CHAPTER FIVE

LATEST STATE AID ENFORCEMENT DEVELOPMENTS IN THE DOMESTIC AMBIT

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1. Introduction

EU State aid law is characterised by the existence of an exclusive competence of the European Commission to declare aid measures of the Member States compatible or incompatible with the Internal Market (Article 107 of the Treaty on the Functioning of the European Union (hereinafter the TFEU).[1]

Hence, enforcement of the State aid rules is primarily a task for the European Commission (hereinafter the Commission). By contrast, with regard to the Treaty antitrust rules – Articles 101 and 102 TFEU (prohibition of restrictive agreements and of abuse of a dominant position), Regulation 1/2003[2] has decentralised the application of these provisions. Although the Commission has a right of first refusal to examine and decide on restrictive practices that adversely affect trade between Member States, national authorities and national courts can and shall fully enforce these Articles (unless the Commission has decided to start a procedure). There is now even an EU directive on claims for

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[1] Article 107 of the Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47–390. CJEU 17 September 1980, C-730/79, ECLI:EU:C:1980:209 (*Philip Morris*), par. 17.

[2] 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, 04.01.2003, p. 1–25.

damages for victims of EU or national competition law infringements.[3]

With regard to the role of national courts it can be said that Articles 101 and 102 TFEU (the substantive antitrust provisions) are directly effective (individuals can rely on these provisions in national courts as a plaintiff or a defendant), while Article 107 TFEU (incompatibility of State aid measures with the Internal Market) is not. That however is not the end of this story. On the basis of Article 108 (3) TFEU (a procedural provision), the Court of Justice of the European Union (hereinafter the CJEU) has defined a rather important role for national courts. Article 108 TFEU has been further implemented by successive procedural regulations, the current version of which is Regulation 2015/1589.[4]

As a matter of principle, it should be remembered that Articles 107-108 TFEU relate to measures granted by the Member States (and not conduct by undertakings) in order to avoid a detrimental 'subsidy race' among Member States.[5] It seems therefore logical that the appraisal of the compatibility of these measures with the Internal Market takes place exclusively at the EU level, i.e. by an authority that is not involved in the infringement of the Treaty rules at issue.

This being said, the CJEU recognized quite early on that national courts have a role to play in the enforcement of the State aid rules. Article 108 (3) TFEU provides for a system of compulsory notification, by the

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[3] Directive 2014/104/EU 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 349/1, 05.12.2014.

[4] 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 248/9, 24.09.2015.

[5] This objective is often recalled by the Commission. In the framework of an investigation into Italian state support for a steel producer, the Commission stated that:

> "Steelmakers across the EU are struggling with worldwide overcapacity and strong imports – the response to this challenge must be to improve the sector's long-term global competitiveness. Therefore, EU State aid rules enable Member States to for example support research activities or relieve energy costs of steel companies, and the Commission tackles international trade distortions using anti-dumping or anti-subsidy measures. It is also why EU countries and the Commission have put in place strict safeguards against State aid to rescue and restructure steel companies in difficulty. *This avoids harmful subsidy races between EU countries and that uncontrolled State aid in one EU country can unfairly put at risk thousands of jobs across the EU*", IP/16/115, Brussels, 20 January 2016 (emphasis added).

Member States, to the Commission, of new state measures (those not existing at the time when Articles 107-108 TFEU entered into force for the Member State concerned). As long as the Commission has not taken a decision on the compatibility of the aid with the Internal Market, the Member State concerned shall suspend the implementation of the aid under the so-called 'stand-still obligation'. The same obligation to refrain from granting aid of course exists for aid that should have been notified and was not. At the request of an interested party, a national court can establish the existence of aid within the meaning of Article 107 TFEU,[6] as well as the fact that it should have been notified, while it was not. To come to that conclusion the national court can obtain the help of the Commission in the form of an opinion,[7] or of the CJEU, by making a preliminary reference, under Article 267 TFEU. The court can also verify whether the aid is exempted from application of Articles 107 and 108 TFEU, under one of the existing block exemption regulations, e.g. the 'de minimis' exemption for smaller aid amounts or one of the exemptions for aid that comply with EU policy objectives (such as aid for R&D), see now the General Bock Exemption Regulation (hereinafter the GBER).[8]

Finally, once the Commission has found a State aid measure to be incompatible with the Internal Market it shall order the Member State concerned to recover the aid from the beneficiary, if the aid has already been granted (in violation of the 'stand-still' obligation of Article 108 (3) TFEU). Recovery of aid often leads to an action in court by the beneficiary, raising (substantive) defences, against the Member State in question.

