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State aid & National enforcement

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

STATE AID, STATE AID (NOTION), STATE AID RECOVERY, FOREWORD, PRINCIPLE OF EFFECTIVENESS, JUDICIAL REVIEW, STATE AID (NOTIFICATION), STATE AID (NEW), STATE AID COMPATIBILITY, LIMITATION PERIOD / PRESCRIPTION, STATE AID SCHEME, STATE AID (NATIONAL ENFORCEMENT)

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A. Introduction

[1] [2]

It is settled EU case-law that the European Commission ("Commission") and national courts have distinct, but complementary, roles in State aid matters: [3] with the Commission, lies the exclusive substantive assessment (the control of the compatibility of State aid with the internal market); with the national courts, lies the protection of the subjective rights of third parties affected by unlawful aid (i.e., to simplify, not-notified aid and not covered by a group exemption) by ensuring the dual obligation a prior notification and standstill obligation by Member States with a view to allowing the Commission to fully exercise its exclusive competence. [4]

The Commission's powers and obligations are guided by, among others, the principle of effectiveness. In line with that principle, the Commission has very broad powers under Article 108(2) and (3) TFEU. As early as 1973, in *Commission v. Germany* [5], the EU case-law held that, when the Commission finds an unlawful aid to be incompatible with the internal market, the Commission has the faculty to decide that the Member State concerned should abolish or alter the aid, which may include an obligation of recovery on behalf of the Member State concerned. In 1999, the State aid Procedural Regulation converted this into a legal obligation for the Commission. [6]

The Commission cannot act as effectively on its own. The national courts therefore have a key role in the process of recovering unlawful aid. [7] Once seized either by the Member State following a Commission decision or by a third party affected by the unlawful grant of an aid, the national court also has extensive obligations with regard to unlawful aid recovery. National courts have in fact more powers than the Commission in that case since, unlike the Commission, they do not have to make any prior assessment of the compatibility of the aid with

the internal market, and must limit themselves to the unlawfulness of the aid in order to order its cessation and recovery or any other appropriate measure to restore competition distorted by this unlawfulness. By way of example, in *Residex*, [*8*] the national court has jurisdiction to cancel a public guarantee not provided under normal market conditions and to ensure aid recovery and, to that end, cancel the guarantee if that cancellation is such as to lead to or facilitate the restoration of the competitive situation which existed before that guarantee was provided.

Between 2020 and 2022, national and EU courts have issued a number of interesting judgments regarding national enforcement of State aid. Of course, State aid has undergone a major upheaval in the last two years with, on the one hand, the specific interpretative guidance provided by the Commission in the context of the Covid-19 Temporary Framework, from March 2020 until June 2022 [*9*], and, on the other hand, a massive granting of aid, partly financed by the EU, with the recovery plan. However, as far as the control of State aid by national courts is concerned, the years 2020 and 2022 do not suggest a revolution (indeed, it should be underscored that not anyone case, strangely enough (to the best of our knowledge), was ever brought before a national court in 2020-2022 alleging any unlawful aid in the implementation of Covid-19 cases). In the absence of a revolution, trends and movements in the evolution of national State aid implementation are taking place in small steps, clarifying certain points and consolidating solutions.

The recent case-law shows a great diversity of aid mechanisms, national means of recovery and types of litigation, illustrating that, partly because the lack of EU legislative harmonisation, national specificities persist with the risk of potential divergencies. At the same time, recurrent EU cases are becoming familiar to researchers and State aid practitioners. The names of *CELF*, Spanish *TDT*, *Fallimento TDM* have become, beyond the *SFEI* case and other 90s' cases, a familiar sight in national case-law. The last two years are no exception to this trend.

B. National enforcement: national courts have well understood their role

National authorities have primary responsibilities in the implementation of State aid law. Upstream, they are obliged to notify State aid that meets the conditions of Article 107(1) TFEU. Following a Commission decision, they must ensure that the granting of the aid corresponds to the decision. In the absence of compliance with the notification procedure, it is up to the national authorities either to recover the unlawful and incompatible aid, even in the absence of any final Commission decision, [*10*] or to recover it in execution of a Commission decision.

Similarly (they are part of Member States!), national courts have a fundamental role in State aid litigation. Their jurisdiction is based on the direct effect of the last sentence of Article 108(3) TFEU, [*11*] which prohibits States from putting aid into effect before the Commission has ruled on its compatibility (*standstill* obligation). The national court is exclusively competent to deal with unlawful aid. It is responsible for protecting the rights which undertakings - in particular competitors of the aid recipient - derive from the direct effect of Article 108(3) TFEU and for safeguarding those rights where unlawful aid is granted. [*12*] In order to perform its function of safeguarding the rights of individuals who have been harmed by the granting of unlawful aid, the national court has a number of powers which have been recognised by the EU case-law and which are synthesised by Commission interpretative communications updated (from 2007 and 2009 notices) in July 2019 and 2021. [*13*] National court is seised mainly on two counts: either to have an aid payment recognised as unlawful State aid in order to draw all the consequences thereof, or to rule on the lawfulness of aid recovery measures. In order to carry out this duality of litigation, it is required, in particular, to qualify the contested aid measure, take interim measures, exchange views with the Commission, order the recovery of aid on the administration or the

repayment of a tax, ensure the effectiveness of the recovery by ruling out appeals against national recovery measures, engage the liability of the State for the granting of unlawful aid or its recovery, and engage the liability (under national liability law) of the beneficiary at the request of the competitor or any affected third party. [*14*]

Some clarifications on aid control by national courts

Decisions on the division of competences between national courts and the Commission have become less frequent in recent years as the respective roles are well understood and assimilated. Some clarifications are sometimes necessary and this is what the Italian Supreme Court provided. [*15*] The Italian Council of State was criticised for having interpreted the criteria for State aid. The Italian Supreme Court replied that the Council of State had merely established the existence of aid, without ruling on the compatibility of the aid. In so doing, it did not exceed its powers.

It is clear from State aid law that the date on which aid is granted is the date on which the right to the aid is conferred on the beneficiary, regardless of when the application is made or the advantage is actually received. The actual transfer of State resources is therefore not decisive for the characterisation of aid. It is the right to receive the aid that triggers the notification obligation. [*16*]

This issue of temporality and timing of aid was also at the heart of a dispute before the Polish courts.[*17*] It was a question of corporate tax exemption. The aid was spread over several years until the undertaking obtained the maximum amount of aid. One beneficiary requested that the expiry date be extended so that it could use the maximum amount of aid available. The administration refused on the grounds that this would increase the amount of aid granted. The Polish judge, in an interesting argument, annulled the decision by distinguishing between the granting of aid and the use of the aid. The postponement of the expiry of the time limit does not change the maximum amount that can be granted, which was previously established, but extends the period of use.

A State aid qualification often established by the dialogue of judges

The classification of State aid is part of the essential task of national courts faced with a dispute. While they have taken on board the various criteria set out in Article 107(1) TFEU, some situations are so complex that they require interpretation by the Court of Justice through the preliminary ruling procedure. Over the period 2020-2022, this mechanism has again made it possible to clarify the control of State aid and its classification.

The Court ruled in particular that an aid scheme in which a private body, approved by the State, receives compensation for treating waste and pays subsidies to economic operators does not constitute State aid insofar as these subsidies were not constantly under public control. [*18*]

It also indicated to a referring Italian court that compensation to farmers who were forced to slaughter infected animals must be notified if it is not covered by any exemption or de minimis regulation. [*19*]

The Court also provided clarification on the application of the de minimis Regulation by national authorities. An undertaking may renounce previous aid or request a reduction in aid in order not to exceed the ceiling of €200,000 over three tax years. The Member State is not obliged to accept these modifications and it is up to the national courts to assess the consequences of the absence of the possibility for undertakings to adjust previous aid prior to the granting of de minimis aid, in order to respect the ceiling.

