the claimant as regards the existence of State aid through a coherent set of provisions enshrined in a regulation. These would make the ability for national judges to order the disclosure of evidence mandatory provided that conditions preventing abuse are respected. Such disclosure could first be ordered to defendants or third parties, and residually to NSAAs. The regulation would specify that it also covers categories of evidence and evidence containing confidential information. Finally, it would contain a section on the binding nature of the EC and the NSAAs decisions for national courts regarding the existence of State aid. In it, it would codify *Lufthansa* and establish the binding character of final findings of the national authorities.

c. Causal link

The Damages Directive does not really address the issue of causality, which remains in the hands of the MS. Recently, the CJEU has nevertheless limited the procedural autonomy of MS relating to the causal link in EU competition cases such as *Kone*[83] or *Otis*[84], in the name of the principle of effectiveness. From this, it would appear that national law is incompatible with EU law where the causal link is automatically regarded as broken in some circumstances.

According to Butorac Malnar, in *Kone*, the CJEU required national courts to apply a different standard of causation, but left them almost without guidance.[85] The reasoning adopted by Advocate General (AG) Kokott in her opinion, and not followed by the CJEU, is perceived by the author as a better one. The AG raised the issue of the standard of causation at the EU

[83] Judgment of 5 June 2014, *Kone AG and Others v. ÖBB-Infrastruktur AG*, C-557/12, EU:C:2014:1317.
[84] Judgment of 12 December 2019, *Otis GmbH and Others v. Land Oberösterreich and Others*, C-435/18, EU:C:2019:1069.
[85] Vlatka Butorac Malnar, "The Kone case: A missed opportunity to put the standard of causation under the umbrella of the EU", in *EU Competition and State Aid Rules: Public and Private Enforcement*, ed. Vesna Tomljenović et al. (Berlin Heidelberg: Springer-Verlag, 2017), 189.

level, stating that only the *details* of application of claims to compensation and the *rules* for their actual enforcement should be dictated by national law. Concretely, it covers jurisdiction, procedure, time limits and the furnishing of proof. Causation, on the other hand, is a condition for the *existence* of claims and cannot be left to the legal orders of the MS alone.[86] Following that statement, AG Kokott determines the EU law conditions applicable to the establishment of a causal link. The proposed standard of causation is a "sufficiently direct causal nexus" between the harmful conduct and the loss suffered, as is used for non-contractual liability of EU institutions under Article 340 TFEU. She goes further and recommends that, for the sake of consistency, that same criterion be applied to all other cases involving damages claims for breach of EU law, irrespective of whether such claims are brought by individuals against MS or between private parties.[87] This proposal is of great significance for this article. The suggested causation criterion would also apply to State aid damages claims against MS. It remains to be seen whether the harmonised standard would be beneficial to claimants. In this regard, the AG clarifies the meaning of a sufficiently direct causal link. First, it should not be understood as a single causal link, but rather as a *contributory* clause. Second, a person who has acted unlawfully is liable only for reasonably foreseeable loss, where the compensation of which is consistent with the objectives of the infringed provision of law.[88] These criteria could be valuable for claimants in the State aid field, since it would be established that the existence of exogenous factors cannot in itself remove the causal link.

However, expecting the Council to legislate voluntarily on the causation standard, which goes to the heart of the legal tradition of MS, is utopian at present. Nor does the harmonisation seem likely to come from the CJEU, which for the time being responds in an *ad hoc* manner to references for preliminary rulings. Finally, it is not within the EC's competence to solve the issue through soft law. The obstacle of causality therefore persists at the moment.

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[86] Opinion of Advocate General Kokott delivered on 30 January 2014, *Kone AG and Others v. ÖBB-Infrastruktur AG*, C-557/12, EU:C:2014:45, paragraphs 23 and 28.

[87] *Ibidem*, paragraph 34.