The CJEU has also gradually clarified the obligations of national courts to render decisions within the limits of their powers as defined above. What the EU can expect national courts to do is also limited by the principle of procedural autonomy.

In this chapter, we will first analyse recent case law of the Court of

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[6] CJEU 22 March 1977, C-78/76, ECLI:EU:C:1977:52 (*Steinike & Weinlig*), par. 14; CJEU 11 July 1996, C-39/94, ECLI:EU:C:1996:285 (*SFEI*), par. 49; CJEU 21 November 1991, C-354/90, ECLI:EU:C:1991:440 (*Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others v. France*).

[7] Commission Notice on the enforcement of State aid law by national courts, OJ C 85/1, 09.04.2009, par. 89. See also Article 29 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, OJ L 248/9, 24.09.2015, p. 9–29.

[8] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, OJ L 187, 26.06.2014.

Justice on the consequences for State aid cases of the principle of procedural autonomy. In the following sections, we will discuss recent case law with respect to a couple of other important questions on the role of national courts in the enforcement of EU State aid law: substantive defences under national law against the implementation of recovery decisions, the supplementary role of national law in interest calculation and the role of national authorities in the enforcement of Commission decisions (practical problems and cooperation with the Commission).

2. Powers and duties of national courts with regard to the EU State aid rules, in light of the principle of procedural autonomy

In settled case law, the Court of Justice has recognised the so-called 'procedural autonomy' of the Member States.[9] The procedural autonomy of the Member States is however subject to the principles of equivalence and effectiveness.

Recently, in *Mono Car Styling*,[10] referring to older judgments, the CJEU said that "[…] according to settled case law, the principle of effective judicial protection is a general principle of [Union] law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the ECHR and which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union [...]". The Court added that:

> "it has consistently held that, in the absence of [Union] rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from [Union] law, but the Member States, however, are responsible for ensuring that those rights are effectively protected in each case." Thus, the Court concludes, "whilst it is in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, [Union] law nevertheless requires, in addition to observance of the principles of equivalence and effectiveness, that the national legislation does not undermine the right to effective judicial protection".

[9] CJEU 19 September 2002, C-336/00, ECLI:EU:C:2002:509 (*Republik Österreich and Martin Huber*), par. 61.

[10] CJEU 16 July 2009, C-12/08, ECLI:EU:C:2009:466 (*Mono Car Styling*), par. 47-49.

The State aid procedural regulation, Regulation 2015/1589[11] does not contain any procedural rules for national courts. Hence the principle of procedural autonomy has full effect, subject to the limitations stemming from the principles of equivalence and effectiveness.

Koen Lenaerts,[12] now president of the CJEU, has put it this way. Although it is for the Member States to establish a system of legal remedies and procedures, EU law requires them to do so in a way that ensures respect for the right to effective judicial protection. This judge-made principle is now codified in the second paragraph of Article 19 (1) TEU pursuant to which Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. He adds that, in accordance with the principle of sincere cooperation laid down in Article 4 (3) TEU, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that achieves that result.

With respect to State aid cases this could, for example, mean that national law could not, as a matter of principle or in general, deny the competitor of the beneficiary the opportunity to act in court against the aid measure. That would deprive that competitor of effective legal protection and at the same time jeopardise the attainment of the objective pursued by the State aid rules.

A specific question with regard to procedural autonomy is that of limitation periods. If the limitation period under national law, for example, for recovery of aid or for an action by a competitor against an unlawful aid measure is (very) short, this will render the exercise of such correcting measures aimed at giving full effect to the State aid rules problematic. However, in *Palmisani*[13] the CJEU ruled that EU law, as it stood, did not preclude Member States from requiring any action for reparation of the loss or damage sustained as a result of the belated transposition of the Directive in issue to be brought within a limitation period of one year from the date of its transposition into national law, provided that that procedural requirement is no less favourable than procedural requirements in respect of similar actions of a domestic nature. With regard to limitation periods the standard therefore seems to be the principle of equivalence.

Another issue of procedural autonomy, on which the Court had to rule rather recently is that of res judicata. In the *Klausner Holz Niedersachsen*

[11] 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 248/9, 24.09.2015.