Ruling on aid qualification, a Spanish court ruled on the exemption from the tax on environmental damage caused by large-scale retail outlets, introduced in Aragon. [*20*] This decision followed a preliminary ruling [*21*] in which the Court considered that the exemption of surfaces smaller than 500 m2 and certain sectors of activity did not constitute aid if it was justified by environmental objectives. The Spanish judge assessed the measure and considered that it did not constitute State aid.

In another case, the Spanish judge made a more questionable decision. It concerned the qualification of a property tax exemption on military land made available by the State to a military shipbuilding company. The company in question challenged the refusal of the exemption, which the Spanish judges in first instance, following a preliminary reference, [*22*] had upheld. However, the Supreme Court considered that the Court of Justice had not taken into account all the elements to qualify the exemption as aid and annulled the decision of the Supreme Court of Aragon which considered the exemption as unlawful aid. [*23*]

In a more orthodox ruling, concerning the same scheme in Catalonia, the Supreme Court rejected the appeal in cassation, notably on the grounds that taxpayers cannot use the argument that a tax measure benefiting other companies constitutes State aid to avoid paying the tax. [*24*]

The Portuguese Supreme Court, on the other hand, challenged a lower court decision in order to ensure uniformity in the interpretation of EU law. [*25*] At issue was the interpretation of the conditions for the compatibility of aid decided by the Commission and in particular the terms “undertaking” and “establishment”. For the Portuguese Supreme Court, in the context of the compatibility decision, these terms must be understood as equivalent.

Increasingly controlled recovery conditions

For a long time now, the role of national authorities and national courts in the implementation of State aid law has been well known. Claimants, judges and administrations have mastered their office in the context of recovery. The national courts are responsible for dealing with requests for unlawful aid recovery and requests for the annulment of the national recovery procedure. In the last two years, national courts have dealt with two types of cases.

National court enforcing Commission recovery decisions

Firstly, as regards the challenge of national recovery decisions, several judgments show that the courts have understood their role as guarantor of the execution of the recovery decision by rejecting the arguments put forward by the beneficiaries in support of their challenge of the recovery measure. The General Court and the Court of Justice also rejected arguments against the Commission’s recovery decisions: legitimate expectations, legal certainty, scope of the recovery, etc. [*26*]

The German Federal Court of Justice has rejected the invocation of the constitutional principle of equality in order to preserve the effectiveness of a recovery decision. [*27*] In this case, and in a decision clearly recalling the role of the national court in the recovery procedure, the German Court thus rightly gives precedence to the effectiveness of the recovery over a constitutional rule.

Moreover, the Italian Supreme Court’s judgment of 20 November 2020 is of obvious interest. [*28*] It shows an original and interesting practice of enforcement of the Commission’s recovery decisions, since, in this case, recovery is carried out by means of *ad hoc* legislation providing for financial penalties against recalcitrant

beneficiaries. This empowerment of the beneficiary in the recovery procedure was challenged because penalties were contested by beneficiaries who refused to repay the aid. The Supreme Court decided to annul the decision of the Regional Court of Piedmont which had annulled the penalties and ordered the aid recovery. For the Italian High Court, the annulment of the penalties called into question the recovery decision. The *ad hoc* legislation, as well as the Supreme Court's decision, show that the national legal orders have taken on board their obligation to take all necessary measures to recover unlawful and incompatible aid.

Finally, the Administrative Court of Appeal of Nancy rejected the national statute of limitations that prevented recovery. [*29*] The five-year period is considered too short to allow recovery, especially since the exhaustion of the period is linked to the delay of the national authorities in executing the recovery decision. Contrary to past case-law, the French judge no longer relies on the ten-year period, which is specific to the Commission [*30*] . This judgment rightly takes up and integrates the contribution of the *Esti Pagar* [*31*] and *Nelson Antunes da Cunha* [*32*] judgments.

It is increasingly common for national courts to ask the Court of Justice to interpret Commission recovery decisions. In a case concerning aid from the UK in the form of a company tax scheme in Gibraltar, the Court, when asked by a national court, clarified that national authorities may apply a national provision providing for a mechanism for setting off taxes paid by the beneficiary abroad against those payable in Gibraltar, in order to avoid double taxation. [*33*]

In a rather original case, where the Court was asked by a French judge to interpret a Commission decision as to the extent of the recovery required, the Court found the decision invalid. [*34*] The Commission erred in law in classifying a reduction in employee contributions as a selective advantage. This invalidation has consequences for the recovery since the referring French court annulled the national recovery acts and order the sums already recovered to be restituted to the employers. [*35*]

The Spanish Supreme Court has ruled in the same vein, holding that the invalidation of a Commission recovery decision renders ineffective the procedures initiated by the Member States' authorities to recover the aid. [*36*]

National court enforcing recovery actions brought before it

Secondly, as regards recovery actions before national courts, the last two years have been quite rich.

Firstly, in Spain, the emblematic case of unlawful aid to Digital Terrestrial Television (DTT) has been provisionally resolved. An appeal for the annulment of the agreement containing the unlawful aid had been filed. Following a Commission recovery decision, validated by the Court on preliminary ruling, [*37*] and an infringement condemnation of Spain for non-execution of the recovery decision, [*38*] the Spanish Supreme Court decided to annul the contested agreement in order to put an end to the State aid. However, the issue of recovery has not been settled and will undoubtedly give rise to further litigation.

Secondly, in France, the consequences of the unlawful transport aid granted by the Ile de France region have given rise to interesting decisions. Before the Commission issued a decision on the compatibility of this aid, actions had been brought before the national court and the latter had to take into account the evolution of the legal circumstances. Thus, in a first case, the Council of State annulled the aid recovery but confirmed the recovery of interest on the unlawful aid that had become compatible. [*39*] It specified that the national judge must assess the lawfulness at the date of the decision and not at the date the aid was granted in order to draw the consequences of the compatibility decision.

In a second case, the Council of State draws the consequences of the compatibility of this unlawful aid in the contractual field. [***40***] According to the Council of State, the unlawfulness of the aid does not constitute a sufficiently serious defect for the contract to be set aside. The aid due under the contract must be paid, but only the sums subsequent to the compatibility decision. Before the Commission's compatibility decision, the aid was unlawful and the beneficiary could not claim it.

In the contractual field, the German judge generally takes a more radical position. If the unlawful aid is granted by means of private law contracts, the breach of the notification obligation leads to the nullity of the contract. However, such annulment is not required by EU recovery principles, so the German court prefers a more serious consequence. However, in a recent decision, the German judge interestingly did not annul the entire contract granting unlawful aid but only the provisions in question, thus making it possible to reconcile contractual stability and effective recovery of the aid. [***41***]

Again, regarding this issues of unlawful but compatible aid, the Court has clarified the relationship between its *CELF* case law and Article 106(2) TFEU. [***42***] This provision does not exempt SGEI aid from prior notification. In the event of unlawful aid under Article 108(3) TFEU, all consequences must be drawn. Thus, the recovery of interest linked to the unlawfulness of the aid is required even where the compatibility decision is adopted under Article 106(2) TFEU. In other words, Article 106(2) TFEU does not provide any preferential treatment for SGEIs as regards the notification obligation.

The development of State accountability

For a long time, State accountability remained on the fringes of State aid litigation because it was rarely, if at all, successful. Now, claims for compensation brought by competitors against the State are developing before national courts, mainly in Italy and France.

In Italy, in the famous *Fallimento Traghetti del Mediterraneo* case, the Supreme Court validated the decision of the Court of Appeal to hold the State liable, brought by the competitor of the beneficiary of the unlawful aid, and to order it to pay him €2.3 million. [***43***] This case is particularly interesting because the Italian courts had initially ordered the State to compensate the competitor because of the failure to refer the question of the qualification of the aid for a preliminary ruling. In the end, it is on the basis of the granting of unlawful aid which causes commercial damage to the competitor that the latter is compensated. It should be noted that this decision of the Italian Supreme Court follows a preliminary ruling of the Court of Justice who ruled that aid granted on a market that has not yet been liberalised can qualify as new aid insofar as it is likely to affect trade between Member States. [***44***]

In France, several cases have enabled the national courts to clarify the liability regime resulting from the granting of unlawful aid.

