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## **COMMUNICATION FROM THE COMMISSION**

### **Commission Notice on the enforcement of State aid rules by national courts**

## **Draft Commission Notice on the enforcement of State aid rules by national courts**

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## 1. INTRODUCTION

- (1) Since 2012, the European Commission has implemented the State aid modernisation agenda (SAM)<sup>1</sup>. Under the SAM, the Commission has adopted a package of legislation, guidelines and notices for the assessment of State aid measures. This package has allowed the Commission to focus its *ex ante* scrutiny on cases with the biggest impact on the internal market, while developing closer cooperation with the Member States in State aid enforcement. To that end, the Commission introduced more possibilities for the Member States to grant aid without prior Commission scrutiny by providing further exemptions from the obligation to notify the Commission of any planned State aid measure. As a result, the amount of aid granted on the basis of block exemptions has increased<sup>2</sup>. In this context, the role of national courts in ensuring compliance with State aid rules has become even more prominent.
- (2) In 2019, the Commission published a study on the enforcement of State aid rules and decisions by national courts in 28 Member States<sup>3</sup> (the ‘Enforcement Study’)<sup>4</sup>. The Enforcement Study has reviewed over 750 national judgements on cases, which fall into two categories: 1) cases where national courts are involved in drawing the consequences of the unlawful implementation of aid (‘private enforcement’) and 2) cases where national courts are involved in implementing Commission decisions ordering recovery (‘public enforcement’).
- (3) The Enforcement Study has revealed that the number of State aid cases addressed to national courts increased over the period from 2007 to 2017. Despite this increase, national courts only awarded remedies on rare occasions, and claims for damages represent a small minority of cases. In addition, the means of cooperation between the Commission and national courts, which were introduced in 2009 by the Commission Notice on the enforcement of State aid law by national courts (the ‘2009 Enforcement Notice’)<sup>5</sup> and in 2015 by Council Regulation (EU) 2015/1589 (the ‘Procedural Regulation’)<sup>6</sup> have not been widely used.
- (4) This Notice provides national courts and other interested parties with practical information on the enforcement of State aid rules at national level. Its main purpose is to provide guidance to national courts when they apply these rules and to encourage closer

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – EU State Aid Modernisation (SAM), COM/2012/0209 final.

<sup>2</sup> Since 2015, more than 96% of new aid measures for which expenditure was reported for the first time was covered by the General Block Exemption Regulation. See [http://ec.europa.eu/competition/state\\_aid/scoreboard/index\\_en.html](http://ec.europa.eu/competition/state_aid/scoreboard/index_en.html).

<sup>3</sup> The Enforcement Study was conducted before the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community was signed (24 January 2020) and before it entered into force (1 February 2020). All reference to Member States in the Enforcement Study is to be intended as also referring to the United Kingdom.

<sup>4</sup> See ‘Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)’, Publications Office of the European Union, Luxembourg, 2019, available at <https://state-aid-caselex-accept.mybit.nl/report>.

<sup>5</sup> Commission Notice on the enforcement of State aid law by national courts (OJ C 85, 9.4.2009, p. 1).

<sup>6</sup> 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, p. 9).

cooperation with the Commission. It takes into account the questions raised by these courts in the context of the Enforcement Study or in cases referred for preliminary rulings to the Court of Justice of the European Union ('Court of Justice'). Some examples are the coherence between the procedures before the Commission and national court proceedings, or the questions raised by the incorrect application of block exemption regulations.

- (5) This Notice is intended to provide guidance to courts and tribunals of the Member States, as defined in Article 267 of the Treaty on the Functioning of the European Union ('TFEU'). It does not bind the national courts or affect their independence.
- (6) Since the 2009 Enforcement Notice, the case law of the General Court and the Court of Justice of the European Union (together, the 'Union Courts') has evolved. This Notice incorporates those developments and replaces the 2009 Enforcement Notice.
- (7) The main focus of this Notice is private enforcement. The Commission Notice on the Recovery of unlawful and incompatible State aid addresses the aspects related to public enforcement<sup>7</sup>. Furthermore, this Notice aims to encourage closer cooperation between the Commission and national courts by laying down all the available tools of cooperation and to address the consequences in case of violation of State aid rules.

### **1.1. The system of State aid control**

- (8) According to Article 107 TFEU, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (9) The general prohibition of State aid relies on a double system of *ex ante* and *ex post* control of interventions involving State aid. Pursuant to Article 108 TFEU, the Commission must keep under constant review all systems of existing aid and assess any plans by a Member State to grant new aid or alter existing aid. For the Commission to perform this review effectively, Member States must cooperate by providing any relevant information and by notifying State aid measures.
- (10) Member States are under an obligation, first, to notify the Commission of any measure intended to grant new aid or alter existing aid and, second, not to put into effect such planned measure until the Commission has assessed its compatibility with the internal market ('standstill obligation')<sup>8</sup>. The standstill obligation stemming from Article 108(3) TFEU has direct effect<sup>9</sup>: it confers rights on individuals, which they can rely on before national courts.

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<sup>7</sup> [OJ C 247, 23.7.2019, p.1.](#)

<sup>8</sup> Judgment of the Court of Justice of 14 November 2019, *Dilly's Wellnesshotel*, C-585/17, ECLI:EU:C:2019:969, paragraph 54.

<sup>9</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 88; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 22; Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 29.

- (11) It follows that the implementation of the system of State aid control, of which the provision of Article 108(3) TFEU constitutes a fundamental feature, is a matter for both the Commission and the national courts, their respective roles being complementary but separate. While the Commission has exclusive competence for assessing the compatibility of aid measures with the internal market, it is for the national courts to safeguard the rights of individuals faced with a possible breach of Article 108(3) TFEU<sup>10</sup>.

## 1.2. The standstill obligation

- (12) The immediate enforceability of Article 108(3) TFEU implies that national courts must take all appropriate actions, in accordance with their national law, to address the consequences of an infringement of that provision<sup>11</sup>.
- (13) For a measure to be subject to the requirements of Article 108(3) TFEU, two conditions need to be satisfied, one positive and one negative: first, the measure qualifies as State aid<sup>12</sup>; and second, the measure does not fulfil all the conditions to benefit from an exemption from the notification obligation.
- (14) Where a measure does not constitute State aid, Member States can, therefore, implement it without prior notification to the Commission. The Commission provided guidance for the interpretation of the notion of State aid<sup>13</sup>.
- (15) Secondly, the Commission has adopted block exemption regulations – such as the General Block Exemption Regulation<sup>14</sup> – setting out the conditions according to which aid measures must or can be considered compatible with the internal market under Article 107(2) or (3)<sup>15</sup>. By *de minimis* regulations<sup>16</sup> the Commission also set the

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<sup>10</sup> Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 38; Judgment of the Court of Justice of 11 March 2010, *CELF et ministre de la Culture et de la Communication*, C-1/09, ECLI:EU:C:2010:136, paragraph 26; Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraph 21; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 21.

<sup>11</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraphs 88 to 89; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraphs 22 to 23.

<sup>12</sup> In that sense, see the 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 ([OJ C 262, 19.7.2016, p. 1](#)).

<sup>13</sup> 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 ([OJ C 262, 19.7.2016, p. 1](#)); Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest ([OJ C 8, 11.1.2012, p. 4](#)); Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees ([OJ C 155, 20.6.2008, p. 10](#)).

<sup>14</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty ([OJ L 187, 26.6.2014, p. 1](#)).

<sup>15</sup> Pursuant to Article 109 TFEU, the Council of the European Union may adopt regulations for the application of Articles 107 and 108 TFEU and determine categories of aid that are exempted from the notification obligation. As provided for in Article 108(4) TFEU, the Commission may then adopt regulations relating to the categories of State aid that the Council has determined, pursuant to Article 109 TFEU.

<sup>16</sup> Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid ([OJ L 352, 24.12.2013, p. 1](#)); Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest ([OJ L 114, 26.4.2012, p. 8](#)); Commission Regulation (EU) No 1408/2013 of 18

conditions according to which aid is deemed not to affect trade between Member States and not to distort or threaten to distort competition<sup>17</sup>. If an aid measure fulfils all the relevant conditions provided for in these regulations, the Member State concerned is exempted from its obligation to notify the Commission of the aid.

- (16) Thirdly, in the Decision on State aid for Services of General Economic Interest<sup>18</sup> and in the Regulation on public passenger transport services by rail and by road<sup>19</sup>, the Commission set conditions to consider the compensations for public service obligations compatible with the internal market pursuant to Articles 106(3) and 93 TFEU. Also in these cases, the measures concerned are not subject to the standstill obligation.

## **2. GENERAL PRINCIPLES OF THE ENFORCEMENT OF STATE AID RULES**

### **2.1. The principle of sincere cooperation**

- (17) Article 4(3) of the Treaty on European Union<sup>20</sup> ('TEU') requires Member States to facilitate the achievement of the European Union's tasks. Pursuant to the principle of sincere cooperation enshrined in this Article, the European Union and Member States, acting within the scope of their jurisdiction, must assist each other in carrying out those tasks.
- (18) The obligation of mutual assistance stemming from Article 4(3) of the TEU also applies to national courts<sup>21</sup>. This means that the Commission assists national courts when they apply European Union law<sup>22</sup>, and that, conversely, national courts assist the Commission in the fulfilment of its tasks. National courts must, therefore, take all the necessary measures to ensure fulfilment of their obligations under European Union law

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December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the agriculture sector ([OJ L 352, 24.12.2013, p. 9](#)); Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid in the fishery and aquaculture sector ([OJ L 190, 28.6.2014, p. 45](#)).

<sup>17</sup> Such regulations are adopted on the basis of the enabling Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid ([OJ L 248, 24.9.2015, p. 1](#)).

<sup>18</sup> Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (notified under document C(2011) 9380) ([OJ L 7, 11.1.2012, p. 3](#)).

<sup>19</sup> Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road ([OJ L 315, 3.12.2007, p. 1](#)).

<sup>20</sup> [OJ C 202, 7.6.2016, p. 13](#).

<sup>21</sup> Judgment of the Court of Justice of 22 October 2002, *Roquette Frères*, C-94/00, ECLI:EU:C:2002:603, paragraph 31.

<sup>22</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 50; Judgment of the Court of Justice of 28 February 1991, *Delimitis v Henninger Bräu*, C-234/89, ECLI:EU:C:1991:91, paragraph 53.

and refrain from taking decisions which may jeopardise the attainment of the objectives of the TEU and the TFEU (together, the ‘Treaties’)<sup>23</sup>.