[12] Lenaerts, *Effective judicial protection in the EU.*

[13] CJEU 10 July 1997, C-261/95, ECLI:EU:C:1997:351 (*Palmisani*), par. 39.

case, the Court rendered a judgment on that principle in the context of State aid law.[14]

The Court ruled that EU law precludes, in circumstances such as those at issue in the main proceedings, the application of a rule of national law enshrining the principle of res judicata from preventing a national court which has held that contracts forming the subject-matter of the dispute before it constitute State aid, within the meaning of Article 107 (1) TFEU, implemented in breach of the third sentence of Article 108 (3) TFEU, from drawing all the consequences from that breach because of a national judicial decision which has become definitive, which court, without examining whether those contracts constitute State aid, has held that the contracts remain in force.

3. Rules and case law of the Court of Justice on the duties of national courts with regard to State aid

3.1 General Rules

It has already been mentioned in the introduction that the European Commission has exclusive competence to declare aid compatible or incompatible with the Internal Market, and that the standstill provision of Article 108 (3) TFEU is directly effective: national courts can establish that there is aid that was notifiable and that the granting of the aid without notifying it, or without awaiting the Commission's decision on compatibility with the Internal Market, is unlawful.

In order to facilitate the national courts' power and duty (if they are called upon) to establish the existence of State aid, the Commission recently issued a Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union,[15] essentially based on the case law of the European Courts.

The role of national courts in State aid matters is also confirmed in Article 29 of Regulation 2015/1589, according to which, for the application of Article 107 (1) and Article 108 TFEU, the courts of the Member States may ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of

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[14] CJEU 11 November 2015, C-505/14, ECLI:EU:C:2015:742 (*Klausner Holz Niedersachsen*), par. 45-46.

[15] Commission Notice on the notion of State aid as referred to in Article 107 (1) of the Treaty on the Functioning of the European Union, C/2016/294, OJ C 262, 19.07.2016, p. 1–50.

the State aid rules. Furthermore, the Commission may act as *amicus curiae*. Pursuant to Article 29 (2) of the Regulation, where the coherent application of Article 107 (1) or Article 108 TFEU so requires, the Commission, acting on its own initiative, may submit written observations to the courts of the Member States that are responsible for applying the State aid rules.

However, the Regulation does not impose any obligation on the national courts with regard to the type of measures they should take in order to guarantee the effectiveness of the State aid rules or the decisions taken by the Commission on the basis thereof.

On this issue, there is case law of the Court and a Commission Notice of 2009.[16]

In its 2009 Notice, the Commission first reiterates that a national court can identify State aid. If there is State aid, the court can check whether the stand-still obligation has been respected and if not, take appropriate measures. Furthermore, where there is a block exemption, the court can go into a substantive appraisal. Where the standstill obligation has not been respected the national court can take one of the following measures:

- Preventing the payment of unlawful aid;
- Recovery of unlawful aid, regardless of incompatibility;
- Recovery of interests;
- Damages for competitors and other third parties
- Interim measures against unlawful aid.

As to preventing the payment of unlawful aid, the CJEU stated that "[...] the validity of measures giving effect to aid is affected if national authorities act in breach of the last sentence of Article 93 (3) of the Treaty (now Article 108 (3) TFEU). National courts must offer to individuals in a position to rely on such breach the certain prospect that all the necessary inferences will be drawn, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision, and possible interim measures".

As to the principle that national courts should order full recovery of unlawful aid that has not (yet) been declared incompatible with the Internal Market, the Commission relies on the case law of the CJEU in the

[16] Commission Notice on the Enforcement of State aid law by national Courts, OJ C 85/1 (2009).

SFEI case.[17] In this ruling, the Court merely stated that a national court, seized of a request, should draw the appropriate conclusions from an infringement of the last sentence of Article 93 (3) of the Treaty (now Article 108 (3) TFEU), where the matter has also been referred to the Commission, which has not yet given a final decision as to whether the State measures constitute State aid, and that it is not required to declare that it lacks jurisdiction or to stay proceedings until such time as the Commission has adopted a position on how the measures in question are to be categorized. The Commission however concedes that the Court accepted that there can be exceptional circumstances in which the recovery of unlawful aid would not be appropriate.