Closing two emblematic cases, *CELF* ***[45]*** and *SNCM* ***[46]***, the Council of State confirmed the compensation, against the French State (represented by the *Collectivité de Corse*), of €10 and €84 million respectively in favor of the competitor of the beneficiary of unlawful aid. In these two decisions, the establishment of the causal link between the unlawful aid and the damage to competitors was facilitated by the duopolistic nature of the markets and by the provision of very detailed expert reports on the shifts in customers and the financial consequences of the aid on the competitor's activity.

In a different situation, the French Court of Cassation logically refused to hold the State liable for refusing to grant unlawful aid. [*47*] In this case, a public company had delayed in setting up an agreement allowing it to receive aid. The loss of an opportunity to benefit from unlawful and incompatible aid is not compensable. [*48*]

Finally, the Council of State has specified the conditions for an original case of State liability: liability for abusive support of an undertaking in difficulty. [*49*] In this case, the representative of an undertaking in difficulty may request that the State be ordered to compensate for the damage caused by the artificial prolongation of the company's activity due to the unlawful aid and therefore the aggravation of its liabilities in three situations: either the aid was granted in violation of the applicable texts (e.g. Article 108(3) TFEU), or, at the time it was granted, the aid was "unlikely to achieve an objective of general interest", or finally, the amount of the aid was unrelated to the pursuit of the objective pursued.

C. What then are challenges that national courts continue to face?

Although developments in the national enforcement of State aid are largely positive, as mentioned above, there are still challenges that need to be addressed.

On the one hand, Brexit has affected the formerly common European approach, as the UK has now enacted the Subsidy Control Act in April 2022. This raises the question of the extent to which this new regime under UK law will actually diverge from existing State aid law and affect the role of UK judges. Of course, this is no longer an issue for EU State aid law (rather international trade between the EU and the UK), but it is interesting to assess how national judges who were still recently "common judges of EU law" will react on the new system.

In addition, the national approach to State aid continues to be a challenge for national judges, as State aid law issues are manifold and the correct implementation of Article 108(3) TFEU may also lead to setting aside national law. The following national case-law shows that the arguments put forward with regard to State aid law are only assessed with restraint by the courts in legal disputes. In the following, the individual problems are evaluated on the basis of recent case-law.

What challenges arise following the Brexit?

Brexit has of course an impact on the previous State aid regime which applied in the UK. Discussions on a new aid regime (which the UK carefully labelled "subsidy") had already begun in February 2021, when the Department for Business, Energy and Industry Strategy first published a consultation paper with proposals for a new subsidy control regime in the UK. Subsidy control was a key issue in the Brexit negotiations. The need for a new aid regime was part of the UK's drive to leave the EU aid regime behind once and for all. The UK promised a new regime to protect British industry and provide the ability to help companies in difficulty. The EU, on the other hand, wanted to ensure that a regime similar to its own State aid rules would continue to apply. The rules of the UK and EU Trade and Cooperation Agreement on State aid represented a compromise of sorts, giving the UK some freedom to design its own system, but requiring it to go considerably further than would have been required under WTO rules. On 30 June 2021, the UK Government published its long-awaited Subsidy Control Bill, which was revised until the adoption of the Subsidy Control Act 2022, which entered into force on 4 January 2023. [*50*] The UK government has heralded the new Act as a "clear departure" from the EU regime, allowing for important national priorities such as allegedly boosting economic growth across the UK and promoting green industrial revolution, but without imposing a heavy bureaucratic burden.

Section 9, Schedule 1, of the Act provides that a public authority may only grant a subsidy if it believes that the subsidy is consistent with seven general principles of subsidy review: common interest, least distortive means of achieving the policy objective, design made to change the economic behaviour of the beneficiary (incentive effect), excluded costs, proportionality and necessity, competition and investment within the UK, beneficial effects to outweigh negative effects on competition or investment within the UK or international trade or investment. Section 9, Schedule 2, of the Act provides that further principles might be relevant depending on the final intent of the aid, e.g. for energy and environmental purposes. Many of the principles that have been included in the Act, such as the above-mentioned, remain similar to those that apply under EU State aid rules.

For example, private parties will still be able to challenge subsidies in UK courts (except that judicial review is not open to legislative acts). However, even EU State aid rules, including national enforcement principles, continue to apply to "State aid" covered by the Northern Ireland Protocol. Furthermore, the Act includes automatically prohibited forms of subsidies: unlimited guarantees, subsidies contingent on export performance of the use of domestic goods or services, subsidies granted for the relocation of activities, rescue or restructuring subsidies, subsidies for insurers that provide export credit insurance and subsidies for air carriers for the operation of routes.

Perhaps the most innovative part – and most significant departure from the EU State aid regime – is that not all subsidies have to be referred to the CMA, contrary to the obligatory notification to the Commission. Part 4, Chapter 1, of the Act demonstrates which subsidies have to be referred on a mandatory basis to the CMA, which are reported on a voluntary basis and under what conditions a post-award referral might be invoked. Before granting any subsidies, the public authorities must self-assess the compatibility of the subsidy against the above-mentioned subsidy control principles. For reasons of transparency, according to Chapter 3 of the Act, all subsidies above £100,000 have to be uploaded in a central database. It remains to be seen whether this new Act will effectively change the UK approach of granting subsidies to its companies, which has been historically lower than in many other Member States in the EU. It follows from this, however, that the new UK Subsidy Control regime is – at least in some parts – in fact clearly different from the EU State aid regime.

All in all, the biggest change is the self-assessment of subsidies by the authorities. However, many principles that the authorities have to examine are still closely linked to the EU principles. Since parties can still challenge all subsidies in court, the approach of UK national courts is unlikely to change significantly. Whether the Act actually marks a definitive departure from the UK's European past and to what extent it will affect the role of national judges in the UK remains yet to be seen.

Challenging the existence of an aid

The Commission is the exclusive competent authority to decide on the compatibility of aid. In doing so, however, it must always precisely set out the five cumulative criteria for the existence of aid. [***51***] This decision is reserved solely for the Commission, not for the Member States. The Member States and especially the national courts can establish the existence of an aid, without ruling on its compatibility. [***52***]

However, the assertion of the existence of aid by parties is rarer than one might think. This is not least due to the fact that assertion is more difficult for plaintiffs than one first thinks. Emblematic of the difficulties of invoking the existence of aid was, among other things, a preliminary ruling of 2020. In the underlying case, a major telecommunications company had challenged the payment of a tax on the grounds that it constituted unlawful aid. The main counterargument was that the telecommunications company - as a taxpayer - could not rely on the fact that exempting others constituted unlawful Aid in order to avoid paying this tax. The national court then

referred this issue to the Court. In its ruling, the Court stated that the telecommunications company could only have challenged the tax under State aid rules if the main proceedings had not been about an application for exemption from the tax in question (which should therefore constitute an aid in itself, if it is 'hypothecated' to the underlying aid, conferred by the tax), but about the legality of the rules applicable to that tax. Since this would not have been the case, the request was rejected. [*53*]

What seems logical at first glance is that the parties see their own interest and want to interpret what they see as unlawful aid in such a way that they can simply evade the regulations on which it is based. The Court has made it clear that this is too short-sighted. This judgment poses some risks to the parties. What the ruling clearly shows is that State aid law cannot be used to extricate oneself from an (unfortunate) tax situation. State aid law pursues a common European interest, which should not benefit the individual, but the general public. Therefore, if unlawful aid is suspected, then the regulation or law itself, which contains the aid, must be challenged. It is not sufficient to object to the applicability of the regime to the individual case based on the assumption that it contains an unlawful aid. However, the parties would not challenge a general regulation in a detached manner with their own resources and risk, in the meantime, continuing to accept the unfavorable financial situation for them in their own Member State. The financial risks are simply too high. This represents a potential hurdle in the assertion of unlawful aid before national courts that could deter future claimants.