[88] *Ibidem*, paragraphs 36-40.

d. Quantification of the damage

Article 17(1) of the Damages Directive obliges MS to ensure the power of national courts to estimate the harm suffered, when the latter is established. Once again, the condition for estimation, i.e. the precise quantification being "practically impossible or excessively difficult", leaves a significant margin of discretion for national courts. It has nevertheless the advantage of making this power mandatory, whereas the 2021 Notice only approves the use of reasonable estimates by national courts where national procedural rules allow it. Thus, a provision on this issue would be welcomed in a possible new State aid regulation.

Taking inspiration from Article 17(3) could also be beneficial. Except for the nominal group "national competition authority", which may need to be changed, the wording of the provision is in our view satisfactory. It finds a right balance between the potential assistance that a specialised authority can provide to a non-specialised national court and the possibility for the authority to decline such a task to concentrate on its main function of advising MS. In case national authorities would consider their assistance not to be appropriate, there is still the possibility for national courts to use the cooperation tools foreseen under Article 29 of Regulation 2015/1589. The interest in allowing NSAAs to assist national courts with respect to the determination of the quantum of the damages is at least twofold. Firstly, if the national authority, unlike the EC, has already dealt with the measure because it has issued an opinion on it, it is likely to take less time to assist the national court in quantifying the damage. Furthermore, if the national court has ordered disclosure of evidence to the national authority, it might be easier for the former to stick to one channel of communication, with one authority. Secondly, the assistance provided by national authorities might go further than that of the EC. Indeed, in its 2009 Notice, the EC specified that it would limit itself to providing the national court with the factual information or the economic legal clarification sought, without considering the merits of the case pending before the national court.[89] The wording of Article 17(3) of the Damages Directive does not seem to limit national authorities in the same way. It should nonetheless be noted that the European institution did not explicitly exclude the merits of the case from its considerations in the 2021 Notice.[90] Thus, it either considered this

[89] EC, *2009 Notice*, paragraph 93.

[90] EC, *2021 Notice*, paragraph 117.

to be self-evident or is deliberately opening new avenues for itself. Future practice will tell.

As we already wrote, more detailed guidance on economic approaches was issued in the non-binding Practical Guide on Quantifying Harm. Part 4 of the Practical Guide focuses on quantification of harm from exclusionary practices and may be used by analogy in the area of State aid cases.[91] However, transposing calculation methods from one context to another can complicate the court's task. Ideally, the EC should publish a specific guide in the State aid field.

To sum up, the proposed regulation should contain a section on the quantification of harm, in which it would be stated that national courts can estimate the damage already established and receive assistance from NSAAs when the latter consider it appropriate. In addition, the EC should publish a guide describing specific calculation methods and giving concrete examples in the field of State aid.

e. Specialised national authorities

The harmonisation of the State aid remedial framework that is currently feasible is likely to be partial and not always effective. Hence, it is worth going back to the roots of the problem and try to prevent the illegal granting of aid. In this regard, Colombo reviews the instruments of administrative integration the EC has put in place in order to counterbalance the decentralisation carried out under the 2012 State Aid Modernisation (SAM) reform,[92] which is synonymous with more State aid errors. These are numerous and include the Notice on the notion of State aid, top-down integration whereby the EC organises working groups with national representatives, newsletters and databases providing informal guidance, transnational cooperation across MS through the SAM working groups organised by national experts, or even bilateral partnerships between the EC and national authorities. However, the results are unsatisfactory, leading to a pattern of integration at variable speeds. Interestingly, for Colombo, the use of soft instruments to secure uniform execution of supranational rules may be hampered by national administrations' lack of cooperation.[93] In our view, the next step is to impose NSAAs through State aid regulation.

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[91] Goyder and Dons, "Damages claims", 425.

[92] Carlo Maria Colombo, "State aid control in the modernisation era: Moving towards a differentiated administrative integration?", *European Law Journal* 25, no. 3 (2019): 292-316.

[93] *Ibidem*, 316.