Be that as it may, according to the Commission, the national court's obligation to protect individual rights under Article 108 (3) remains unaffected where the Commission has not yet taken a decision, regardless of whether a Commission procedure is pending or not.[18] Again, with due respect, this can only be inferred *a contrario* from that judgment where the Court ruled that the last sentence of Article 88 (3) EC (now Article 108 (3) TFEU) is to be interpreted as meaning that the national court is not bound to order the recovery of aid implemented contrary to that provision, where the Commission has adopted a final decision declaring that aid to be compatible with the common market, within the meaning of Article 87 EC (now Article 108 TFEU).

Applying Union law, the national court must order the aid recipient to pay interest in respect of the period of unlawfulness.

A Commission Notice cannot of course derogate from the case law of the European Courts. In addition, the Notice dates already from 2009. It seems therefore useful to examine more recent case law.

In *Deutsche Lufthansa*[19] this airline brought an action in a German court against alleged State aid (in the form of 'marketing support' and reduction of airport fees) granted by Frankfurt Airport to Lufthansa's competitor Ryanair. Lufthansa sought an order for the recovery of the payments made to Ryanair and those corresponding to the reduction in airport fees which had benefited Ryanair. In the meantime, the Commission had opened a procedure against these measures under Article 108 TFEU.

The Court of Justice considered i.a.:

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[17] CJEU 11 July 1996, C-39/94, ECLI:EU:C:1996:285 (*SFEI*), par. 53.
[18] CJEU 12 February 2008, C-199/06, ECLI:EU:C:2008:79 (*CELF I*).
[19] CJEU 21 November 2013, C-284/12, ECLI:EU:C:2013:755 (*Lufthansa*), par. 40-44.

40. [...] even if in its final decision, the Commission were to conclude that there were no aid elements, the preventive aim of the State aid control system established by the TFEU [...] requires that, following the doubt raised in the decision to initiate the formal examination procedure as to the aid character of that measure and its compatibility with the internal market, *its implementation should be deferred* until that doubt is resolved by the Commission's final decision.

41. It is also important to note that the application of the European Union rules on State aid is based on an *obligation of sincere cooperation* between the national courts, on the one hand, and the Commission and the Courts of the European Union, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty. In the context of that cooperation, national courts *must take all the necessary measures*, whether general or specific, to ensure fulfilment of the obligations under European Union law *and refrain from those which may jeopardise the attainment of the objectives of the Treaty*, as follows from Article 4 (3) TEU. Therefore, national courts must, in particular, refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional.

42. Consequently, where the Commission has initiated the formal examination procedure with regard to a measure which is being implemented, national courts are required to adopt *all the necessary measures with a view to drawing the appropriate conclusions from an infringement of the obligation to suspend* the implementation of that measure.

43. To that end, national courts may decide to suspend the implementation of the measure in question and order the recovery of payments already made. *They may also decide to order provisional measures* in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's decision to initiate the formal examination procedure.

44. Where they entertain doubts as to whether the measure at issue constitutes State aid within the meaning of Article 107 (1) TFEU or as to the validity or interpretation of the decision to initiate the formal examination procedure, national courts *may seek clarification from the Commission* and, in accordance with the second and third paragraphs of Article 267 TFEU, as interpreted by the Court, they may or must refer a question to the Court for a preliminary ruling (see, to that effect, as regards requests for preliminary rulings on the validity of State aid, Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 72 to 74).[20]

[20] The authors' emphasis is added.

From this judgment, it appears clearly that even where the Commission has initiated the procedure, but has not yet taken a decision on whether there is incompatible aid, the national court can and shall take measures to safeguard the rights of the parties. It is in particular clear from the language of the judgment that such appropriate measures can entail provisional measures, obviously including, an order to suspend the aid. Whether the national court is also under an obligation to order recovery of aid granted pending the procedure before the Commission (and before a decision by the Commission declaring the aid incompatible with the internal market) is still not totally clear.

It can thus be deduced from this judgment that national courts are under an obligation to take measures to defer the implementation of an unlawful State aid measure pending an examination by the Commission, when this is requested by an interested party. Whether these measures include, already at that stage, as a matter of principle, the full recovery of the aid, as contended by the Commission, remains debatable.

Furthermore, it is also uncertain whether a national court is under an obligation to take measures at the request of a competitor, or another interested party that acts against the beneficiary of the aid. Obviously, the court cannot order the recovery by the State if it is not a party in the procedure. But can it, at the request of a competitor, order the cessation of the granting of aid or its use? We will come back to this question.

The *Lufthansa* judgment has been confirmed by *Flughafen Lübeck v. Air Berlin.*[21] The Court added that national courts cannot, in a situation such as that at issue in the main proceedings, (i.e. a competitor claims against the State) stay the proceedings until the closure of the formal investigation procedure.