On the bright side, this ruling shows that the parties have recognised the strength and scope of State aid law and are prepared to use it as part of their legal arguments before national courts as well. The parties have understood that State aid law is a strong and cutting sword, and they are no longer afraid to invoke it nationally.

Failure to comply with recovery of State aid: consequences?

Once the Commission finds that an aid is unlawful and incompatible, it is up to the Member States to recover the aid correctly. The recovery of the aid follows the national law. It is therefore up to the national judges to assess the right legal situation in order to correctly and effectively recover unlawful granted aid.

In this context, the Federal German Court of Justice clarified that the legal situation prior to the grant of the unlawful aid is decisive for its recovery, in particular the scope and method of the recovery. It held that an alleged violation of the constitutional principle of equality cannot be claimed in national actions against recovery orders due to the binding effect of Commission decisions on unlawful and incompatible aid. Rather, such (alleged) discrimination must be invoked before the Union courts in actions against the Commission decision ordering recovery of the aid. The Member State is in this context obliged to take all necessary measures to ensure the implementation of the finding by the Commission, as the decisions are binding on all bodies of the respective State, including the courts. [*54*]

Interestingly, the French Council of State found that the legal situation at the timing of the decision of the unlawful aid is decisive for its recovery. [*55*]

Both approaches have their legitimacy, but which one will prevail remains to be seen. The better arguments, however, seem to speak in favour of the German approach, since the *ex ante* situation must be re-established, meaning that this legal situation should also be the decisive one. However, it is unclear whether this would actually lead to different results in practice, since the effectiveness of the recovery is always in the foreground.

It becomes clear that the actual recovery of the aid, which takes place at national level, may sometimes also contravene existing national laws, but Union's primary law takes precedence in such cases. As a consequence, it may even be necessary for Member States to adapt their national law accordingly in order to avoid recurring conflicts. In any case, the national decision ordering the recovery of the unlawful aid must be in line with the Commission's implementing rules. Although the implementation of a recovery decision is subject to national law, it is reviewed by the Commission for its appropriateness and effectiveness, and the sanctions imposed by the Commission are to be considered compatible with this objective. Therefore, the lifting of sanctions without valid reasons constitutes a violation of the Commission's decision and of national law on recovery. [*56*]

If a Member State fails to comply to a recovery decision of the Commission, and therefore fails to fulfil its obligations, it might be imposed a fine. [*57*] An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under Union law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay. Where the Commission considers that the Member State has still not complied with the judgment, it may bring a further action seeking financial penalties. There are more and more judgements of the European Courts finding a failure of a Member State to fulfil its obligations to recover unlawful State aid. [*58*] When a State persists in not executing a recovery decision after having already been condemned for failure to comply with the decision, it may be condemned for failure to comply with the judgment. In one case, Greece was condemned to pay €4.368 million for its failure to recover unlawful aid. [*59*] In setting the penalty, the Court takes into account the amount of aid to be recovered, the GDP, the duration of the breach and the State's repeated breaches.

The last two years have not seen any major changes regarding the failure to enforce a recovery decision. The Court traditionally rejects all arguments of Member States that fail to demonstrate the absolute impossibility of enforcing a recovery decision. Thus, regardless of the large number of beneficiaries, the practical difficulties, the risk of social unrest, etc., the Member State must recover unlawful and incompatible aid. [*60*] Since the Commission, as the guardian of the law, keeps a strict eye on the reimbursement of the aid, the Member States and the implementing agencies are strongly advised to follow the Commission's decisions. There is no advantage for the Member States in withdrawing the reimbursement, since the 10-year limitation period for the recovery of the aid applies only to the Commission. National courts may request recovery beyond this period and must exclude national time limits that start on the day the aid was granted - and not on the day the recovery decision was requested - as well as time limits that already expire before the Commission's recovery decision. Indeed, the expiry of the time limit must not be the result of the delay accepted by the national authorities in recovering the aid. Furthermore, if the State does not start recovery until it loses all actions against the Commission's recovery decision and does not inform the Commission of its difficulties, it is an obstacle to the immediate recovery of the aid. [*61*] In this respect, national courts are strongly advised to comply with the decisions in a timely manner or even to establish such rules at the national level in order to avoid repercussions in the form of fines.

Remaining obstacles in national approach to State Aid law

As mentioned above, there are some good initiatives and trends in the approach of national courts and Member States in the area of State aid law. Nevertheless, other criticisms can also be observed.

Two major obstacles stand out. First, the effective recovery of aid varies significantly between Member States, as already outlined. Some Member States fulfill their obligations more quickly than others. Here, national regulations for effective recovery might be necessary in some Member States (and EU harmonisation but this

idea is blocked by the Member States for political reasons). The second major point of criticism is the sometimes loose handling of State aid law by the Member States. In this context, the years 2020-2022 have also produced some important decisions.

In a decision of the Portuguese Southern Central Administrative Court [*62*], the judges first elaborated on the primacy of Union law and the fact that setting aside national law that is incompatible with Union law is an obligation of the national court and that the national judge must *ex officio* disapply national provisions that are incompatible with Union law. [*63*] In contrast, with respect to the direct effect of Article 108(3) TFEU and the 'invocability' of Union law before the national courts, the Portuguese court took a loose approach to the 'direct effect of the measure.' It found that the applicant had not shown to what extent the unlawful aid it claimed affected it, nor which rights were affected by the implementation of the unlawful aid it ultimately sought to have guaranteed. This judgment is interesting insofar as it sheds light on standing before national courts in State aid matters. In doing so, it is apparent that the court took a narrow approach to the direct effect of the measure on the standing of a non-competitor to challenge the legality of a possible (unlawful) aid scheme - since it had not been notified to the Commission. This decision could - at least in Portugal - deter future plaintiffs from claiming unlawful aid, who might be reluctant to take legal action because of their concern to be properly affected by the measure at issue.

In another Portuguese decision, the Portuguese Southern Central Administrative Court found that, notwithstanding a government decree excluding firms operating in agriculture, which followed the correct implementation of a national law in a State aid decision, an agribusiness may reap the benefits of a corporate tax-relief scheme. [*64*] This was based on the fact that the court did not consider the exclusion of agriculture in the Commission decision to be binding, since the exclusion did not only refer to the tax advantage (i.e. the aid), but also to other measures, which were (apparently) apparent from the decision. According to the court, this did not mean that any tax advantage was to be excluded from the applicant; it was not the intention of the national law to do so. Even if the decision would not allow such an interpretation, such applicability would at least result from the reference to the de minimis Regulation. However, the de minimis Regulation that was applicable at that time was not applicable to the agricultural sector. [*65*] It follows that that the court did not apply the rules rigidly, but clearly (over)interpreted the norms and thus took a very lenient implementation approach of State aid rules at the national level. This trend is worrying because, as shown, the effective implementation of and compliance with State aid law is strictly monitored by the Commission. Such a loose interpretation by national courts and Member States administrations therefore entails risks not only for them but also for the recipients of the aid, who may face serious financial difficulties as a result of the recovery obligation.

D. Conclusion

The main role of national courts in the EU State aid control system is to protect the subjective rights of individuals affected by State aid that not approved by the Commission or not covered by the benefit of an exemption regulation.

When national courts are seised by competitors of aid recipients, they have the power (and the obligation) to take all necessary measures to eliminate the effects of unlawfully granted State aid. They may suspend unlawful aid measures and order the recovery of aid already granted.

As this article has shown, national courts have well understood their role in the State aid regime. In order to carry out this duality of litigation, the national courts qualify the contested aid measure, take interim measures, exchange with the Commission, impose the recovery of an aid to the administration or the restitution of a tax,

ensure the effectiveness of the recovery by dismissing actions against national recovery measures, engage the liability of the State for the granting of unlawful aid or its recovery and engage the liability of the beneficiary at the request of the competitor.