## **2.2. The principles of equivalence and effectiveness applied to national procedures**

- (19) The Court of Justice has consistently recognised the principle of procedural autonomy in the enforcement of State aid rules<sup>24</sup>. According to this principle, in the absence of European Union legislation on the subject, Member States are free to choose how they fulfil their obligations stemming from the Treaties, provided that the means they use do not adversely affect the scope and effectiveness of European Union law. As a result, national courts must take appropriate measures in accordance with their national law to preserve the correct implementation of State aid rules in the absence of a Commission decision on the compatibility of the measure<sup>25</sup>.
- (20) The application of national law cannot result in making it impossible or excessively difficult for the national courts to ensure compliance with Article 108(3) TFEU<sup>26</sup>. In accordance with the Union Courts’ case law, the applicable national legislation must not be less favorable than the one governing similar domestic situations (‘principle of equivalence’) and must not be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by the European Union law (‘principle of effectiveness’)<sup>27</sup>.

### **2.2.1. Legal standing**

- (21) In application of the principle of procedural autonomy, Member States apply their national rules on legal standing to national litigation concerning State aid, provided that these respect the principles of equivalence and effectiveness.

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<sup>23</sup> Judgment of the Court of Justice of 11 September 2014, *Commission v Germany*, C-527/12, ECLI:EU:C:2014:2193, paragraph 56; Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 41.

<sup>24</sup> Judgment of the Court of Justice of 21 September 1983, *Deutsche Milchkontor GmbH*, C-205/82, ECLI:EU:C:1983:233, paragraphs 22 to 23; Judgment of the Court of Justice of 13 June 2002, *Netherlands v Commission*, C-382/99, ECLI:EU:C:2002:363, paragraph 90; Judgment of the Court of Justice of 11 September 2014, *Commission v Germany*, C-527/12, ECLI:EU:C:2014:2193, paragraphs 39 to 42; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 72; Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraphs 40 to 41; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 135.

<sup>25</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 89.

<sup>26</sup> Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraphs 41 to 42 and 45; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraphs 138 to 140.

<sup>27</sup> Compliance with the principle of effectiveness must be addressed by analysing the particular features of that provision and its role in the relevant procedure. In that sense, see Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraph 40.



- (22) Pursuant to the principle of effectiveness, national rules on individuals' legal standing and interest in bringing proceedings should not undermine their right to effective judicial protection of the rights conferred on them by European Union law<sup>28</sup>.
- (23) The Enforcement Study showed that national courts rule mostly on cases brought by competitors of the aid beneficiary, which are directly affected by the distortion of competition arising from the implementation of the unlawful aid<sup>29</sup>.
- (24) However, a natural or legal person may have an interest in bringing proceedings before national courts, not only to eliminate the distortion of competition created by the unlawful implementation of State aid. National courts must assess the legal interest of the claimant in bringing proceedings, regardless of whether the latter has been directly affected by the distortion of competition arising from the aid measure. Consequently, when applying the national rules on standing, national courts have to take into account their duty to protect the interest of any parties having a sufficient legal interest in initiating proceedings ('third parties')<sup>30</sup>.
- (25) In addition, national courts have to consider further elements when assessing third parties' standing and interest in cases concerning State aid granted through fiscal measures. Third party taxpayers may be regarded as having an interest in bringing an action to obtain the refund of a tax levied in breach of the standstill obligation only where the tax to which they are subject forms part of the financing of the unlawful State aid<sup>31</sup>. Their legal standing does not rely on the existence of a competitive relationship with the aid beneficiary<sup>32</sup>.
- (26) Conversely, third party taxpayers cannot rely on the unlawfulness of an aid measure exempting from taxation certain undertakings or sectors to avoid payment of that tax or to obtain its reimbursement. This is also the case where they operate in competition with the beneficiaries<sup>33</sup>. In fact, such a solution would result in strengthening the

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<sup>28</sup> Judgment of the Court of Justice of 13 January 2005, *Streekgewest*, C-174/02, ECLI:EU:C:2005:10, paragraph 18.

<sup>29</sup> See 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 71, available at <https://state-aid-caselex-accept.mybit.nl/report>.

<sup>30</sup> For example, in Romania, any person who is affected by an unlawful State aid measure has the legal standing in court. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 404, available at <https://state-aid-caselex-accept.mybit.nl/report>. Also, in Latvia, legal standing is directly based on Article 108(3) TFEU and thus national courts may rely on the definition of 'interested party' of the Procedural Regulation to determine whether a person has legal standing in a case. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 300, available at <https://state-aid-caselex-accept.mybit.nl/report>.

<sup>31</sup> Reference is made, for instance, to cases where the unlawful aid is financed by a levy to which the plaintiff is subject. The position is, however, different where the dispute concerns not an application to be exempted from the contested tax, but the legality of the rules relating to that tax. See in that sense Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 25 and Judgment of the Court of Justice of 26 April 2018, *ANGED*, C-233/16, ECLI:EU:C:2018:280, paragraph 26;

<sup>32</sup> Judgment of the Court of Justice of 13 January 2005, *Streekgewest*, C-174/02, ECLI:EU:C:2005:10, paragraph 19.

<sup>33</sup> Judgment of the Court of Justice of 10 November 2016, *DTS Distribuidora de Televisión Digital v Commission*, C-449/14 P, ECLI:EU:C:2016:848, paragraphs 81 to 82; Judgment of the Court of Justice of 21 December 2016, *Commission v Aer Lingus*, C-164/15 P, ECLI:EU:C:2016:990, paragraph 121; Judgment of the



anticompetitive effects of the State aid as it would enlarge the number of undertakings benefitting from a tax exemption constituting unlawful State aid.

### 2.2.2. Jurisdiction

- (27) The principle of procedural autonomy implies that it is for the national legal system of each Member State to designate the courts having jurisdiction in proceedings concerning the granting of unlawful aid. It also implies that Member States determine the detailed procedural rules governing these legal actions, provided that the principles of equivalence and effectiveness are complied with<sup>34</sup>.
- (28) In the absence of specific rules of European Union law, the construction of the Member States' judicial systems varies widely. While a few Member States have set up specialised courts for State aid matters, others have assigned exclusive jurisdiction to chambers of existing courts or adopted procedural rules clarifying the courts' jurisdiction in public and private enforcement cases<sup>35</sup>. In the majority of the Member States, civil and administrative courts are competent in the application of State aid rules<sup>36</sup>.

### 2.2.3. The principle of *res judicata*

- (29) The principle of *res judicata* states that judgements that have become definitive cannot be called into question anymore. This is the case where all rights of appeal have been exhausted or where the time limits provided to exercise those rights have expired. The principle of *res judicata* aims to guarantee the stability of law and legal relations, as well as the sound administration of justice and is enshrined both in the legal order of the European Union and in national legal systems<sup>37</sup>.
- (30) Under the principle of primacy of European Union law<sup>38</sup>, national courts are under a duty to give full effect to the provisions of European Union law, including by refusing

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Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraphs 24 to 28.

<sup>34</sup> Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 72.

<sup>35</sup> For example, Ireland has attributed exclusive jurisdiction to the Competition List of the High Court to hear competition law disputes, including State aid cases. Also, in Italy, the administrative courts of the country have been attributed nearly exclusive competence to hear cases concerning public and private enforcement of State aid rules from 19 January 2013. Civil courts have kept their competence regarding certain types of proceedings and actions. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, pp. 253 and 263 to 264, available at <https://state-aid-caselex-accept.mybit.nl/report>. See, also, 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', pp. 103 to 104.

<sup>36</sup> In particular, in most Member States, administrative courts are competent when the plaintiff challenges an act of the public authority, such as the order implementing the recovery or awarding the aid, while civil courts are competent for issues related to the recovery of State aid in the context of insolvency proceedings or to the award of damages. See 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 64, available at <https://state-aid-caselex-accept.mybit.nl/report>.

<sup>37</sup> Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraph 38.

<sup>38</sup> Judgment of the Court of Justice of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, C-26/62, ECLI:EU:C:1963:1; Judgment of the Court of Justice of 15 July 1964, *Costa v E.N.E.L.*, C-6/64,

on their own motion to apply any conflicting provision of national legislation. This also applies to national rules enshrining the principle of *res judicata*<sup>39</sup>.

- (31) Moreover, the case law of the Union Courts has limited the force of the principle of *res judicata* in the field of State aid. Thus, *res judicata* may extend only to the pleas already expressly settled - subject to the requirements of equivalence and effectiveness - but not to questions that could have been, but were not, raised in an earlier action<sup>40</sup>.
- (32) The principle of the primacy of European Union law also prevents the application of the principle of *res judicata* from limiting the exclusive competence conferred on the Commission by the TFEU<sup>41</sup>. The circumstance that a national court has ruled on a State aid measure prior to a decision by the Commission on that same measure cannot prevent the latter from finding that the measure at stake constitutes unlawful State aid. This holds even if such a conclusion had been previously ruled out by a national court adjudicating at last instance.

### 3. THE ROLE OF THE COMMISSION

- (33) The aim of the system of prior control established by Article 108(3) TFEU is to ensure that only compatible aid can be implemented<sup>42</sup>. In order to achieve that aim, the implementation of planned aid is to be deferred until the Commission adopts a decision on its compatibility with the internal market<sup>43</sup>.

#### 3.1. The exclusive competence of the Commission

- (34) The Commission generally exercises its main role to assess the compatibility of an aid measure in two steps. First, the Commission assesses whether the measure qualifies as State aid under Article 107(1) TFEU<sup>44</sup>; second, it examines whether the measure is compatible with the internal market. The first step, consisting in the assessment of the existence of aid, is a competence exercised by both the Commission and national courts,

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ECLI:EU:C:1964:66; Judgment of the Court of Justice of 9 March 1978, *Amministrazione delle finanze dello Stato v Simmenthal*, C-106/77, ECLI:EU:C:1978:49.

<sup>39</sup> Judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, ECLI:EU:C:2007:434, paragraphs 60 and 61.

<sup>40</sup> Judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, ECLI:EU:C:2007:434, paragraphs 57 to 59; Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraphs 30 and 42 to 43.

<sup>41</sup> Judgment of the Court of Justice of 11 November 2015, *Klausner Holz Niedersachsen*, C-505/14, ECLI:EU:C:2015:742, paragraph 44; Judgment of the Court of Justice of 4 March 2020, *Buonotourist v Commission*, C-586/18 P, ECLI:EU:C:2020:152, paragraphs 92 to 96; Judgment of the Court of Justice of 4 March 2020, *CSTP Azienda della Mobilità v Commission*, C-587/18 P, ECLI:EU:C:2020:150, paragraphs 92 to 96.