State aid is not always straightforward in the sense that a company receives a direct advantage from the state or is exempted from paying taxes or other charges. It is well established that state guarantees can also constitute aid. With regard to other type of measures which will be requested from national courts, an example is *Residex.*[22] The Court ruled that the last sentence of Article 108 (3) TFEU must be interpreted as meaning that the national courts have jurisdiction to cancel a guarantee in a situation such as that in the main proceedings, in which unlawful aid was implemented by means of a guarantee provided by a public authority in order to cover a loan granted by a finance company to an undertaking which would not have been able to secure such financing under normal

[21] CJEU 4 April 2014, C-27/13, ECLI:EU:C:2014:240 (*Flughafen Lübeck v. Air Berlin*).

[22] CJEU 8 December 2011, C-275/10, ECLI:EU:C:2011:814 (*Residex*).

market conditions. When exercising that jurisdiction, those courts are required to ensure that the aid is recovered and, to that end, they can cancel the guarantee, in particular where, in the absence of less onerous procedural measures, that cancellation is such as to lead to or facilitate the restoration of the competitive situation which existed before that guarantee was provided.

Again, the CJEU does not rule that the national court is under an obligation to cancel the guarantee, but that it has the power to do so.

All these recent judgments show that while being firm on effectiveness and loyal cooperation, and stressing the powers and obligations of national courts under the State aid rules, as far as these rules allow them to act (i.e. taking into account the exclusive competence of the Commission to decide on the compatibility of State aid with the Internal Market), it nevertheless remains cautious in impinging too much on procedural autonomy (leaving it to the national courts to determine under their national law what measures are appropriate) and in obliging these courts to take irrevocable measures (such as recovery) that could, later on conflict with a Commission decision (of compatibility).

3.2 Disputes between competitors

A recent case brought before a Belgian court illustrates the limits of what a competitor can claim in court in a case where unlawful aid has been granted.

In early 2014, the Belgian State decided to adopt a Royal decree providing Brussels National Airport with an annual allowance for 3 years to pass it further on to airlines using the infrastructure of its airport by carrying more than 400,000 passengers per year. One of the low-cost airlines (the 'Airline') which did not meet the 400,000 passengers' threshold argued that this constituted illegal State aid and (i) filed a complaint with the European Commission, (ii) sought the annulment of the Royal decree before the Belgian Council of State and (iii) lodged a cease-and-desist action before the Brussels Commercial Court.[23] The Airline argued that the fact that the other airlines receive and, a fortiori use, unlawful State aid constitutes unfair market practices within the meaning of the Belgian Code of Economic Law.[24] According to settled case law of the Belgian Cour de Cassation, prohibited market practices include the

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[23] Judgment of the Brussels Commercial Court (Dutch speaking section), AR 2014/52 655, 29 April 2015, unpublished.

[24] Article VI.104 of the Code on Economic Law provides that: "Any act contrary to honest market practices whereby an enterprise affects or may affect the professional interests of one or more other undertakings, is prohibited."

breach of a legal or regulatory obligation. This would apply to Article 108 (3) TFEU which prohibits granting State aid without the approval of the Commission. However, the Commercial Court emphasised that the Airline is actually not the addressee of this prohibition but that this applies to Member States. In addition, the Court indicates that an action for a cease-and-desist order against a conduct that is completed (and where there is no danger of reiteration) is inadmissible. Finally, the Court noted that the Belgian State had undertaken vis-à-vis the Commission to suspend the implementation or the Royal Decree, therefore it ruled that there was no necessity to take a measure.

This case raises several interesting questions.

As a general comment, one could question the fact that the court uses national rules regarding cease-and-desist actions to reach the conclusion that this was not the adequate way for the claimant to seek redress. The court could maybe have reached the opposite conclusion based on the above-mentioned case law of the CJEU, notably in *Deutsche Lufthansa*, allowing national courts to take appropriate measures to prevent the implementation of unlawful State aid and safeguarding the rights of the parties. However, at the same time, the Brussels commercial court also underlined that what the Airline was seeking was actually not possible for that court to award – at least by means of a cease-and-desist order – and that, in any event, the Belgian State had already committed itself to suspend the implementation of the measure. The national court also considered the fact that the Commission was currently investigating the measure and this ruling could be interpreted as a way to lean towards interim measures, which the court did not have to grant, because the Belgian State had committed itself to suspend further aid.