Although some clarifications on the control and the extent of the functions of national courts are necessary now and then, the system overall is working well. Apart from a few exceptions, it is necessary to highlight the increasing control of the conditions of recovery by the national courts. The national courts apply the primacy of Union law, even if this means in some cases deviating from their own constitutional principle of equality, in order to preserve the useful effect of a recovery decision. Another positive trend is that in case of interpreting issues, national courts are increasingly referring cases to the Court of Justice to interpret recovery decisions of the Commission. A positive development is also the engagement of State liability, in the form of compensation, long ignored in State aid litigation. Even if this trend is rather perceived in France and Italy for the moment, there is no doubt that this practice will continue to develop within the European Union.

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

[1] Jacques Derenne is a member of the Brussels and Paris bars, Sheppard Mullin; professor at the Université de Liège and at the Brussels School of Competition, with the contribution of Amélie Lamarcq, Rechtsreferendarin, Sheppard Mullin, who is gratefully acknowledged here.

[2] Denis Jouve is the professor of public law, Université Reims Champagne-Ardenne, Centre de Recherches juridiques (CRDT), Head of Master Droit public des affaires.

[3] See, in particular, the *Saumon* and *SFEI* cases: judgment of 21 November 1991, *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon v French Republic*, C-354/90, EU:C:1991:440; judgment of 11 July 1996, *Syndicat français de l'Express international (SFEI) a.o v La Poste a.o.*, C-39/94, EU:C:1996:28. See ***Dimitris Vallindas***, *The Paris Commercial Tribunal rules that a recipient of State aid could not be held liable for not having verified whether the aid had been notified (SFEI / La Poste-Chronopost), 7 December 1999, e-Competitions December 1999, Art. N° 13361.*

[4] ***Jacques Derenne***, ***Ciara Barbu-O'Connor***, *State aid & Private enforcement: An overview of EU and national case law, 7 May 2020, e-Competitions State aid & National enforcement, Art. N° 92521*

[5] Judgment of 12 July 1973, *Commission v. Germany*, 70/72, EU:C:1973:87, paragraph 13.

[6] Article 14(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999, pp. 1–9, now Article 16(3) of 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

(codification), OJ L 248, 24.9.2015, pp. 9–29. See ***Adinda Sinnaeve***, *The Council of the EU unanimously agrees on the new procedural regulation for State aid control, 22 March 1999, e-Competitions March 1999, Art. N° 39353.*

[*7*] See ***Phedon Nicolaides***, *State aid & Private enforcement: An overview of EU and national case law, 3 November 2022, e-Competitions State aid & National enforcement, Art. N° 108829.*

[*8*] Judgment of 8 December 2011, *Residex Capital IV CV v Gemeente Rotterdam*, C-275/10, EU:C:2011:814, upon reference from the Court of Appeal The Hague, Gerechtshof Den Haag, July 10, 2007, LJN BD 6981, finally ruled by Dutch Supreme Court, judgment of 26 April 2013, Residex, 08/04343. See ***Markus Wellinger***, *The EU Court of Justice clarifies that the Dutch Court must cancel an illegal guarantee covering a loan when such measure is the least onerous (Residex), 8 December 2011, e-Competitions December 2011, Art. N° 58922* and ***Onno Brouwer***, ***Alvaro Pliego Selie***, ***Tim van Helfteren***, *The Dutch Supreme Court remands a case on recovery of State aid to an appellate court to determine whether a loan provider also benefited from a State guaranteed loan, or whether the recipient was the sole beneficiary (Residex), 26 April 2013, e-Competitions April 2013, Art. N° 107131.* See also ***Jacques Derenne***, ***Cédric Kaczmarek***, *Concurrences N° 1-2012, Art. N° 42237, pp. 168-169*; and J. Derenne, *Recovery of Unlawful State Aid and Determination of Beneficiaries: Guidance for National Courts*, Journal of European Competition Law & Practice, OUP, Vol. 3, No. 5, 2012).

[*9*] Communications from the Commission of 19 March 2020, OJ C 91 I, 20.3.2020, p. 1; of 3 April 2020, OJ C 112 I, 4.4.2020, p. 1; of 8 May 2020, OJ C 164, 13.5.2020, p. 3; of 29 June 2020, OJ C 218, 2.7.2020, p. 3; of 13 October 2020, OJ C 340 I, 13.10.2020, p. 1; of 28 January 2021, OJ C 34, 1.2.2021, p. 6; of 24 November 2021, OJ C 473, 24.11.2021, p.1. See, e.g. ***Morten Nissen***, ***José Rivas***, *The EU Commission adopts a new Temporary Framework to complement the existing State aid toolbox during the COVID-19 outbreak, 19 March 2020, e-Competitions March 2020, Art. N° 93810*, ***James Webber***, ***Ruba Noorali***, ***Sara Ashall***, ***Matthew Readings***, ***Elvira Aliende Rodriguez***, *The EU Commission announces a major relaxation of the State aid rules via a new Temporary Framework during the COVID-19 outbreak, 19 March 2020, e-Competitions March 2020, Art. N° 93813*, and ***François-Charles Laprévote***, ***Theodora Zagoriti***, ***Giulio Cesare Rizza***, *The EU Commission adopts a Temporary Framework to support the economy in the context of the COVID-19 outbreak, 19 March 2020, e-Competitions March 2020, Art. N° 93837.*

[***10***] Judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172. See ***Markus Wellinger***, *The EU Court of Justice provides guidance on the duty of recovery in case of non-compliance with block exemption regulation (Eesti Pagar), 5 March 2019, e-Competitions March 2019, Art. N° 90072.*

[***11***] Judgment of 15 July 1964, *Costa v E.N.E.L.*, 6-64, EU:C:1964:66. See ***Thomas Bugeja***, ***Maria DeBono***, *The EU Court of Justice issues judgment on the enforcement of EU State aid laws in national courts in the event of inconsistencies with domestic Member State law (Costa / Enel), 15 July 1964, e-Competitions 1964, Art. N° 108782*,

[***12***] Judgment of 11 December 1973, *Lorenz v Germany*, 120/73, EU:C:1973:152. See ***Joris Gruyters***, *The EU Court of Justice defines the 'reasonable period' by which the Commission's preliminary examination of a State aid measure must be concluded (Gebrüder Lorenz), 11 December 1973, e-Competitions December 1973, Art. N° 108841.*

[*13*] Commission Notice on the recovery of unlawful and incompatible State aid, OJ C 247, 23.7.2019, pp. 1–23; Commission Notice on the enforcement of State aid rules by national courts, OJ C 305, 30.7.2021, pp. 1–28.

[*14*] *SFEI* case, cited above, paragraph 75; judgment of 13 January 2005, *Streekgewest Westelijk Noord-Brabant v Staatssecretaris van Financiën*, C-174/02, EU:C:2005:10.

[*15*] Italian Supreme Court, Decision No. 7012 of 11 March 2020, *CINECA and MIUR v BE Smart S.r.l.* See ***Massimo Merola***, ***Daniele Gallo***, ***Alessandro Cogoni***, ***Guido Bellenghi***, *The Italian Supreme Court rules on the compatibility of state aid in the university education sector, 11 March 2020, e-Competitions March 2020, Art. N° 107619.*

[*16*] Judgment of 18 May 2022, *Tirrenia di navigazione*, T-593/20, EU:T:2022:300; ***Bruno Stromsky***, *Maritime transport: The General Court of the European Union upholds decisions of the European Commission declaring aid granted to a public maritime service incompatible with the internal market (Tirrenia di navigazione), 18 May 2022, Concurrences N° 3-2022, Art. N° 108226, pp. 153-155.* See ***Phedon Nicolaides***, *The EU General Court issues a decision which confirms that the date on which State aid is deemed to be granted is not necessarily the date on which the actual benefit materialises (Tirrenia di navigazione), 18 May 2022, e-Competitions May 2022, Art. N° 108778.*

[*17*] Polish Supreme Administrative Court, judgment of 3 March 2021, Case No. II GSK 237/19. See ***Michał Bernat***, *The Polish Supreme Administrative Court issues a decision on the applicability of regional investment aid for the purposes of tax exemption and the maximum amount of aid that may be granted in an administrative decision, 3 March 2021, e-Competitions March 2021, Art. N° 107271.*

[*18*] Judgment of 21 October 2021, *ECO TLC*, C-556/19, EU:C:2020:844.