<sup>42</sup> Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 19.

<sup>43</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraphs 25 to 26; Judgment of the Court of Justice of 18 May 2017, *Fondul Proprietatea*, C-150/16, ECLI:EU:C:2017:388, paragraph 40; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 84.

<sup>44</sup> 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 ([OJ C 262, 19.7.2016, p. 1](#)).

as the latter may have to establish if a measure is subject to the standstill obligation<sup>45</sup> (see Sections 4.2.1 and 4.2.2). The second step, consisting in the compatibility assessment, falls within the exclusive responsibility of the Commission. The compatibility assessment must be included in a decision<sup>46</sup>, which is subject to review by the Union Courts<sup>47</sup>.

- (35) The Commission can assess a measure's compatibility with the internal market following a preliminary examination (when it does not have doubts about the measure's compatibility with the internal market)<sup>48</sup> or a formal investigation (when it has doubts about the measure's compatibility with the internal market)<sup>49</sup>. When it initiates a formal investigation, the Commission adopts a decision in which it provides its preliminary views on the State aid nature of the measure and sets out its doubts about the measure's compatibility with the internal market ('opening decision')<sup>50</sup>.
- (36) While during the formal investigation the status of the measure's compatibility is pending, the opening decision has certain legal consequences (see Section 4.1.3).
- (37) The assessment of State aid measures by the Commission in its decisions limits national courts in the exercise of their competences (see Section 4.1). Prior Commission decisions are binding on national courts, to the extent that a national court must follow the Commission's assessment on the existence of aid<sup>51</sup>. Conversely, if a national court rules prior to any Commission decision, this ruling cannot prevent the Commission from exercising at some point in time the exclusive competence conferred on it by the TFEU (see Section 2.2.3)<sup>52</sup>.

### **3.2. The powers of the Commission to enforce State aid rules**

- (38) As a general rule, in order to impose remedies for the violation of State aid rules, when it concludes that the measure examined constitutes unlawful and incompatible State aid, the Commission needs to adopt a final decision which concludes the formal investigation and orders the recovery of this aid ('recovery decision')<sup>53 54</sup>.

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<sup>45</sup> Judgment of the Court of Justice of 4 March 2020, *Buonotourist v Commission*, C-586/18 P, ECLI:EU:C:2020:152, paragraph 90.

<sup>46</sup> See Articles 4 and 9 of the Procedural Regulation ([OJ L 248, 24.9.2015, p. 14](#)).

<sup>47</sup> Judgment of the Court of Justice of 19 July 2016, *Kotnik and Others*, C-526/14, ECLI:EU:C:2016:570, paragraph 37.

<sup>48</sup> Decision not to raise objection, Procedural Regulation, Article 4(3).

<sup>49</sup> See the notions of 'positive decision' and 'negative decision' respectively in Article 9 (3) and (5) of the Procedural Regulation.

<sup>50</sup> See Article 4(3) and (4) of the Procedural Regulation ([OJ L 248, 24.9.2015, p. 14](#)).

<sup>51</sup> Judgment of the Court of Justice of 15 September 2016, *PGE*, C-574/14, ECLI:EU:C:2016:686, paragraph 33.

<sup>52</sup> Judgment of the Court of Justice of 4 March 2020, *Buonotourist v Commission*, C-586/18 P, ECLI:EU:C:2020:152, paragraphs 92 to 96; Judgment of the Court of Justice of 4 March 2020, *CSTP Azienda della Mobilità v Commission*, C-587/18 P, ECLI:EU:C:2020:150, paragraphs 92 to 96.

<sup>53</sup> Judgment of the Court of Justice of 14 February 1990, *France v Commission* ('*Boussac*'), C-301/87, ECLI:EU:C:1990:67, paragraphs 9 to 22. This does not preclude the possibility for the Commission to issue a recovery injunction in specific cases.

<sup>54</sup> When the Commission simply establishes that State aid has been granted unlawfully, without prior notification to the Commission under Article 108(3) TFEU, it does not order the recovery of the aid already disbursed, before it adopts a final decision declaring the aid incompatible with the internal market.

- (39) By adopting rules of procedure in the field of State aid, the Commission has codified its enforcement powers<sup>55</sup>. Pursuant to Article 16 of the Procedural Regulation, the Commission must order the recovery of unlawful and incompatible aid by adopting a decision. When it establishes in a Commission decision that an aid measure is unlawful and incompatible with the internal market, the Commission has no discretion and must order its recovery<sup>56</sup>, unless that would be contrary to a general principle of European Union law<sup>57</sup>. In addition, the Commission's powers to order recovery are subject to a limitation period of 10 years<sup>58</sup>.
- (40) In some instances, pursuant to Article 13 of the Procedural Regulation, the Commission could, at its discretion, adopt provisional measures while it completes the compatibility assessment. In particular, the Commission may issue suspension or recovery injunctions, provided that a number of conditions are fulfilled<sup>59</sup> <sup>60</sup>. These measures seek to limit the damage associated with the implementation of the aid in breach of the notification and standstill obligations<sup>61</sup>.

#### 4. THE ROLE OF NATIONAL COURTS

- (41) While the Commission must examine the compatibility of an aid measure with the internal market, even where it has established its implementation in breach of Article 108(3) TFEU, the primary role of national courts is to preserve the rights of individuals faced with that breach<sup>62</sup>.
- (42) National courts have the responsibility to provide effective legal protection to third parties<sup>63</sup>. Their contribution to the State aid control system is especially necessary in cases where unlawful aid is granted, in the absence of a final Commission decision on

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<sup>55</sup> Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 66; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 110.

<sup>56</sup> Judgment of the Court of Justice of 7 March 2002, *Italy v Commission*, C-310/99, ECLI:EU:C:2002:143, paragraph 99.

<sup>57</sup> See Article 16 of the Procedural Regulation ([OJ L 248, 24.9.2015, p. 14](#)).

<sup>58</sup> See Article 17(1) of the Procedural Regulation ([OJ L 248, 24.9.2015, p. 14](#)).

<sup>59</sup> Judgment of the Court of Justice of 14 February 1990, *France v Commission*, C-301/87, ECLI:EU:C:1990:67, paragraphs 19 to 20; Judgment of the Court of Justice of 21 March 1991, *Italy v Commission*, C-303/88, ECLI:EU:C:1991:136, paragraph 46; Judgment of the Court of Justice of 21 March 1990, *Belgium v Commission*, C-142/87, ECLI:EU:C:1990:125, paragraphs 14 to 16; [quashed by the Court ; see C-456/18 P].

<sup>60</sup> If the Member State fails to comply with a suspension or a recovery injunction, the Commission is entitled, while carrying out the examination on the substance of the matter, to bring the matter directly before the Court of Justice by applying for a declaration that such failure constitutes an infringement of the TFEU, pursuant to Article 14 of the Procedural Regulation ([OJ L 248, 24.9.2015, p. 19](#)).

<sup>61</sup> See Article 13(1) and (2) of the Procedural Regulation ([OJ L 248, 24.9.2015, p. 19](#)).

<sup>62</sup> Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraph 38; Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraphs 11 to 12.

<sup>63</sup> Judgment of the Court of Justice of 11 December 1973, *Lorenz GmbH v Bundesrepublik Deutschland and Others*, C-120/73, ECLI:EU:C:1973:152, paragraph 8; Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraph 11; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 39.

the same measure or until the adoption of such decision, as well as in cases where a compatible aid has been granted in violation of the standstill obligation<sup>64</sup>.

#### **4.1. Delimitation of the competences of national courts in the application of State aid rules**

- (43) National courts have the power to interpret and apply Articles 107(1) and 108(3) TFEU. In particular, in the absence of a Commission decision regarding the same measure<sup>65</sup>, national courts are bound only by the objective notion of State aid when exercising their competence to assess the existence of State aid.
- (44) The Commission also assesses the existence of State aid, which is normally a first step before assessing its compatibility. Therefore, any proceedings before the Commission, prior or subsequent to those before national courts, could affect the latter<sup>66</sup>, as explained in Sections 4.1.1 to 4.1.3.

##### **4.1.1. Following a decision by the Commission**

- (45) National courts have limited competences vis-à-vis Commission decisions and must follow their assessment on the existence of State aid. National courts also have no jurisdiction to declare Commission decisions invalid<sup>67</sup>. The Union Courts alone have that jurisdiction pursuant to Article 263 TFEU<sup>68</sup>.
- (46) If a national court has doubts about the interpretation or the validity of a Commission decision, that court may seek clarification from the Commission (see Section 5.1) or, depending on the circumstances, may or must<sup>69</sup> refer a question to the Court of Justice for a preliminary ruling, in accordance with Article 267 TFEU<sup>70</sup>.

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<sup>64</sup> For the role of national courts in the public enforcement of State aid, see the Communication from the Commission - Commission Notice on the recovery of unlawful and incompatible State aid ([OJ C 247, 23.7.2019, p. 1](#)).

<sup>65</sup> See also Judgement of the General Court of 20 June 2019, *A&O hostel and hotel Berlin v Commission*, T-578/17, ECLI:EU:T:2019:437, paragraph 72.

<sup>66</sup> Judgment of the Court of Justice of 4 March 2020, *CSTP Azienda della Mobilità v Commission*, C-587/18 P, ECLI:EU:C:2020:150, paragraphs 92 to 93; Judgment of the Court of Justice of 4 March 2020, *Buonotourist v Commission*, C-586/18 P, ECLI:EU:C:2020:152, paragraph 96.

<sup>67</sup> Judgment of the Court of Justice of 22 October 1987, *Foto-Frost v Hauptzollamt Lübeck-Ost*, C-314/85, ECLI:EU:C:1987:452, paragraph 20.

<sup>68</sup> Judgment of the Court of Justice of 21 February 1991, *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest v Hauptzollamt Itzehoe and Hauptzollamt Paderborn*, C-143/88 and C-92/89, ECLI:EU:C:1991:65, paragraph 23; Judgment of the Court of Justice of 9 November 1995, *Atlanta Fruchthandelsgesellschaft and Others (I) v Bundesamt für Ernährung und Forstwirtschaft*, C-465/93, ECLI:EU:C:1995:369, paragraph 51; Judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, ECLI:EU:C:2007:434, paragraph 53.