This case also raises at least two specific further issues.

First, it triggers the question of the standing of competitors of the recipients of an aid measure and the fact that, based on this judgment, they could decide only to lodge an action against the State. At the same time, in the absence of effective remedies at the national level to guarantee an effective protection of their rights, competitors may be discouraged from bringing the existence of potential unlawful aid to the attention of the Commission.

Second, one could wonder what value commitments made by the State to the Commission during an investigation have for a national court ruling on the appropriate action to take in the case of unlawful aid. The commitment made by the State not to further implement a measure may not be sufficient to compensate competitors which could suffer damage linked to the mere fact that the State had committed to grant its support during a certain period before withdrawing this commitment upon Commission investigation.

It remains to be seen whether this judgment is isolated or if this is a trend that is going to develop in Belgium.

3.3 Disputes regarding recovery and substantive defences under national law

Developments regarding the interaction between the application of the State aid rules and national law heavily relate to the consequences of a recovery decision adopted by the Commission. Indeed, the Member State which granted the aid in the first place (and/or beneficiaries) may be tempted to find exceptions or arguments based on national law to avoid proceeding with the recovery. It would certainly jeopardize the rationale of the control of State aid, if the ultimate objective of recovery of incompatible aid could not be achieved because of conflicting rules or principles under national law.

It is settled case law of the Court of Justice that, with the exception of cases in which a recovery decision has been annulled pursuant Article 263 TFEU, the only defence available to a Member State in opposing an infringement action by the Commission is to argue that it was absolutely impossible for it to implement the decision of which it was an addressee.[25] Such impossibility may be of legal nature, for example, where the recovery of the aid would run contrary to a principle of European law.

Issues related to recovery are also dealt with by the Court of Justice where the Commission lodges actions against Member States for failure to fulfil their obligations under Article 108 (2) TFEU. In the *European Commission v. France* case,[26] the Court of Justice had to deal with the failure of the French Republic to take the measures necessary to recover the illegal aid awarded to Société Nationale Corse-Méditerranée and the Compagnie Méridionale de Navigation (SNCM), and to Compagnie méridionale de navigation SA (CMN) in the form of an annual contribution notably for the performance of a public service contract for the operation of ferry services between the port of Marseille and the Corsican ports. Corsica Ferries, a competitor, lodged a complaint with the European Commission which declared the aid incompatible with the Internal Market and ordered its recovery.

[25] CJEU 11 September 2014, C-527/12, ECLI:EU:C:2014:2193 (*Commission v. Germany*), par. 48 and the case law cited.
[26] CJEU 9 July 2015, C-63/14, ECLI:EU:2015:209 (*Commission v. France*).

In order to avoid recovery, the French Republic raised first the fact that the recovery of such a sum would inevitably lead to the compulsory liquidation of SNCM, a process which would itself give rise to serious social unrest (strikes), which may block the port of Marseille for a long period and jeopardise the territorial continuity with Corsica and, ultimately, seriously affect the economic equilibrium of a whole region.

As it had consistently held in the past, the European Court of Justice concluded that regarding the possible outbreak of social unrest which might jeopardise public order, where such unrest is threatened, it is for the Member State to adopt all appropriate measures to guarantee the full scope and effect of EU law so as to ensure its proper implementation in the interests of all economic operators, concerned unless it can show that action on its part would have consequences for public order with which it could not cope by using the means at its disposal.[27] The Court noted that the French Republic had failed to show such consequences and that, in fact, the information regarding the recovery order did not give rise to any particular unrest.

The second argument put forward by the French Republic related to the practical difficulties which, if SNCM ceased to operate, would require the conclusion of a new public service delegation contract with an economic operator other than SNCM, which would not necessarily have the material resources or manpower to satisfy the demands of public service delegation. The need to use such a procedure would thus be likely, at least for a certain period, to interrupt the territorial continuity in question.

Regarding the alleged risk of a break in territorial continuity which might occur between the cessation of activities of SNCM and the conclusion of a new public service delegation contract, the Court agreed with the fact that any cessation of activities of SNCM might certainly be likely in the short term to result in a certain reduction in ferry services between Marseille and the Corsican ports. However, the Court did not consider that the facts put forward by the French Republic would justify the conclusion that such a reduction would have consequences on a scale which could be regarded as making it absolutely impossible to implement the decision at issue.