[*19*] Judgment of 20 May 2021, *Azienda Sanitaria Provinciale di Catania v Assessorato della Salute della Regione Siciliana*, C-128/19, EU:C:2021:401; ***Bruno Stromsky***, *Existing aid: The Court of Justice of the European Union confirms that an increase in the budget and the extension of an existing aid scheme constitutes new aid, which can however be considered retroactively compatible if it fulfils all the conditions of an exemption regulation (Azienda Sanitaria Provinciale di Catania), 20 May 2021, Concurrences N° 3-2021, Art. N° 101995, pp. 139.* See ***Phedon Nicolaides***, *The EU Court of Justice examines whether a national measure providing for the payment of compensation to farmers for the slaughter of diseased animals constitutes new or existing aid (Azienda Sanitaria Provinciale di Catania / Assessorato della Salute della Regione Siciliana), 20 May 2021, e-Competitions May 2021, Art. N° 103287.*

[*20*] Spanish High Court of Justice for Aragon, judgment of 26 November 2020, Aki Bricolaje Espana, No. 149/2014. See ***David Ordóñez-Solís***, *The Spanish High Court of Justice for Aragon rejects an appeal over a tax exemption for a regional tax on large retailers because the appellant does not satisfy the exemption (Aki Bricolaje Espana), 26 November 2020, e-Competitions November 2020, Art. N° 106765.*

[*21*] Judgment of 26 April 2018, *Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Diputación General de Aragón*, C-236/16, EU:C:2018:291; ***Jacques Derenne***, *Existing aid: The Court of Justice of the European Union applies the concept of State aid with respect to a regional tax imposed on large retail establishments according to their sales area but providing for specific exemptions and examines, for the application of the legal reference framework, the differentiation between operators which, in the light of the objective pursued by the legal regime*

concerned, are or not in a comparable factual and legal situation (ANGED), 26 April 2018, Concurrences N° 3-2018, Art. N° 87629. See ***Markus Wellinger***, *The EU Court of Justice clarifies application of the selectivity criterion to State aid (Anged), 26 April 2018, e-Competitions April 2018, Art. N° 87155.*

[***22***] Judgment of 9 October 2014, *Ministerio de Defensa and Navantia SA v Concello de Ferrol*, C-522/13, EU:C:2014:2262; ***Jérôme Gstalter***, *Tax exemption : The Court of Justice of the European Union finds that the exemption from property tax of a plot of land belonging to the State and made available to an undertaking which owns a shipyard may constitute State aid (Navantia), 9 October 2014, Concurrences N° 1-2015, Art. N° 71351, pp. 152-153.*

[***23***] Spanish Supreme Court, judgement of 2 October 2020, *Navantia*, No. 2083/2019. See ***David Ordóñez-Solís***, *The Spanish Supreme Court grants an appeal allowing a real estate tax break to the nationalised shipyards company (Navantia), 2 October 2020, e-Competitions October 2020, Art. N° 106862.*

[***24***] Spanish Supreme Court, order of 15 January 2020, Administrative Section, nº 3631/2014, ES:TS:2020:793A.

[***25***] Portuguese Supreme Administrative Court, judgement of 3 June 2020, *Miranda do Douro*, No. 034/04.6BEMDL 01241/17. See ***Carlos Botelho Moniz***, ***Eduardo Maia Cadete***, *The Portuguese Supreme Administrative Court considers the distinction between 'establishment' and 'undertaking' in the context of EU State aid rules (Miranda do Douro), 3 June 2020, e-Competitions June 2020, Art. N° 107030.*

[***26***] Judgment of 2 February 2023, *Spain v Lico Leasing | Pequeños y Medianos Astilleros Sociedad de Reconversión*, C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60, paras. 75 et seq.; General Court, judgement of 23 September 2020, *Spain v Lico Leasing / Pequeños y Medianos Astilleros Sociedad de Reconversión*, T-515/13 RENV and T-719/13 RENV, EU:C:2018:591. See ***General Court of the European Union***, *The EU General Court rules that the Spanish tax system applicable to certain finance lease agreements entered into by shipyards constitutes an aid scheme and that the unlawful State aid granted under that system must be recovered from the beneficiaries (Spain / Lico Leasing / Pequeños y Medianos Astilleros Sociedad de Reconversión), 23 September 2020, e-Competitions September 2020, Art. N° 96983*, ***Stamatis Drakakakis***, ***Argyris Papaefthymiou***, ***Ellie Gavriilidou***, *The EU General Court finds a Spanish ship finance scheme to be illegal State aid (Spain / Lico Leasing / Pequeños y Medianos Astilleros Sociedad de Reconversión), 23 September 2020, e-Competitions September 2020, Art. N° 100037*, and ***Markus Wellinger***, ***Francesco Pili***, *The EU General Court dismisses the actions for annulment in the 'Spanish tax lease saga' (Spain / Lico Leasing / Pequeños y Medianos Astilleros Sociedad de Reconversión), 23 September 2020, e-Competitions September 2020, Art. N° 97172.*

[***27***] German Federal Court of Justice, judgment of 23 February 2021, No. EnVR 6/20. See ***Ulrich Soltész***, ***Philipp Werner***, ***Harald Weiss***, *The German Federal Court of Justice declares that the legal situation prior to the grant of unlawful State aid is decisive when considering whether recovery orders are binding, 23 February 2021, e-Competitions State aid & National enforcement, Art. N° 108700.*

[***28***] Italian Supreme Court, judgment of 20 November 2020, A.O. / A.A.. See ***Massimo Merola***, ***Daniele Gallo***, ***Alessandro Cogoni***, ***Guido Bellenghi***, *The Italian Supreme Court annuls a ruling by the Piedmont Regional Tax Court which voided a decision requiring two companies to return illegal State aid (A.O. / A.A.), 20 November 2020, e-Competitions November 2020, Art. N° 107762.*

[**29**] Administrative Court of Appeal of Nancy, judgment of 16 February 2021, *EARL Les jardins Vitrés*, nº 19NC01433; Administrative Court of Appeal of Nancy, judgment of 6 April 2021, *Sté centrale éolienne du Bassigny*, n° 19NC02555.

[**30**] Some jurisdictions are still wrong but without consequence since they also disregard the five-year period: Administrative Court of Appeal of Lyon, judgement of 2 March 2022, *Sté Domaine de Bayanne*, n° 19LY02936.

[**31**] Case C-349/17, cited above.

[**32**] Judgment of 30 April 2020, *Nelson Antunes da Cunha Lda*, C-627/18, ECLI:EU:C:2020:321; ***Markus Wellinger***, *The EU Court of Justice further narrows the scope for exceptions to the recovery of interest on illegal State aid following a company receiving a credit line for the recovery of agricultural and breeding livestock activities from the Portuguese authorities (Nelson Antunes da Cunha), 30 April 2020, e-Competitions April 2020, Art. N° 95192.*

[**33**] Judgment of 15 September 2022, *Fossil Group*, C-705/20, EU:C:2022:680; ***Raphaël Vuitton***, *Double taxation: The Court of Justice of the European Union considers that the authorities of a Member State responsible for the recovery of aid may apply, for the purposes of determining the amount to be recovered, a national provision providing for a mechanism to prevent double taxation (Fossil), 15 September 2022, Concurrences N° 4-2022, Art. N° 109606, pp. 107-108.* See ***European Court of Justice***, *The EU Court of Justice declares that national authorities responsible for the recovery of aid classified as unlawful may apply a domestic provision in order to prevent double taxation (Fossil Group), 15 September 2022, e-Competitions September 2022, Art. N° 108739* and ***Phedon Nicolaides***, *The EU Court of Justice issues judgment on the recovery of incompatible State aid which must take into account the possible application of general rules for the avoidance of double taxation (Fossil), 15 September 2022, e-Competitions September 2022, Art. N° 108945.*

[**34**] Judgment of 17 September 2020, *Ministre de l'Agriculture et de l'Alimentation v Compagnie des pêches de Saint-Malo*, C-212/19, EU:C:2020:726 . See ***European Court of Justice***, *The EU Court of Justice declares invalid a Commission decision penalizing France for State aid (Ministre de l'Agriculture et de l'Alimentation / Compagnie des pêches de Saint-Malo), 17 September 2020, e-Competitions September 2020, Art. N° 96766* and ***Markus Wellinger***, ***Francesco Pili***, *The EU Court of Justice clarifies some aspects of State aid related to social security contributions (Ministre de l'Agriculture et de l'Alimentation / Compagnie de pêche de Saint-Malo), 17 September 2020, e-Competitions September 2020, Art. N° 97162.*

[**35**] Conseil d'État, judgment of 30 December 2020, *Cie des pêches St Malo*, n° 411507.