<sup>69</sup> Based on Article 267 TFEU, a national court whose decision is not subject to further judicial review is under an obligation to initiate a preliminary reference to the Court of Justice in certain circumstances. Where the interpretation of European Union law may be clearly deduced from existing case law or where it leaves no scope for reasonable doubt, a court against whose decisions there is no judicial remedy under national law is not required to refer the case for a preliminary ruling by the Court of Justice, although it is free to do so. See Judgment of the Court of Justice of 6 October 1982, *CILFIT v Ministero della Sanità*, C-283/81, ECLI:EU:C:1982:335, paragraphs 14 to 20; Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de la Rioja*, C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 42 and 43; Judgment of the Court of Justice of 28 July 2016, *Association France Nature Environnement*, C-379/15, ECLI:EU:C:2016:603, paragraphs 47 to 50; Judgment of the Court of Justice of 15 September 2016, *PGE*, C-

#### 4.1.2. Following Commission decisions declaring the aid compatible

- (47) A final Commission decision recognising the compatibility of unlawful aid after it has been granted does not have the effect of regularising *ex post facto* the measures implementing the aid, which had been adopted in breach of the standstill obligation provided for by the TFEU.
- (48) In this context, national courts must offer individuals the ‘certain prospect that all appropriate conclusions will be drawn’<sup>71</sup> from the infringement of the standstill obligation. Such conclusions relate in particular to the validity of the acts giving effect to the aid and to the recovery of financial support granted in disregard of the standstill obligation, in accordance with their national law.
- (49) It follows that, where a third party seeks before a national court the elimination of advantages linked to the premature implementation of the aid, the court should uphold its action even if the Commission has already declared the aid in question compatible. Any other interpretation would have the effect of allowing the Member States to disregard the provisions of the TFEU and thus deprive them of their effectiveness<sup>72</sup>.

#### 4.1.3. Following an opening decision by the Commission

- (50) The situation is different when the Commission has merely initiated, pursuant to Article 108(2) TFEU, an investigation procedure regarding an aid measure brought before a national court. In the opening decision, the Commission, in principle, expresses doubts as to whether an aid measure is compatible with the internal market. While these doubts generally concern the compatibility of the aid, the assessment of the existence of aid is preliminary in nature and is drawn from an initial examination of the measure in question<sup>73</sup>.
- (51) In accordance with Article 4(3) TEU, national courts must take into account the legal situation resulting from the ongoing procedures before the Commission, even if it is provisional.
- (52) This means that, while the investigation procedure is ongoing, the opening decision has, in itself, legal consequences that the national courts must draw. Following an opening decision, a national court cannot hold that this measure does not constitute aid within

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574/14, ECLI:EU:C:2016:686, paragraph 40, Judgment of the Court of Justice of 4 October 2018, *Commission v France (Advance Payment)*, C-416/17, ECLI:EU:C:2018:811, paragraphs 108 and following.

<sup>70</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 50 to 51; Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 44.

<sup>71</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 30; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 89; Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 23; Judgment of the Court of Justice of 13 December 2018, *Rittering and Others*, C-492/17, ECLI:EU:C:2018:1019, paragraph 42.

<sup>72</sup> Judgment of the Court of Justice of 19 December 2019, *Arriva Italia and Others*, C-385/18, ECLI:EU:C:2019:1121, paragraph 85.

<sup>73</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraphs 37 to 40.



the meaning of Article 107(1) TFEU, otherwise the effectiveness of Article 108(3) TFEU would be compromised<sup>74</sup>.

- (53) To that end, it is the responsibility of national courts to order measures appropriate to remedy the unlawful implementation of the aid until the Commission adopts a final decision. 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 other provisional measures in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's opening decision<sup>75</sup>.
- (54) In addition, the national courts cannot simply stay their proceedings until the Commission has reached a final decision<sup>76</sup>. A decision to stay proceedings would, *de facto*, have the same effect as a decision to refuse the application for interim measures and would amount to maintaining the unlawful advantage during the period in which implementation of the aid is prohibited.

#### **4.2. The competences of national courts**

- (55) As referred to in paragraphs 11 to 13, national courts must establish whether State aid has been granted in accordance with Article 108(3) TFEU within the limits set by the exclusive competence of the Commission to assess the compatibility of the aid and any pre-existing Commission decision on the same measure.
- (56) National courts carry out their assessment in two steps: first, they assess the nature of the measure to establish whether it qualifies as State aid under Article 107(1) TFEU; second, if the national courts find that the measure constitutes State aid, they have to conclude whether the measure is subject to the standstill obligation. Where national courts find a breach of the standstill obligation, they must adopt appropriate remedies to safeguard the rights of individuals affected by such breach.

##### **4.2.1. Assessing the existence of aid**

- (57) The finding that the aid was unlawfully implemented requires the preliminary finding that the State aid exists. The Union Courts have confirmed that, as is the case for the Commission, national courts have jurisdiction to interpret the notion of State aid<sup>77</sup>.

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<sup>74</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 38.

<sup>75</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraphs 41 to 43.

<sup>76</sup> Judgment of the Court of Justice of 11 March 2010, *CELF et ministre de la Culture et de la Communication*, C-1/09, ECLI:EU:C:2010:136, paragraphs 31 and following; Order of the Court of Justice of 4 April 2014, *Flughafen Lübeck*, C-27/13, ECLI:EU:C:2014:240, paragraph 30.

<sup>77</sup> Judgment of the Court of Justice of 22 March 1977, *Steinike & Weinlig*, C-78/76, ECLI:EU:C:1977:52, paragraph 14; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 49; Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraph 10; Judgment of the Court of Justice of 18 July 2007, *Lucchini*, C-119/05, ECLI:EU:C:2007:434, paragraph 50; Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 39.



- (58) To ascertain the existence of State aid, a series of complex issues often needs to be assessed (see paragraph 14). In its Notice on the notion of State aid as referred to in Article 107(1) TFEU<sup>78</sup>, the Commission has issued detailed guidance to provide assistance to national courts.
- (59) Where doubts arise as to the existence of State aid elements, national courts may ask the Commission to provide its opinion (see section 5.1.1.2). National courts also have the possibility or the obligation to refer the matter to the Court of Justice for a preliminary ruling under Article 267 TFEU.

#### 4.2.2. Assessing if there is a breach of the standstill obligation

- (60) In the context of assessing whether an aid measure is subject to the standstill obligation, national courts must consider whether the measure falls under one of the exceptions from the notification obligation (see section 1.2). In particular, national courts evaluate whether the measure concerned fulfils the criteria set out in a block exemption regulation or constitutes existing aid.
- (61) If an aid measure fulfils all the conditions provided in a block exemption regulation, it is exempted from prior notification to the Commission and compatible with the internal market.
- (62) With regard to ‘existing aid’, the Procedural Regulation defines the circumstances under which aid is to be considered as existing in order to provide legal certainty to Member States and beneficiaries<sup>79</sup>. Following the developments in State aid policy, certain measures which did not constitute new aid when they were put into effect may since have become unlawful. When a measure constituting State aid falls into the category of existing aid, it is not subject to notification by the Member State, but is still subject to review by the Commission.

##### 4.2.2.1. *Applying the conditions of block exemption regulations*

- (63) Member States may rely on a measure being exempted from the notification requirement if it fulfils the general and specific conditions provided for in block exemption regulations. However, if a Member State implements an aid measure that does not meet all conditions of the applicable block exemption without prior notification to the Commission, the implementation of that aid is unlawful.
- (64) The notification and standstill obligations stemming from the TFEU are binding not merely on national courts but also on all administrative bodies of the Member States<sup>80</sup>.
- (65) When national courts assess if a State aid measure has been lawfully implemented, they must verify whether the conditions of a block exemption regulation were complied with to establish that the measure was exempt from the notification obligation. The Court of Justice has defined the scope of the competences of national courts when they establish

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<sup>78</sup> [OJ C 262, 19.7.2016, p. 1.](#)

<sup>79</sup> Procedural Regulation, Articles 21 to 23.

<sup>80</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraphs 90 to 92.

whether the conditions of the General Block Exemption Regulation were correctly applied<sup>81</sup>, that is to say, the extent to which national courts can interpret its provisions.

- (66) The adoption of block exemption regulations does not intend to transfer to Member States the assessment of State aid compatibility with the internal market, which remains the exclusive competence of the Commission<sup>82</sup>. Assessing the compatibility of a specific aid measure with criteria other than the ones set out in the relevant block exemption regulation would require a complex assessment, which is the sole competence of the Commission<sup>83</sup>. It is, however, the duty of national courts to ascertain whether national authorities have granted aid that fully complies with the general and specific conditions of the applicable block exemption regulation, strictly interpreted.
- (67) Where aid has been implemented under a block exemption regulation without satisfying all applicable conditions, the recipient of this aid cannot have at that time a legitimate expectation that the granting of the aid was lawful<sup>84</sup>. National authorities are not vested with the power to adopt final decisions finding that there is no obligation to notify the aid<sup>85</sup>.

#### 4.2.2.2. *Existing aid*

- (68) As referred to in paragraph 62, contrary to new aid, existing aid is not subject to the notification obligation. If a national court finds that a measure qualifies as existing aid, it cannot review it. Indeed, it is exclusively for the Commission to assess whether an existing aid is still compatible with the internal market and propose appropriate measures where a scheme is no longer compatible. When implementing State aid rules, national courts are limited to assessing whether an aid measure constitutes existing aid within the meaning of Article 108(1) TFUE.
- (69) The Treaties do not provide any guidance on the qualification of an aid measure as existing aid. It is in the provisions of the Procedural Regulation where the circumstances under which aid is to be considered as existing are defined<sup>86</sup>. However, the Procedural Regulation does not contain any provision relating to the powers and obligations of

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<sup>81</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 101; Judgment of the Court of Justice of 29 July 2019, *BMW v Commission*, C-654/17 P, ECLI:EU:C:2019:634, paragraph 151.

<sup>82</sup> Judgment of the Court of Justice of 29 July 2019, *BMW v Commission*, C-654/17 P, ECLI:EU:C:2019:634, paragraphs 132 and 133; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 67.

<sup>83</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 68.

<sup>84</sup> Judgment of the Court of Justice of 15 December 2005, *Unicredito Italiano*, C-148/04, ECLI:EU:C:2005:774, paragraph 104; Judgment of the Court of Justice of 19 March 2015, *OTP Bank*, C-672/13, ECLI:EU:C:2015:185, paragraph 77 ; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 104.

<sup>85</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 101; Judgment of the Court of Justice of 29 July 2019, *BMW v Commission*, C-654/17 P, ECLI:EU:C:2019:634, paragraph 151.

<sup>86</sup> Procedural Regulation, Articles 1(b) and 17(3).

national courts, which continue to be governed by the provisions of the TFEU as interpreted by the Court of Justice<sup>87</sup>.