At the risk of stating the obvious, this case underlines again that, while the Court is open to consider the impact of a recovery decision at national level, it applies a very high threshold which Member States must meet under an absolute impossibility defence to escape their recovery obligation.

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[27] CJEU 9 December 1997, C-265/95, ECLI:EU:C:1997:595 (*Commission v. France*), par. 56 and 57.

3.4 The supplementary role of national law: interest calculation

As mentioned above, the enforcement of State aid rules sometimes creates pressure or an opportunity for national law to take into account the effective enforcement of State aid rules, to set aside national rules. However, as it is true for other non-harmonised areas or European law, where there is no intention of the European Union to intervene on a specific aspect of the law, national rules apply. This is the case, even if, as is discussed below, it leads, by means of a reference under national law to Regulation 794/2004[28], to an early application of the compound interest standard set to the recovery of State aid, even though the decision declaring that aid incompatible with the common market and ordering its recovery was adopted and notified to the Member State concerned before that regulation entered into force.

In *A2A SpA v. Agenzia delle Entrate*[29], the Court of Justice dealt with a request for a preliminary ruling from the Italian Corte suprema di cassazione regarding the issue of the calculation of interest relating to the recovery of incompatible aid.

A2A benefitted from a three-year exemption from corporation tax granted by the Italian Republic to joint stock companies with majority public shareholdings. The Commission considered that such an exemption constituted State aid incompatible with the Internal Market. In *Commission v. Italy*,[30] the Court held that, by failing to adopt, within the prescribed period, the necessary measures to recover from the recipients the aid declared by the decision of the Commission to be unlawful and incompatible with the common market, the Italian Republic had failed to fulfil its obligations under that decision.

Following that judgment, the Italian Republic adopted a regulatory framework regarding actions for recovery of the aid at issue. On that basis, the Agenzia delle Entrate sent to A2A tax assessments so as to recover sums owed by way of corporation tax that it had not paid in accordance with the exemption granted by the Italian Republic. In addition, those tax assessments required payment, of the sum of 120 million Euro in the form

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[28] Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty the former procedural implementing Regulation, OJ L 2004, L 140/1, 30.04.2004.

[29] CJEU 3 September 2015, C-89/14, ECLI:EU:C:2015:211 (*A2A SpA v. Agenzia delle Entrate*).

[30] CJEU 1 June 2006, C-207/05, ECLI:EU:C:2006:366 (*Commission v. Italy*), par. 54.

of interest calculated on a compound basis.

A2A brought an action before the Corte suprema di cassazione against those tax assessments. It raised the fact that those were contrary to EU law because the calculation of interest on a compound basis was made under a reference to provisions of Regulation 794/2004 that was not applicable *ratione temporis* to the decision of the European Commission applicable to A2A, since that decision was notified to the Italian Republic before Regulation 794/2004 entered into force. The referring court asked the CJEU whether EU law precluded such a national provision or whether it allowed the application of compound interest to the recovery of State aid, even though the recovery decision was notified before the entry into force of Regulation 794/2004. The referring court added that the Commission's practice consisted at the time in referring to provisions of national law, which applied simple interest and allowed the application of compound interest to financial obligations only in accordance with the conditions laid down in the Italian Civil Code, conditions which were not satisfied as regards the recovery of the aid at issue in the main proceedings.

The Court of Justice confirmed that Regulation 794/2004 was not, as such, applicable *ratione temporis*; it held that at the time the decision at issue in the case giving rise to that judgment was adopted, neither Union law, nor the case law of the Court or of the General Court specified whether the necessary interest on aid to be recovered was to be calculated on a simple or on a compound basis and it indicated that the Commission's practice, set out *inter alia* in its 1991 letter to the Member States, linked the question of charging interest to the procedural rules for recovery and referred, in that regard, to national law.[31] Therefore the Court concluded that it was for national law to determine whether, in this case, the interest rate must be applied on a simple or on a compound basis.