[**36**] Spanish Supreme Court, judgment of 29 January 2020, Administrative Section, nº 7010/2018, ES:TS:2020:221. See ***David Ordóñez-Solís***, *The Spanish Supreme Court confirms the annulment of the decision to recover state aid in the digital terrestrial television market , 29 January 2020, e-Competitions January 2020, Art. N° 106852.*

[**37**] Judgment of 20 September 2018, *Spain v Commission*, C-114/17, EU:C:2018:753; ***Raphaël Vuitton***, *Service of general economic interest: The Court of Justice of the European Union rejects an application for annulment of a European Commission's decision in the case for or the deployment of digital terrestrial television in Castilla-La Mancha in Spain (Spain / Commission), 20 September 2018, Concurrences N° 4-2018, Art. N° 88245, p. 155.*

[**38**] Judgment of 29 April 2021, *Commission v Spain*, C-704/19, EU:C:2021:342; ***Raphaël Vuitton**, Recovery: The Court of Justice of the European Union finds that Spain has failed to fulfil its obligations by not recovering aid paid to a company for the deployment of digital terrestrial television in Castilla-La Mancha (Espagne / Commission), 29 April 2021, Concurrences N° 3-2021, Art. N° 101988, pp. 137-138.*

[**39**] Conseil d'État, judgment of 18 March 2020, *Autocars Suzanne*, n° 396651.

[**40**] Conseil d'État, judgment of 25 June 2020, *Dépt de Seine-Saint-Denis*, n° 418446.

[**41**] German Federal Court of Justice, judgment of 23 February 2021, EnVR 6/20. See ***Ulrich Soltész**, **Philipp Werner**, **Harald Weiss**, The German Federal Court of Justice declares that the legal situation prior to the grant of unlawful State aid is decisive when considering whether recovery orders are binding, 23 February 2021, e-Competitions State aid & National enforcement, Art. N° 108700.*

[**42**] Judgment of 24 November 2020, *Viasat Broadcasting UK v TV2 Danmark*, C-445/19, EU:C:2020:952; ***Alain Ronzano**, Effet utile: The Court of Justice of the European Union considers that the national court is obliged to order the beneficiary of aid to pay interest for the period during which the aid was unlawful, even if it has subsequently been declared compatible with the internal market (Viasat Broadcasting UK / TV2/Danmark), 24 November 2020, Concurrences N° 1-2021, Art. N° 98062.* See ***Francesco Pili**, **Markus Wellinger**, The EU Court of Justice rules that national courts should order a recipient of unlawful aid to pay the "illegality interest" even where the Commission finds that the aid is granted to an undertaking performing a Service of General Economic Interest (Viasat Broadcasting UK / TV2 Danmark), 24 November 2020, e-Competitions November 2020, Art. N° 98192.*

[**43**] Italian Supreme Court, judgment of 16 October 2020, *Presidency of the Council of Ministers v Fallimento Traghetti del Mediterraneo S.p.A.*, No. 22631. See ***Massimo Merola**, **Daniele Gallo**, **Alessandro Cogoni**, **Guido Bellenghi**, The Italian Supreme Court decides, following a preliminary reference to the EU Court of Justice, that aid which predated EU market liberalisation can constitute new State aid (Fallimento Traghetti del Mediterraneo), 16 October 2020, e-Competitions October 2020, Art. N° 107757.*

[**44**] Judgment of 23 January 2019, *Presidenza del Consiglio dei Ministri v Fallimento Traghetti del Mediterraneo SpA*, C-387/17, EU:C:2019:51. See ***Phedon Nicolaides**, The EU Court of Justice holds that the EU rules do not impose time limitation rules when national courts deal with a claim for damages arising from non-notified aid (Fallimento Traghetti del Mediterraneo), 23 January 2019, e-Competitions January 2019, Art. N° 89736* and ***Viala Faustine**, **Sylvain Petit**, The EU Court of Justice clarifies the concept of 'existing aid' in a private enforcement case and holds that unlawful aid cannot be retroactively legalised under a limitation period that has lapsed (Fallimento Traghetti del Mediterraneo), 23 January 2019, e-Competitions January 2019, Art. N° 90591.*

[**45**] Conseil d'État, judgment of 22 July 2020, *SIDE*, n° 434446.

[**46**] Administrative Court of Appeal of Marseille, judgment of 22 February 2021, *Collectivité de Corse*, n° 17MA01582; Conseil d'État, judgment of 29 September 2021, *Collectivité de Corse v Sté Corsica Ferries*, n°450892.

[47] French Supreme Court, Cass. com., judgment of 24 June 2020, n° 19-10187. Where courts of appeal have accepted compensation, these decisions have been overturned: Cass.com., judgment of 2 December 2020, *Sté Cherbland*, 18-15.574.

[48] See also ***Jacques Derenne***, *note on Court of Appeal of Paris, judgment of 16 février 2012, Epta Rack, Concurrences N° 1-2012, Art. N° 42253, pp. 178-179* and ***Francesco Martucci***, ***Mélanie Vermorel***, ***Amandine Yahaya***, *note on French Supreme Court, judgment 18 September 2019, EDF v Corsica Sole, Concurrences N° 4-2019, Art. N° 92432, pp. 155-156*.

[49] Conseil d'État, judgment of 27 November 2020, *Sté AOM Air Liberté*, n° 417165.

[50] *https://bills.parliament.uk/bills/3015/publications*. For more ongoing information on the UK system, see the UK State Aid Law Association, UKSALA (*admin@uksala.org*), which was formed in 2012 in order to provide a UK forum for discussion of State aid issues, to educate lawyers and others in the law and practice of State aid, and to contribute to public discussion of State aid and to the development of State aid law.

[51] Judgment of 23 September 2020, *Spain v Lico Leasing / Pequeños y Medianos Astilleros Sociedad de Reconversión*, T-515/13 RENV and T-719/13 RENV, EU:C:2018:591, paras. 55 et seq. In this case, the General Court found that the Spanish tax regime at issue contained vague criteria, giving the authorities a considerable scope for discretion and therefore creating a selective system. This has been upheld by the Court of Justice in its recent judgment of 2 February 2023, *Spain v Lico Leasing / Pequeños y Medianos Astilleros Sociedad de Reconversión*, C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60, paras. 27 et seq. See, ***General Court of the European Union***, *The EU General Court rules that the Spanish tax system applicable to certain finance lease agreements entered into by shipyards constitutes an aid scheme and that the unlawful State aid granted under that system must be recovered from the beneficiaries (Spain / Lico Leasing / Pequeños y Medianos Astilleros Sociedad de Reconversión), 23 September 2020, e-Competitions September 2020, Art. N° 96983*, ***Markus Wellinger***, ***Francesco Pili***, *The EU General Court dismisses the actions for annulment in the 'Spanish tax lease saga' (Spain / Lico Leasing / Pequeños y Medianos Astilleros Sociedad de Reconversión), 23 September 2020, e-Competitions September 2020, Art. N° 97172*, and ***Stamatis Drakakakis***, ***Argyris Papaefthymiou***, ***Ellie Gavriilidou***, *The EU General Court finds a Spanish ship finance scheme to be illegal State aid (Spain / Lico Leasing / Pequeños y Medianos Astilleros Sociedad de Reconversión), 23 September 2020, e-Competitions September 2020, Art. N° 100037*.