- (70) For instance, Article 17(1) of the Procedural Regulation establishes that the powers of the Commission to order the recovery of aid are subject to a limitation period of 10 years, while paragraph 3 of that Article provides that ‘any aid with regard to which the limitation period has expired shall be deemed to be existing aid’.
- (71) In this context, the ten-year limitation period does not provide for a general principle whereby new aid would become existing aid after that period has elapsed<sup>88</sup>. The limitation period of 10 years cannot be applied to national procedures even by analogy<sup>89</sup>, as the recovery is effected in accordance with the rules laid down by the applicable national law.

#### 4.2.3. Safeguarding the rights of individuals faced with the breach of the standstill obligation

- (72) To safeguard the rights of individuals against the unlawful implementation of State aid, national courts can adopt different types of remedies depending on the situation. For instance, they may decide to suspend or terminate the implementation of the measure (Section 4.2.3.1), order the recovery of the sums already disbursed (Section 4.2.3.2) or adopt different provisional measures to otherwise safeguard the interests of the parties concerned (Section 4.2.3.3)<sup>90</sup>. Finally, they may be asked to rule on compensation for damages suffered by third parties as a consequence of the unlawful implementation of the State aid (Section 4.2.3.4). In any event, national courts must offer to individuals the certainty that all appropriate action will be taken, in accordance with their national law, to address the consequences of the infringement of Article 108(3) TFEU<sup>91</sup>.

##### 4.2.3.1 Suspension or termination of the implementation of the measure

- (73) Where a State authority has not yet implemented a State aid measure granted in violation of Article 108(3) TFEU, national courts must prevent that implementation, either by suspending it or by terminating it.
- (74) European Union law does not impose any specific conclusion that the national courts must necessarily draw with regard to the validity of the act granting the unlawful State aid. It solely requires that they take effective measures to prevent the disbursement of

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<sup>87</sup> Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 66; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 110.

<sup>88</sup> Judgment of the General Court of 30 April 2002, *Government of Gibraltar v Commission*, T-195/01 and T-207/01, ECLI:EU:T:2002:111, paragraph 130.

<sup>89</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraphs 108 and 109 ; Judgement of the Court of Justice of 30 April 2020, *Nelson Antunes da Cunha*, C-627/18, ECLI:EU:C:2020:321, paragraph 33

<sup>90</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 43; Judgment of the Court of Justice of 21 December 2016, *Commission v Hansestadt Lübeck*, C-524/14 P, ECLI:EU:C:2016:971, paragraph 29.

<sup>91</sup> Judgment of the Court of Justice of 3 March 2020, *Vodafone Magyarország*, C-75/18, ECLI:EU:C:2020:139, paragraph 23; Judgment of the Court of Justice of 19 December 2019, *Arriva Italia and Others*, C-385/18, ECLI:EU:C:2019:1121, paragraph 84.

the unlawful aid to the beneficiary. However, there may be situations under national law where the suspension of the unlawful implementation of the measure can be achieved by annulling the granting act<sup>92</sup>.

- (75) Accordingly, national courts may declare the contract by which the aid is granted null and void, annul the decision granting the aid, or suspend its implementation (for instance, in cases where the aid is granted in the form of access to a facility or service).
- (76) When the aid is granted in instalments, national courts should order the suspension of future payments.

#### 4.2.3.2 Recovery

- (77) When the unlawful aid has already been paid to the beneficiary, national courts must, in principle, and in the absence of a Commission decision declaring the aid compatible, order the full recovery of the unlawfully granted amount<sup>93</sup>. Abolishing aid by means of recovery is the logical consequence of its unlawfulness<sup>94</sup>.
- (78) To restore the situation existing before the aid was granted, national courts must abolish completely the advantage unlawfully conferred on the beneficiary. Such advantage encompasses the aid (the ‘aid principal’) as well as the non-payment of the interest that the undertaking would have paid had it had to borrow the amount of the aid on the market during the period of the unlawfulness and which results in the improvement of its competitive position over that period (‘illegality interest’)<sup>95</sup>. Therefore, national courts must order the recovery of both the aid principal and the illegality interest.
- (79) If there are parallel procedures before a national court and before the Commission, and if the Commission declares the aid incompatible, the national court should execute the Commission decision in accordance with its provisions<sup>96</sup>.
- (80) If the Commission declares the aid compatible, European Union law only requires Member States to recover the illegality interest in respect of the period of unlawfulness<sup>97</sup>, which runs from the payment of the aid until the declaration of

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<sup>92</sup> Judgment of the Court of Justice of 8 December 2011, *Residex Capital IV*, C-275/10, ECLI:EU:C:2011:814, paragraphs 44-47.

<sup>93</sup> Judgment of the Court of Justice of 21 July 2005, *Xunta de Galicia*, C-71/04, ECLI:EU:C:2005:493, paragraph 49; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 40 and 68; Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraph 12; Judgment of the Court of Justice of 8 December 2011, *Residex Capital IV*, C-275/10, ECLI:EU:C:2011:814, paragraph 43.

<sup>94</sup> Judgment of the Court of Justice of 21 December 2016, *Commission v Aer Lingus*, C-164/15 P and C-165/15 P, ECLI:EU:C:2016:990, paragraph 116; Judgment of the Court of Justice of 19 March 2015, *OTP Bank*, C-672/13, ECLI:EU:C:2015:185, paragraph 70; Judgment of the Court of Justice of 8 December 2011, *Residex Capital IV*, C-275/10, ECLI:EU:C:2011:814, paragraph 33.

<sup>95</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 132; Judgment of the Court of Justice of 8 December 2011, *Residex Capital IV*, C-275/10, ECLI:EU:C:2011:814, paragraph 39.

<sup>96</sup> In that sense, see the Communication from the Commission - Commission Notice on the recovery of unlawful and incompatible State aid ([OJ C 247, 23.7.2019, p. 1](#)).

<sup>97</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 134.

compatibility. The Commission decision does not have the effect of retrospectively regularising implementing measures that were taken in breach of Article 108(3) TFEU<sup>98</sup>.

- (81) If a Commission decision declaring the measure compatible is annulled, this measure cannot be considered cleared by the Commission. If it constitutes State aid, its implementation is considered unlawful<sup>99</sup>. Furthermore, where an action for annulment has been brought, the recipient is not entitled to invoke any legitimate expectation that the aid was lawful<sup>100</sup>.
- (82) For the calculation of the illegality interest, neither Article 16(2) of the Procedural Regulation nor Articles 9 and 11 of Commission Regulation (EC) No 794/2004<sup>101</sup> apply to the recovery of unlawful aid by a Member State in the absence of a Commission recovery decision. Therefore, in such cases, the authorities of the Member State concerned must calculate the illegality interest in accordance with the applicable rules of national law, provided that two conditions are fulfilled. First, these rules must respect the principles of equivalence and effectiveness (see Section 2.2); and second, the illegality interest must be calculated at a rate equivalent to that which would have been applied if the beneficiary had had to borrow the amount of the aid at issue on the market within that period<sup>102</sup>.
- (83) With regard to the prescription period applied to national court's powers to order recovery, the Union Courts have ruled that the ten-year limitation period provided for by the Procedural Regulation applies solely to the Commission<sup>103</sup>. As long as national procedures provide for a longer prescription period, a national judge must order the recovery of aid granted in violation of the standstill obligation, even after the limitation period provided for the Commission has expired. National prescription periods shorter than the 10 years also bind national courts, unless there is a Commission recovery decision<sup>104</sup>. Where the Commission adopts a recovery decision, Member States cannot justify their failure to implement that decision on the basis of requirements of national law, such as national prescription periods<sup>105</sup>.

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<sup>98</sup> Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraph 40; Judgment of the Court of Justice of 19 March 2015, *OTP Bank*, C-672/13, ECLI:EU:C:2015:185, paragraph 76; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 59.

<sup>99</sup> Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraph 63.

<sup>100</sup> Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraph 68.

<sup>101</sup> 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 ([OJ L 140, 30.4.2004, p. 1](#)).

<sup>102</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 141.

<sup>103</sup> Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 61.

<sup>104</sup> Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraphs 71 to 75.

<sup>105</sup> Judgment of the Court of Justice of 20 March 1997, *Land Rheinland-Pfalz v Alcan Deutschland*, C-24/95, ECLI:EU:C:1997:163, paragraphs 34 to 37; Judgment of the Court of Justice of 29 March 2012, *Commission v*

#### 4.2.3.3 Interim measures

- (84) As part of their obligations under Article 108(3) TFEU, national courts are required to take interim measures where this is appropriate to safeguard the rights of individuals and the direct effect of Article 108(3) TFEU<sup>106</sup>. National courts adopt these measures, which aim to eliminate the anti-competitive effects of the aid on a provisional basis<sup>107</sup>, in accordance with their national law, provided that the conditions of equivalence and effectiveness are fulfilled (Section 2.2).
- (85) National courts may choose to take interim measures where unlawful aid has already been paid<sup>108</sup> or is about to be paid. In the first case, national courts may order either the repayment of the aid with illegality interest or the provisional transfer of the aid, including interest for the period between the implementation of the aid and its transfer, on a blocked account. These options ensure that the advantage linked to the unlawful aid does not remain further at the disposal of the beneficiary. Where there is a risk of imminent payment of the aid, the court may issue an interim order preventing the disbursement of the presumably unlawful aid until the substance of the matter is resolved<sup>109</sup>.
- (86) Similarly, where the national court wishes to await the outcome of the Commission's compatibility assessment before adopting a final ruling, it may adopt appropriate interim measures. An ongoing Commission investigation does not release the national court from its obligation to protect rights of individuals under Article 108(3)<sup>110</sup>.
- (87) National courts have an obligation to adopt interim measures if certain conditions are satisfied: (i) there is no doubt regarding the existence of State aid; (ii) the aid is about to

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*Italy*, C-243/10, ECLI:EU:C:2012:182, paragraph 35; Judgment of the Court of Justice of 30 April 2020, *Nelson Antunes da Cunha*, C-627/18, ECLI:EU:C:2020:321, paragraph 60.

<sup>106</sup> Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraph 12; Judgment of the Court of Justice of 21 December 2016, *Commission v Hansestadt Lübeck*, C-524/14 P, ECLI:EU:C:2016:971, paragraph 29; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 52; Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 46.

<sup>107</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 52; Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 46.