In addition, reacting to the objection of A2A based on the grounds of legal certainty, the Court reminded A2A of its settled case law according to which, whilst the principle of legal certainty precludes a regulation from being applied retroactively, namely to a situation which arose prior to the entry into force of that regulation, and irrespective of whether such applications might produce favourable or unfavourable effects for the person concerned, the same principle requires that any factual situation should normally, in the absence of any express contrary provision, be examined in the light of the legal rules existing at the time when the situation occurred. However, where for that reason the new law is valid

[31] See also CJEU 11 December 2008, C-295/07, ECLI:EU:C:2008:707 (*Commission v. Département du Loiret*), par. 82-84.

only for the future, it also applies, save for derogation, to the future effects of situations which came about during the period of validity of the old law (see, to that effect the *Bavaria* case).[32]

3.5 Recovery from the 'beneficiary'

Given that State aid is sometimes granted to help undertakings in difficulty and that a rather long period may run between the opening of an investigation by the Commission and the effective recovery of aid, issues have arisen regarding the quality of the beneficiary from whom the aid is to be recovered. In addition, the European Commission may not be in a position to identify, in its decision, all the undertakings which have received unlawful and incompatible aid.

In its 2007 Recovery Notice,[33] the Commission summarized the case law of the European courts and provided some guidance as to the conditions under which the recovery obligation must be extended to companies other than the original beneficiary of the unlawful and incompatible aid.

The Commission makes a distinction between asset deals and share deals. Regarding asset deals, the Commission considers that there is a transfer of the advantage linked to the aid when the sale is concluded at a price lower than market value, e.g. with a successor company set up in order to circumvent the recovery order.[34]

As to the transfer of shares, the Commission takes the view that it does not affect the obligation of the beneficiary to reimburse such aid. At the same time, it considers that when it can be established that the buyer of the shares paid the prevailing market price for the shares of that company, it cannot be regarded as having benefited from an advantage that could constitute a State aid.

In *Magefesa*,[35] the Court of Justice dealt with a form of successor liability. The Court recalled that the recovery of incompatible aid aims at putting an end to the distortion of competition brought about by the competitive advantage which an undertaking enjoyed in the market as compared with its competitors. Therefore, it ruled that where the undertaking which received the unlawful aid is insolvent and a new

[32] CJEU 22 December 2010, C-120/08, ECLI:EU:C:2010:798 (*Bavaria*), par. 40, 41 and the case law cited.
[33] Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15.11.2007, p. 4–17.
[34] Ibid, par. 33.
[35] CJEU 24 January 2013, C-529/09, ECLI:EU:C:2013:31 (*Magefesa II*).

company has been created to continue the activities of the insolvent undertaking, such a newly created company may, if it retains that advantage, be required to repay the aid in question.

The Court indicated that this may be the case where it is established that that company continues genuinely to derive a competitive advantage because of the receipt of that aid, especially where it acquires the assets of the undertaking in liquidation without paying the market price in return or where it is established that the effect of that company's creation is circumvention of the obligation to repay the aid. The Court further explained that the obligation to repay applies where the payment of a market price is not sufficient to cancel out the competitive advantage linked to receipt of the unlawful aid.

This case constitutes a reminder that the enforcement of State aid rules, as is also the case for the antitrust rules, sometimes requires the corporate veil to be pierced in order to offset the grant of an undue advantage to an undertaking.

4. Conclusion

In this chapter, it has been shown that notwithstanding the Commission's exclusive power to declare State aid compatible or incompatible with the Internal Market, national courts play an increasingly important role in enforcing the EU State aid rules. The procedural regulation on State aid does not deal with the role of national courts. This remains a question of case law.

When defining the powers and duties of national courts in this field the Court of Justice has reiterated the procedural autonomy of the Member States, subject however to the principles of effectiveness and equivalence.

Many questions remain on the exact duties of national courts. The Court of Justice has stressed that national courts shall take all measures in their power to avoid that unlawful aid (i.e. new aid that has not yet been reviewed by the Commission, while it is not exempted from notification) be implemented.

This means that courts should take provisional measures to stop further implementation of unlawful aid pending proceedings by the Commission. But to what extent shall a national court order recovery before the Commission has found the aid to be incompatible with the Internal Market?

A question that has arisen in recent case law is what measures the national court can take at the request of a competitor who claims to be put at a competitive disadvantage by the unlawful aid. The answer is not obvious. By contrast, another question that has indeed been settled quite clearly is that of successor liability in cases of recovery.

Finally, it seems that at a more substantive level the Court of Justice remains strict on the possibility of defences under national law (such as social unrest that may be expected in the case of recovery or practical difficulties with the recovery process).

It can be predicted that in coming years the Court of Justice will have to deal with new questions on the role of national courts in the enforcement of the State aid rules. State aid law came to full development many years after antitrust law. In antitrust law there is now a directive on private enforcement. Will there be one for State aid in the future?