[52] Italian Supreme Court, judgment of 11 March 2020, *CINECA and MIUR v BE Smart S.r.l.*, n° 7012. See ***Massimo Merola***, ***Daniele Gallo***, ***Alessandro Cogoni***, ***Guido Bellenghi***, *The Italian Supreme Court rules on the compatibility of state aid in the university education sector, 11 March 2020, e-Competitions March 2020, Art. N° 107619*.

[53] Judgment of 3 March 2020, *Vodafone*, C-75/18, EU:C:2020:139, paras. 18 et seq.. See ***Markus Wellinger***, *The EU Court of Justice clarifies the conditions in which a legal person liable to pay a tax can plead its incompatibility with the EU State aid rules before a national court (Vodafone), 3 March 2020, e-Competitions March 2020, Art. N° 94011* and ***Phedon Nicolaides***, *The EU Court of Justice rules on a preliminary ruling request regarding the Hungarian turnover taxes in the telecoms sector (Vodafone / Tesco / Google), 3 March 2020, e-Competitions March 2020, Art. N° 93842*.

[54] German Federal Court of Justice, judgment of 23 February 2021, No. EnVR 6/20. See ***Ulrich Soltész***, ***Philipp Werner***, ***Harald Weiss***, *The German Federal Court of Justice declares that the legal situation prior to the grant of unlawful State aid is decisive when considering whether recovery*

orders are binding, 23 February 2021, e-Competitions State aid & National enforcement, Art. N° 108700.

[***55***] Conseil d'État, judgment of 18 March 2020, *Autocars Suzanne*, n° 396651.

[***56***] Italian Supreme Court, judgment of 20 November 2020, *A.O. / A.A.*, No. 26477. See ***Massimo Merola***, ***Daniele Gallo***, ***Alessandro Cogoni***, ***Guido Bellenghi***, *The Italian Supreme Court annuls a ruling by the Piedmont Regional Tax Court which voided a decision requiring two companies to return illegal State aid (A.O. / A.A.), 20 November 2020, e-Competitions November 2020, Art. N° 107762.*

[***57***] Judgment, 20 January 2022, *Larco*, C-51/20, EU:C:2022:36, paras. 53 et seq.

[***58***] Judgment of 14 November 2019, *Commission v Hellenic Republic*, C-93/17, EU:C:2019:903; judgment of 12 March 2020, *Commission v Italy*, C-576/18, EU:C:2020:202; judgment of 29 April 2021, *Commission v Kingdom of Spain*, EU:C:2021:342; judgment of 12 May 2021, *Commission v Hellenic Republic*, C-11/20, EU:C:2021:380; judgment of 20 January 2022, *Commission v Hellenic Republic*, C-51/20, EU:C:2022:36. See ***General Court of the European Union***, *The EU Court of Justice orders Greece to pay a lump sum of €5.5B and a penalty payment of €4.37B for failure to recover wrongful State aid granted to a mining company (Larco), 20 January 2022, e-Competitions January 2022, Art. N° 105766.*

[***59***] Judgment, 20 January 2022, *Larco*, C-51/20, ECLI:EU:C:2022:36; ***Raphaël Vuitton***, *Recovery obligation: The Court of Justice of the European Union orders Greece to pay a lump sum of €5.500.000 and a semi-annual penalty payment of €4.368.000, due to its failure to comply with the recovery obligation of aid granted to a Greek mining company (Larco), 20 January 2022, Concurrences N° 2-2022, Art. N° 106611, p. 166.* See ***General Court of the European Union***, *The EU Court of Justice orders Greece to pay a lump sum of €5.5B and a penalty payment of €4.37B for failure to recover wrongful State aid granted to a mining company (Larco), 20 January 2022, e-Competitions January 2022, Art. N° 105766.*

[***60***] Judgment of 12 May 2021, *Greece v Commission*, C-11/20, EU:C:2021:380; ***Bruno Stromsky***, *Recovery: The Court of Justice of the European Union finds that Greece has failed to recover aid distributed to many farmers to cover losses due to bad weather (Grèce / Commission), 12 May 2021, Concurrences N° 3-2021, Art. N° 101993, pp. 138.* See ***European Court of Justice***, *The EU Court of Justice upholds the Commission's action for failure to fulfill obligations against Greece for granting illegal aid to farmers, 12 May 2021, e-Competitions May 2021, Art. N° 100783* and ***Phedon Nicolaides***, *The EU Court of Justice finds that Greece had not informed the Commission promptly and sufficiently of a State aid measure and did not fulfill its obligations to implement the recovery (Greece / Commission), 12 May 2021, e-Competitions May 2021, Art. N° 100974.*

[***61***] Judgment of 29 April 2021, *Telecom CLM*, C-704/19, EU:C:2021:342; ***Raphaël Vuitton***, *Recovery: The Court of Justice of the European Union finds that Spain has failed to fulfil its obligations by not recovering aid paid to a company for the deployment of digital terrestrial television in Castilla-La Mancha (Espagne / Commission), 29 April 2021, Concurrences N° 3-2021, Art. N° 101988, pp. 137-138.* See ***Phedon Nicolaides***, *The EU Court of Justice finds that Spain failed to fulfil its obligations to recover the whole amount of the incompatible State aid (Telecom CLM), 29 April 2021, e-Competitions April 2021, Art. N° 100973.*

[***62***] Portuguese Southern Central Administrative Court, judgment of 21 May 2020, *"Food Safety*

Plus" Tax, No. 923/16.5BELRS; see *Moniz/Cadete*, e-Competitions, N° 107033. See ***Carlos Botelho Moniz***, ***Eduardo Maia Cadete***, *The Portuguese Southern Central Administrative Court rejects a claim by a food distributor on the grounds that they do not have locus standi to challenge a levy funding an animal carcass collection system under EU State aid rules ("Food Safety Plus" Tax), 21 May 2020, e-Competitions May 2020, Art. N° 107033.*

[***63***] This not new at all of course but it is reassuring to see national courts stating it themselves: judgment of 9 March 1978, *Simmenthal*, 106/77, EU:C:1978:49, paragraphs 17 to 24 ; judgment of 15 July 1964, *Costa v ENEL*, 6/64, EU:C:1964:66; judgment of 19 June 1990, *The Queen v Secretary of State for Transport, ex parte Factortame*, C-213/89, EU:C:1990:257, paragraphs 19 to 22. See ***Thomas Bugeja***, ***Maria DeBono***, *The EU Court of Justice issues judgment on the enforcement of EU State aid laws in national courts in the event of inconsistencies with domestic Member State law (Costa / Enel), 15 July 1964, e-Competitions 1964, Art. N° 108782.*

[***64***] Portuguese Supreme Administrative Court, judgment of 14 October 2020, *Tax Benefits*, No. 0206/13.2BELRA; see *Moniz/Cadete*, e-Competitions, Art. N° 107034. See ***Carlos Botelho Moniz***, ***Eduardo Maia Cadete***, *The Portuguese Supreme Administrative Court issues a decision which finds that notwithstanding a government decree excluding firms operating in agriculture, an agribusiness may reap the benefits of a corporate tax-relief scheme (Tax Benefits), 14 October 2020, e-Competitions October 2020, Art. N° 107034.*

[***65***] Regulation No 69/2001, explanatory note, point 3. Nowadays, the applicable Regulations are Regulation No 1407/2013, which is not applicable for the agriculture sector, see explanatory note, point 6 and Regulation No 1408/2013, which is applicable for the agriculture sector, see explanatory note point 2.