<sup>108</sup> An interesting French court order following a negative decision of the Commission was reported in the Enforcement Study: in order to compensate for the automatic suspensory effect of an appeal against the recovery order, the national court ordered the beneficiary to pay the sums due on a blocked account. In doing so, the court used a provision of French law by which provisional payment is possible in cases where the obligation to pay cannot be seriously called into question. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 156, Case Summary FR8: *Cour administrative d'appel de Bordeaux*, 10 December 2015, available at <https://state-aid-caselex-accept.mybit.nl/report>.

<sup>109</sup> Judgment of the Court of Justice of 26 October 2016, *DEI and Commission v Alouminion tis Ellados*, C-590/14 P, ECLI:EU:C:2016:797, paragraph 101.

<sup>110</sup> National courts may also choose to take provisional measures while awaiting an opinion or information from the Commission, or a judgement from a higher national court or from the Union Courts.

be, or has been, implemented; and (iii) no exceptional circumstances have been found, which would make recovery inappropriate<sup>111</sup>.

#### 4.2.3.4 Action for damages

- (88) As part of their role under Article 108(3) TFEU, national courts may also be required to adjudicate on claims for compensation for damages caused to third parties by unlawful State aid. If successful, such claims provide the claimants with direct financial compensation for the loss suffered.
- (89) The Court of Justice has repeatedly held that affected third parties can bring such actions for compensation for damages before national courts, in accordance with national law<sup>112</sup>, which should comply with the principles of equivalence and effectiveness (see Section 2.2). Consequently, the legal bases on which claimants have relied in the past vary significantly across the Member States.
- (90) Irrespective of the possibility to claim damages under national law, breaches of the standstill obligation can in principle give rise to claims for damages based on the ‘*Francovich*’<sup>113</sup> and ‘*Brasserie du Pêcheur*’<sup>114</sup> jurisprudence of the Court of Justice<sup>115</sup>. This jurisprudence confirms that Member States are required to compensate for loss and damage caused to individuals as a result of breaches of European Union law for which the State is responsible<sup>116</sup>. Such liability exists where: (i) the rule of law infringed is intended to confer rights on individuals; (ii) the breach is sufficiently serious; and (iii) there is a direct causal link between the breach of the Member State's obligation and the damage suffered by the injured parties<sup>117</sup>.
- (91) The first two requirements will generally be met in relation to violations of Article 108(3) TFEU. The Court of Justice has confirmed the existence of rights of individuals

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<sup>111</sup> Judgment of the Court of Justice of 11 March 2010, *CELF et ministre de la Culture et de la Communication*, C-1/09, ECLI:EU:C:2010:136, paragraph 36; Order of the General Court of 3 March 2015, *Gemeente Nijmegen v Commission*, T-251/13, ECLI:EU:T:2015:142, paragraph 45.

<sup>112</sup> Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraph 55; Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 56; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 75; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 56.

<sup>113</sup> Judgment of the Court of Justice of 19 November 1991, *Francovich and Bonifaci v Italy*, C-6/90 and C-9/90, ECLI:EU:C:1991:428.

<sup>114</sup> Judgment of the Court of Justice of 5 March 1996, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, C-46/93 and C-48/93, ECLI:EU:C:1991:428, paragraph 51.

<sup>115</sup> Judgment of the Court of Justice of 13 June 2006, *Traghetti del Mediterraneo*, C-173/03, ECLI:EU:C:2006:391, paragraph 41.

<sup>116</sup> Judgment of the Court of Justice of 19 November 1991, *Francovich and Bonifaci v Italy*, C-6/90 and C-9/90, ECLI:EU:C:1991:428, paragraphs 31 to 37; Judgment of the Court of Justice of 5 March 1996, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, C-46/93 and C-48/93, ECLI:EU:C:1991:428, paragraph 31.

<sup>117</sup> Judgment of the Court of Justice of 13 June 2006, *Traghetti del Mediterraneo*, C-173/03, ECLI:EU:C:2006:391, paragraph 45.



under this provision and clarified that the protection of these rights is the genuine role of national courts<sup>118</sup>.

- (92) Similarly, as Member State authorities are, in principle, under an obligation to notify State aid measures prior to their implementation, the infringement of Article 108(3) TFEU will in most cases be sufficient to establish the existence of a serious breach under the case law of the Union Courts. In the presence of State aid, Member State authorities cannot normally argue that they were not aware of the standstill obligation, as there is sufficient case law and Commission guidance on the application of Articles 107(1) and 108(3) of the Treaty. In case of doubt and for reasons of legal certainty, Member States can always notify the Commission of the measure<sup>119</sup>.
- (93) The third requirement, that the breach of European Union law must have caused an actual and certain financial damage to the claimant, can be met in various ways. The Enforcement Study pointed out that national courts have rarely awarded damages, their main challenge being to identify the causal link between the harm and the unlawful aid<sup>120</sup>.
- (94) Claimants will often argue that the aid directly caused a loss of profit. When confronted with such claims, national courts should take into account the following considerations:
- (a) By virtue of the European Union law requirements of equivalence and effectiveness, national rules may not exclude a Member State's liability for loss of profit<sup>121</sup>. Should national law contain such an exclusion, the national court should leave that provision unapplied as regards damages claims for breach of Article 108(3) TFEU;
  - (b) Determining the actual amount of lost profit will be easier where the unlawful aid enabled the beneficiary to win over a contract or a specific business opportunity from the claimant and the latter has already been executed by the beneficiary.;

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<sup>118</sup> Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraphs 12 to 14; Judgment of the Court of Justice of 21 October 2003, *van Calster and Cleeren*, C-261/01 and C-262/01, ECLI:EU:C:2003:571, paragraph 53; Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraph 38.

<sup>119</sup> In some cases, however, the Union courts have taken the view that, in order to determine whether a mere infringement of European Union law by a Member State constitutes a sufficiently serious breach, national courts must take account of several factors, such as the excusability of the relevant breach or the fact that the position taken by a Union institution may have contributed to that breach. In that sense, see judgment of the Court of Justice of 25 January 2007, *Robins and Others*, C-278/05, ECLI:EU:C:2007:56, paragraph 71; Judgment of the Court of Justice of 4 July 2000, *Haim*, C-424/97, ECLI:EU:C:2000:357, paragraph 38; Judgment of the Court of Justice of 23 May 1996, *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)*, C-5/94, ECLI:EU:C:1996:205, paragraph 28.

<sup>120</sup> In some cases, however, the national courts accepted the principle of responsibility of the State. In that sense, see Administrative Court of Appeal of Marseille, *CTC v Corsica Ferries France*, 12 February 2018; Rapport d'expertise, *CTC v Corsica Ferries France*, 28 February 2019, N/REF: 500060, Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 152, available at <https://state-aid-caselex-accept.mybit.nl/report>.

<sup>121</sup> Judgment of the Court of Justice of 5 March 1996, *Brasserie du pêcheur v Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others*, C-46/93 and C-48/93, ECLI:EU:C:1991:428, paragraphs 87 and 90.

- (c) More complicated damage quantifications are required where the aid merely leads to a loss of market share. One possible way for dealing with such cases could be to compare the claimant's actual income situation (based on the profit and loss account) with the hypothetical income situation had the unlawful aid not been granted<sup>122</sup>;
  - (d) There may be circumstances where the damage suffered by the claimant exceeds the lost profit. This could be the case where, as a consequence of the unlawful aid, the claimant is forced out of business.
- (95) National procedural rules will sometimes allow national courts to rely on an expert's assessment or reasonable estimates for the purpose of determining the actual amount of damage compensation. Where that is the case, and provided the principle of effectiveness<sup>123</sup> is respected, the use of such estimates would also be possible for damages claims arising under Article 108(3) TFEU.
- (96) The possibility to claim damages is, in principle, independent of any parallel Commission investigation concerning the same aid measure. Any ongoing investigation by the Commission does not release national courts from their obligation to safeguard rights of individuals under Article 108(3) TFEU<sup>124</sup>. Since claimants may be able to demonstrate that they suffered a loss due to the premature implementation of the aid and, more specifically, as a result of the beneficiary's illegal time advantage, successful damages claims are also not ruled out where the Commission has already declared the aid compatible by the time the national court decides<sup>125</sup>.
- (97) The Commission has, in a few cases, decided that damages awarded under national law constituted unlawful aid<sup>126</sup>. The Court of Justice recalled that State aid is fundamentally different in its legal nature from damages that national authorities may be ordered to pay

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<sup>122</sup> An interesting case was reported in the Enforcement Study where a French administrative court, following a Commission decision ordering recovery of incompatible aid, decided to award damages for loss of market share to the main competitor of the beneficiary. The court of appeal partially quashed the previous ruling on the estimation of damages and consequently appointed an independent expert to calculate the exact amount of compensation. The expert assessed the number of customers that had shifted from the complainant to the beneficiary because of the incompatible aid and quantified the amount of income subsequently lost. Such quantification is often complex and will depend on the characteristics of the market and the number of competitors. See Annex 3: Country reports of the 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 152, Case Summary FR6: Tribunal administratif de Bastia, 23 February 2017, available at <https://state-aid-caselex-accept.mybit.nl/report>. See also, Court of Appeal of Marseille, *CTC v Corsica Ferries France*, 12 February 2018; Rapport d'expertise, *CTC v Corsica Ferries France*, 28 February 2019, N/REF: 500060.

<sup>123</sup> See above Section 2.2.

<sup>124</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 44; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraphs 57 to 58.

<sup>125</sup> Judgment of the Court of Justice of 12 February 2008, *CELF et ministre de la Culture et de la Communication*, C-199/06, ECLI:EU:C:2008:79, paragraphs 53 and 55; Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 60.

<sup>126</sup> Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of 11 December 2013 ([OJ L 232, 4.9.2015, p. 43](#)).

to individuals in compensation for the damage they have caused<sup>127</sup>. However, when ruling on the compensation to third parties for the costs incurred as a direct result of an unlawful aid, national courts must be careful not to adopt decisions having the sole effect of enlarging the circle of beneficiaries<sup>128</sup>.

- (98) In a few other instances, beneficiaries of unlawful aid tried to claim damages from the State after having been ordered to reimburse the amount. Usually, these beneficiaries put forward arguments concerning the alleged breach of their legitimate expectations. Nevertheless, the Court of Justice held that an unlawfully granted measure could not generate any legitimate expectation for the beneficiary, which should be able to determine whether the correct procedure for the granting of the aid has been followed<sup>129</sup>.
- (99) Damages actions are usually directed against the State aid granting authority. In the ‘*SFEI*’ judgment, the Court of Justice explicitly addressed the question of whether direct damages actions can be brought against the beneficiary under European Union law and concluded that, because Article 108(3) TFEU does not impose any direct obligations on the beneficiary, the breach of that Article is not a sufficient basis for the recipient to incur liability<sup>130</sup>. This is without prejudice to the possibility of bringing a damages action against the beneficiary in accordance with national law, for instance on the basis of national provisions governing non-contractual liability<sup>131</sup>.