Some authors have already been advocating for change, either by giving a role to the NCAs[94] or by creating State aid authorities.[95] The idea of establishing State aid authorities or contact points in order to facilitate the exchange of information and best practices was launched in the 2005 State Aid Action Plan[96] and was supported by respondents of the public consultation on this Plan, but has not been established.[97] Nevertheless, most MS have put State aid coordinating bodies in place, but their organisational set-up and tasks differ per States. State aid coordination can be integrated in the governmental structure, entrusted to the NCA or to an independent monitoring authority. Beyond advocacy and training, their main task is to give non-binding advice to State aid granting authorities on individual State aid measures and State aid policy issues, but they may also issue opinions on State aid measures in some MS.[98] In this respect, the 2019 Study refers to the "screening mechanisms" introduced in a number of MS as a best practice. Such mechanisms work either *ex ante* or *ex post*. In an *ex ante* scheme, the State aid coordinating body provides a non-binding compatibility assessment to the granting authority, anticipating the likely EC substantive decision before the MS notifies the planned measure. In an *ex post* scheme, the State aid coordinating body monitors the compatibility of aid measures already implemented with the GBER, the De Minimis Regulation and the concept of aid, and it can eventually order the recovery of the unlawful aid without an EC decision.[99]

In view of the SAM reform, it appears to us necessary to go further, by ensuring that there is a competent authority for State aid in each MS, with a common set of competences and sufficient resources to perform its functions. We understand the doubts about the neutrality of national agencies

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[94] Alberto Heimler, "State aid control: Recent developments and some remaining challenges", in *EU State Aid Law: Emerging Trends at the National and EU Level*, ed. Pier Luigi Parcu et al. (Cheltenham: Edward Elgar Publishing, 2020), 67-69.

[95] Phedon Nicolaides, "Decentralised state aid control in an enlarged European Union: Feasible, necessary or both?", *World Competition: Law & Economics Review* 26, no. 2 (2003): 263-277.

[96] Commission of the European Communities, *State aid action plan – less and better targeted State aid: A roadmap for State aid reform 2005-2009 (COM(2005) 107 final)*, June 7, 2005, paragraph 53, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0107&from=EN.

[97] Monique Negenman, "A State aid network?", *European Food and Feed Law Review* 6, no. 4 (2011): 621.

[98] *Ibidem*, 623-624.

[99] EC, *Study on the Enforcement of State Aid Rules*, 106. The legality of the *ex post* system of control has been confirmed with the judgement of 5 March 2019, *Esesti Pagar AS v. Ette Ettevõtluse Arendamise Sihtasutus*, Case C-349/17, EU:C:2019:172.

in assessing the compatibility of State aid under EU law. However, here their role would be different, for they would only determine the existence of aid or not, as well as the application of the GBER. As the notion of aid is objective[100] and the GBER contains clear conditions, very little discretion would be left to them. Moreover, experience in the field of data protection has shown that, on several occasions, national independent supervisory authorities[101] have imposed fines on public authorities for failure to comply with European law,[102] which strengthens confidence in such independent authorities. NCAs could be considered, as they are supposed to be independent, they are not engaged to any extent in granting aid, they know about market analysis, and the integration of State aid control with competition protection would allow them to carry out competition policy effectively.[103] But this is not the only option, and existing audit bodies could also be assigned this function.

An interesting proposal is that of Buts, Joris and Jegers. They suggest that all aid plans should be notified to the NCA's State aid department, with four possible outcomes. First, the measure is not State aid and does not need to be notified to the EC. Second, the aid is not State aid as it falls under the De Minimis Regulation. Third, the measure is a State aid covered by the GBER, the EC only needs to be informed *ex posteriori*. Fourth, the measure is a State aid, not covered by the GBER, and thus must be notified to the EC. In their view, when the aid grantor and the NCA disagree, the measure concerned would have to be notified to the EC.[104] This solution would be ideal from the point of view of the legality of aid since, in theory, no more aid could be granted by the State without notification to the EC if the slightest doubt exists for the authority. An alternative that is less intrusive on MS' freedom and therefore perhaps easier to introduce in an EU regulation would be that granting authorities have to notify all

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[100] Judgment of 27 January 1998, *Ladbroke Racing Ltd v. Commission of the European Communities*, T-67/94, EU:T:1998:7.

[101] When they were given the possibility by their national law, according to Article 83(7) of the General Data Protection Regulation.