## 5. COOPERATION BETWEEN THE COMMISSION AND NATIONAL COURTS

- (100) The Commission must support national courts in fulfilling their key role in the enforcement of State aid rules, pursuant to Article 4(3) TEU. Conversely, national courts can request the Commission’s assistance when applying these rules in the context of a pending case. Close cooperation between the courts of the Member States and the Commission contributes to an increased level of consistency<sup>132</sup> and effectiveness in the application of State aid rules across the European Union.

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<sup>127</sup> Judgment of the Court of Justice of 27 September 1988, *Asteris and Others v Greece and EEC*, C-106 to 120/87, ECLI:EU:C:1988:457, paragraph 23; Judgment of the Court of Justice of 21 December 2016, *Commission v Aer Lingus*, C-164/15 P and C-165/15 P, ECLI:EU:C:2016:990, paragraph 72.

<sup>128</sup> Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 57.

<sup>129</sup> Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraphs 98 to 104; Judgment of the Court of Justice of 15 December 2005, *Unicredito Italiano*, C-148/04, ECLI:EU:C:2005:774, paragraph 104; Judgment of the Court of Justice of 19 March 2015, *OTP Bank*, C-672/13, ECLI:EU:C:2015:185, paragraph 77.

<sup>130</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraphs 72 to 74.

<sup>131</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 75. In situations involving a conflict of laws, the law applicable is determined by Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) ([OJ L 199, 31.7.2007, p. 40](#)).

<sup>132</sup> Recital 37 of the Procedural Regulation ([OJ L 248, 24.9.2015, p. 12](#)).

## 5.1. Commission's assistance to national courts

- (101) When supporting national courts, the Commission must respect its duty of professional secrecy and safeguard its own functioning and independence<sup>133</sup>. In fulfilling its duty under Article 4(3) TEU towards national courts, the Commission is committed to remaining neutral and objective. The Commission may ask national courts to transmit the information necessary to provide the requested assistance. When the Commission assists national courts, it will not serve the private interests of the parties. The Commission's contribution is, indeed, part of its duty to ensure the correct implementation of State aid rules and defend the public interest<sup>134</sup>. The Commission will, therefore, not hear any of the parties involved in the national proceedings.
- (102) The support offered to national courts under Article 29 of the Procedural Regulation is without prejudice to the possibility or obligation<sup>135</sup> for national courts to ask the Court of Justice for a preliminary ruling on the interpretation or the validity of European Union law in accordance with Article 267 TFEU<sup>136</sup>.

### 5.1.1. The means of cooperation

- (103) Article 29 of the Procedural Regulation codified three means of cooperation between the Commission and national courts. Sections 5.1.1.1, 5.1.1.2 and 5.1.1.3 of this Notice explain in further detail these means of cooperation.

#### 5.1.1.1. Transmission of information to national courts

- (104) Pursuant to Article 29 of the Procedural Regulation, national courts may ask the Commission to transmit information in its possession to them<sup>137</sup>.
- (105) National courts may ask the Commission to provide information on State aid procedures before it. This includes, for instance, information on: (i) whether a procedure regarding a State aid measure is pending before the Commission; (ii) whether a Member State has duly notified a certain aid measure in accordance with Article 108(3) TFEU; (iii) whether the Commission has initiated a formal investigation; and (iv) whether the Commission has already adopted a decision<sup>138</sup>.

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<sup>133</sup> Order of the Court of Justice of 6 December 1990, *Zwartveld and Others*, C-2/88 Imm., ECLI:EU:C:1990:440, paragraphs 10 and 11; Judgment of the General Court of 18 September 1996, *Postbank v Commission*, T-353/94, ECLI:EU:T:1996:119, paragraph 93.

<sup>134</sup> Recital 37 of the Procedural Regulation ([OJ L 248, 24.9.2015, p. 12](#)).

<sup>135</sup> See Judgment of the Court of Justice of 6 October 1982, *CILFIT v Ministero della Sanità*, C-283/81, ECLI:EU:C:1982:335, paragraphs 14 to 20; Judgment of the Court of Justice of 11 September 2008, *Unión General de Trabajadores de la Rioja*, C-428/06 to C-434/06, ECLI:EU:C:2008:488, paragraphs 42 and 43; Judgment of the Court of Justice of 28 July 2016, *Association France Nature Environnement*, C-379/15, ECLI:EU:C:2016:603, paragraphs 47 to 50; Judgment of the Court of Justice of 15 September 2016, PGE, C-574/14, ECLI:EU:C:2016:686, paragraph 40; Judgment of the Court of Justice of 4 October 2018, *Commission v France (Advance Payment)*, C-416/17, ECLI:EU:C:2018:811, paragraphs 108 and following.

<sup>136</sup> Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 44; Judgment of the Court of Justice of 15 September 2016, PGE, C-574/14, ECLI:EU:C:2016:686, paragraph 40.

<sup>137</sup> Procedural Regulation, Article 29(1), first part.

<sup>138</sup> Upon receipt of this information, the requesting national court may ask for regular updates on the state of play.

- (106) In addition, national courts may request that the Commission transmits documents in its possession. This can include copies of existing Commission decisions if these decisions have not already been published on the Commission's website, factual data, statistics, market studies and economic analyses.
- (107) The duty of loyal cooperation enshrined in Article 4(3) TEU requires the Commission to provide national courts with whatever information they may seek<sup>139</sup>. This also includes information covered by the obligation of professional secrecy.
- (108) In transmitting information to national courts, the Commission must uphold the guarantees given to natural and legal persons under Article 339 TFEU<sup>140</sup>. Article 339 TFEU prevents members, officials and other servants of the Commission from disclosing information that is covered by the obligation of professional secrecy. This can include confidential information and business secrets.
- (109) Where the Commission intends to transmit information covered by professional secrecy to a national court, it will ask the national court to confirm that it will guarantee the protection of such confidential information and business secrets. Where the national court offers such a guarantee, the Commission will transmit the information requested, indicating those parts that are covered by professional secrecy and should therefore not be disclosed. Where, on the other hand, the national court cannot offer such a guarantee, the Commission will refrain from transmitting the information concerned<sup>141</sup>.
- (110) The Commission may also not be able to disclose information to national courts in other situations. In particular, the Commission may refuse to transmit information to a court of a Member State where such transmission would interfere with the functioning and independence of the European Union. This would be the case where disclosure would jeopardise the accomplishment of the tasks entrusted to the Commission<sup>142</sup> (for example, information concerning the Commission's internal decision-making process).
- (111) To ensure efficiency in its cooperation with national courts, the Commission endeavours to provide national courts with the requested information within 1 month from the date of the request. Where the Commission needs to ask national courts for further clarifications on their initial requests or to consult third parties directly affected

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<sup>139</sup> Judgment of the General Court of 18 September 1996, *Postbank v Commission*, T-353/94, ECLI:EU:T:1996:119, paragraph 64; Order of the Court of Justice of 13 July 1990, *Zwartveld and Others*, C-2/88 Imm., ECLI:EU:C:1990:315, paragraphs 16 to 22.

<sup>140</sup> Judgment of the Court of Justice of 28 February 1991, *Delimitis v Henninger Bräu*, C-234/89, ECLI:EU:C:1991:91, paragraph 53; Judgment of the General Court of 18 September 1996, *Postbank v Commission*, T-353/94, ECLI:EU:T:1996:119, paragraph 90.

<sup>141</sup> Judgment of the General Court of 18 September 1996, *Postbank v Commission*, T-353/94, ECLI:EU:T:1996:119, paragraph 93; Order of the Court of Justice of 6 December 1990, *Zwartveld and Others*, C-2/88 Imm., ECLI:EU:C:1990:440, paragraphs 10 and 11.

<sup>142</sup> Order of the Court of Justice of 6 December 1990, *Zwartveld and Others*, C-2/88 Imm., ECLI:EU:C:1990:440, paragraph 11; Judgment of the Court of Justice of 26 November 2002, *First and Franex*, C-275/00, ECLI:EU:C:2002:711, paragraph 49; Judgment of the General Court of 18 September 1996, *Postbank v Commission*, T-353/94, ECLI:EU:T:1996:119, paragraph 93.

by the transmission of the information, the one-month period starts to run afresh from the moment the clarification is received or the consultation concluded<sup>143</sup>.

#### *5.1.1.2. Transmission of opinions concerning the application of State aid rules*

- (112) Article 29 of the Procedural Regulation also provides the possibility for national courts to ask the Commission to provide its opinion on questions concerning the application of State aid rules<sup>144</sup>.
- (113) When applying State aid rules to a case pending before them, national courts must respect the relevant European Union rules and case law of the Union Courts. Without prejudice to the ultimate interpretation of the Treaties by the Union Courts, national courts may find guidance on the application of State aid rules in the Commission's decision-making practice, as well as in the relevant Commission notices and guidelines. National courts may also find guidance on previous Commission opinions or observations published on the Commission's website, when the issues at stake present elements of analogy with those faced by other national courts<sup>145</sup>.
- (114) However, there may be circumstances in which previous Commission decisions or opinions and Commission notices and guidelines do not provide sufficient guidance to the courts of the Member States. In accordance with the principle of sincere cooperation enshrined in Article 4(3) TEU, and given the crucial role played by national courts in State aid enforcement, the Commission offers the courts of the Member States the opportunity to request the Commission's opinion on relevant issues concerning the application of State aid rules<sup>146</sup>.
- (115) Requests for a Commission opinion may, in principle, cover all economic, factual or legal matters relating to State aid that arise in the context of the national proceedings. The courts of the Member States may ask the Commission, among other things:
- (a) Whether a certain measure presents aid elements within the meaning of Article 107(1) TFEU and, if so, request guidance on how to quantify the aid amount. Such requests can relate to a specific State aid element under Article 107 TFEU (namely, notion of undertaking, existence of a selective advantage, imputability of the measure to the Member State and involvement of State resources, possible distortion of competition and effect on trade between Member States).
  - (b) Whether a certain aid measure fulfils a requirement of a block exemption regulation so that prior notification to the Commission is not necessary and the standstill obligation provided in Article 108(3) TFEU does not apply.
  - (c) Whether an individual aid falls under an aid scheme notified to the Commission and declared compatible with the internal market by a Commission decision, or

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<sup>143</sup> This could be the case, for example, for certain types of information submitted by a private person, or where information submitted by one Member State is being requested by a court of a different Member State.