[102] See, e.g., the Dutch Supervisory Authority for Data Protection's decision of 25 November 2021 fining the Minister of Finance EUR 2,75 million, available at the GDPR Enforcement Tracker, https://www.enforcementtracker.com/ETid-946.

[103] Lech Bieguński, "Forms of State aid authorities in associated countries of Central and Eastern Europe", *European State Aid Law Quarterly* 11, no. 3 (2012): 569-570.

[104] Caroline Buts, Tony Joris and Marc Jegers, "State aid policy in the EU Member States. It's a different game they play", *European State Aid Law Quarterly* 12, no. 3 (2013): 337-338.

aid plans and wait for the NSAA's opinion, but are not bound by the latter. For example, the aid provider would still be able to grant the aid even if the NSAA considers that the conditions for falling under the GBER or the De Minimis Regulation are not met, but at its own risk. The NSAA would keep a register of all notifications of State aid[105] and the attached opinions, which the EC could consult in order to better target its *ex post* control. Moreover, the State aid version of Article 9 of the Damages Directive could dissuade the granting authority from departing from the NSAA's view, since the State aid nature of the measure would be binding on the national court. If it is a question of *de minimis* aid, the step of proving infringement is already completed for the claimant. If it concerns aid allegedly exempted, the court should also apply the conditions of the GBER to determine whether the aid was indeed covered. In this context, it could order the NSAA to disclose evidence following the State aid version of Article 6 of the Damages Directive. Of course, the claimant has yet to prove the causal link and the quantification of the damage, but the national court may still call upon the NSAA to disclose evidence or help quantify the damage via the rules inspired by Articles 6 and 17 of the Damages Directive.

Public and private enforcement of State aid law go together, the latter reinforcing the former. It therefore seems sensible to bring together the provisions on NSAAs and courts in the same regulation, which would target a better enforcement of State aid rules at national level. The legislative instrument would cover the prevention of State aid law infringements in a first chapter dedicated to the establishment of NSAAs and their competences. The second part would concern the proceedings before national courts and would contain (at least) the provisions we have previously proposed. As a result, the connections between prevention and compensation would clearly appear to claimants, as well as MS.

IV. Conclusion

This article sought to find inspiration from the Damages Directive in order to enhance the situation of State aid damages claimants. The latter suffer from the difficulty to prove the conditions of the MS liability in State aid cases, i.e. the infringement of Article 108(3) TFEU to some extent, and particularly the damage suffered, its quantification and the causal link between this damage and the breach of State aid law. The conditions of

[105] *Ibidem*, 338.

liability for breach of EU antitrust law mirror these, the only difference being the infringement of Articles 101 or 102 TFEU. Accordingly, we analysed the provisions relating to these elements in Directive 2014/104.

The outcome is not completely satisfactory. Aiming at respecting national procedural autonomy, the Damages Directive does not seem to tackle the three conditions of liability in a very effective way. Most provisions set vague goals, and unless MS have gone further and added guidance for the courts, the latter enjoy room for manoeuvre, which could lead to traditional and potentially defendant friendly interpretation. However, we cannot deny that the Damages Directive has tangible impact when we look at the figures of damages actions. This does not mean that the claims will be successful, but it is exciting to see victims gaining awareness of their rights, and/or maybe feeling more hopeful about the outcome of their case. In our opinion, the best way to help State aid damages claimants is to attempt to prevent the granting of illegal aid, while being aware that it could still happen and thus create a link between the control phase and the possible litigation phase. On the one hand, the threat for the MS to pay damages reinforces the weight of the monitoring body's opinion, and thus reduces the risk of unlawful aid.[106] On the other hand, the possible role of the monitoring authority before the national court has the potential to facilitate the legal position of the damages claimant. Hence, we suggested some building blocks for future regulatory action that can hopefully stimulate legislative debate in years to come!

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[106] Without this threat, faced with an incompatible aid, the EC only orders the recovery of the unlawful aid and of the interests from the beneficiary to the MS, which is hardly a deterrent. Another option is that recovered State aid should go into the EU budget. See Buts, Joris and Jegers, "State aid policy", 340.

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