<sup>144</sup> Procedural Regulation, Article 29(1), second part.

<sup>145</sup> See Section 5.1.2.

<sup>146</sup> Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 50.

otherwise qualifies as existing aid, and hence the standstill obligation under Article 108(3) TFEU does not apply.

- (d) Whether exceptional circumstances<sup>147</sup>, which would prevent the national court from ordering full recovery under European Union law, exist.
  - (e) What are the legal prerequisites for damages claims under European Union law and guidance on how to quantify the damage incurred.
- (116) National courts do not have jurisdiction to assess the compatibility of an aid measure on the basis of Article 107(2), Article 107(3), Article 106(2) and Article 93 TFEU<sup>148</sup>. Therefore, they cannot ask the Commission to provide its opinion on the compatibility of a certain aid measure with the internal market. National courts can, however, ask the Commission whether it is already assessing the compatibility of a certain aid measure, as explained in Section 5.1.1.1 above.
- (117) When giving its opinion, the Commission, in line with the principle of sincere co-operation of Article 4(3) TEU, will provide the national court with the factual information or economic or legal clarification sought. Unlike the authoritative interpretation of European Union law by the Union Courts, the Commission's opinion does not legally bind the national court.
- (118) The Commission will provide its opinion to national courts in accordance with their procedural rules and practices. To ensure an effective cooperation with the courts of the Member States, the Commission will endeavour to provide the national court with the requested opinion within 4 months from the date of the request. Where the Commission needs to ask the national court for further clarifications concerning its request, this four-month period may be extended.
- (119) National courts must protect rights of individuals under Article 108(3) TFEU also during the period in which the Commission prepares the requested opinion. As set out above, the national court's obligation to protect rights of individuals under Article 108(3) TFEU, including by way of interim measures<sup>149</sup>, applies irrespective of an outstanding Commission opinion.

#### 5.1.1.3. Submission of *amicus curiae* observations

- (120) Pursuant to Article 29(2) of the Procedural Regulation, the Commission may submit written observations to national courts applying State aid rules. It may also make oral observations with the permission of the national court in question. These observations are also known as '*amicus curiae* observations'. The Commission submits *amicus curiae* observations on its own initiative.

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<sup>147</sup> To that effect, see judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraphs 68 to 71.

<sup>148</sup> Judgment of the Court of Justice of 4 March 2020, *CSTP Azienda della Mobilità v Commission*, C-587/18 P, EU:C:2020:150, paragraph 90; Judgment of the Court of Justice of 19 July 2007, *Lucchini*, C-119/05, EU:C:2007:434, paragraphs 50 to 52.

<sup>149</sup> See *supra*, Section 4.2.3.3.



- (121) The courts of the Member States or the parties to a case pending before a national court may, however, ask the Commission to provide *amicus curiae* observations in a case where State aid matters are at stake. The decision to intervene as *amicus curiae* in a case before a national court is an exclusive prerogative of the Commission and falls entirely within its discretion. The Commission has, therefore, no obligation to reply to these requests or to take a position on them.
- (122) The Commission submits *amicus curiae* observations in the context of national judicial proceedings to ensure a coherent application of Articles 107(1) or 108(3) TFEU<sup>150</sup>. To evaluate the necessity and appropriateness of its contribution, the Commission may consider, among other things:
- (a) Whether the case is expected to have a significance beyond the specific case at hand (for example, where the case involves a general question of State aid);
  - (b) Whether the observations from the Commission may contribute to the effectiveness of the enforcement of State aid rules by the concerned national courts;
  - (c) If the case involves a novel question of substance, which is not covered by the Commission decision-making practice or notices and guidelines; or
  - (d) Whether the case is pending before a court whose judgment cannot be subject to further appeals.
- (123) The Commission fully respects the independence and functioning of national courts. As for the Commission's opinions referred to in Section 5.1.1.2 above, *amicus curiae* observations are not binding on the national court adjudicating the case in which the Commission intervened. Before submitting on its own initiative *amicus curiae* observations, the Commission informs the Member State concerned by sending a letter to its Permanent Representation to the European Union.
- (124) In order to be able to submit useful observations, the Commission may request the relevant national court to transmit documents at its disposal that are necessary for the Commission's assessment of the matter. The Commission will only use those documents for the exclusive purpose of preparing its observations.
- (125) The Procedural Regulation does not provide for a procedural framework within which the *amicus curiae* observations are to be submitted. Therefore, the Commission submits its observations in accordance with the Member States' procedural rules and practices, including those safeguarding the rights of the parties. Where a Member State has not yet established the relevant procedural framework, it is for the national court to determine which procedural rules should be followed for the submission of *amicus curiae* observations in the case pending before it.

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<sup>150</sup> Since 2014, the Commission has submitted *amicus curiae* observations regarding the existence of aid, the definition of service of general economic interest, the execution of the Commission's recovery decisions and guidance on whether to use national or European Union law. In that sense, see 'Final Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001)', Publications Office of the European Union, Luxembourg, 2019, p. 111, available at <https://state-aid-caselex-accept.mybit.nl/report>.

- (126) The national procedural framework should respect the principles set out in Section 2.2 of this Notice. This implies that the national procedural framework for the submission of observations on issues concerning the application of Articles 107(1) and 108(3) TFEU cannot make the submission of such observations (a) excessively difficult or practically impossible (in line with the principle of effectiveness); and (b) more difficult than the submission of observations in court proceedings where equivalent national law is applied (pursuant to the principle of equivalence).

#### 5.1.2. Single contact point and publication of opinions and *amicus curiae* observations

- (127) For more effective cooperation and communication with the courts of the Member States, the Commission has established a single contact point where national courts can address their requests:

European Commission  
Directorate General for Competition  
COMP Amicus State Aid  
1049 Bruxelles/Brussel  
BELGIQUE/BELGIË  
Telephone: 0032 2 29 76271  
Fax: 0032 2 29 53584  
E-mail: [COMP-AMICUS-STATE-AID@ec.europa.eu](mailto:COMP-AMICUS-STATE-AID@ec.europa.eu)

- (128) The Commission invites national courts to continue using this single contact point to convey to the Commission any information or request in accordance with Sections (5.1.1.1), (5.1.1.2) and (5.1.1.3) of this Notice. National courts can send their submissions in any of the 24 European Union official languages<sup>151</sup>.
- (129) The Commission will report on its cooperation with national courts in its annual report on competition policy. It will also make its opinions and observations available on its website<sup>152</sup>.
- (130) When submitting opinions or *amicus curiae* observations, the Commission asks national courts to authorise their publication. This allows the Commission to publish on its website the opinions and *amicus curiae* observations submitted by the Commission and, when available, the judgments rendered by the national court concerned.
- (131) The Commission will endeavour to set up a dedicated online platform where national courts can send to the Commission questions about State aid policy other than those referred to in Sections (5.1.1.1), (5.1.1.2) and (5.1.1.3) of this Notice, which may arise in their daily work.

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<sup>151</sup> A complete list of the European Union official languages is provided in Article 55(1) TEU.

<sup>152</sup> Publication of the Commission's opinions and *amicus curiae* observations is subject to the national court's consent.

## 5.2. National courts' assistance to the Commission

- (132) The duty of loyal cooperation enshrined in Article 4(3) TEU also implies that Member States, including their judicial authorities, have to assist the European Union institutions with a view to attaining the objectives of the European Union.
- (133) To ensure the effective enforcement of State aid rules, national courts are invited to forward to the Commission without delay a copy of any written judgment they have issued following the provision by the Commission of information or an opinion, or its submission of *amicus curiae* observations. This enables the Commission to become aware in a timely fashion of cases for which it might be appropriate to submit observations, should one of the parties lodge an appeal against the judgment. When transmitting a judgment, national courts indicate to the Commission whether they give their authorisation for that judgment to be published on the Commission's website.
- (134) For a more effective and consistent application of State aid rules, the Commission encourages the Member States to set up coordination points for national judges dealing with State aid issues. The Commission also takes the view that the creation of formal or informal networks of judges dealing with State aid matters, either at national or European level, may be particularly important for knowledge sharing. Central coordination points and networks of judges may allow national judges to share best practices in the field of State aid and facilitate the transmission of information by the Commission on any recent developments in State aid policy by way of, for instance, training courses and newsletters.

## 6. CONSEQUENCES OF THE FAILURE TO IMPLEMENT STATE AID RULES AND DECISIONS

- (135) As indicated in Sections 4.2.1 and 4.2.2 of this Notice, national courts may be called upon to apply directly in their national legal systems the provisions of Articles 107(1) and 108(3) TFEU. Where national courts, by their rulings, grant new aid in breach of the standstill obligation, the Commission may initiate an investigation procedure pursuant to Article 12 of the Procedural Regulation to assess the compatibility of the unlawful State aid with the internal market. In addition, where the courts of the Member States fail to ensure compliance with the obligations stemming from a Commission recovery decision or the Treaties<sup>153</sup>, the Commission may initiate infringement proceedings.
- (136) As organs of the Member States, national courts are called upon to take appropriate measures to ensure that recovery decisions are effectively implemented. The consequences of Member States' failure to implement Commission recovery decisions are outlined in the Commission Notice on the recovery of unlawful and incompatible State aid<sup>154</sup>.

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<sup>153</sup> Judgment of the Court of Justice of 11 September 2014, *Commission v Germany*, C-527/12, ECLI:EU:C:2014:2193, paragraph 56.

<sup>154</sup> ([OJ C 247, 23.7.2019, p. 1-23](#)), Section 6.

- (137) National courts must also safeguard the rights of individuals faced with a possible breach of the standstill obligation<sup>155</sup>. As indicated in Section 6.2 of this Notice, Member States, including their national courts, which fail to safeguard these rights fail to fulfil their obligations under European Union law<sup>156</sup>.

### **6.1. Procedures before the Commission regarding unlawful aid**

- (138) National courts may infringe directly Article 108(3) TFEU by granting new aid in the context of their proceedings. This can occur where a national court issues a ruling affecting the implementation of an act granting State aid. This is the case for instance, where the interpretation of a contract or an aid-granting decision has the effect of prolonging the original duration of an aid measure<sup>157</sup>.
- (139) As a result, national courts have to comply with Article 108(3) TFEU and notify to the Commission any decision amending or prolonging an act granting State aid, for instance by way of interpreting it<sup>158</sup>.
- (140) If the national court does not ensure compliance with the standstill obligation by notifying the new aid and subjecting it to the Commission's review, the Commission may initiate an investigation concerning the unlawful State aid on its own initiative or after receipt of a complaint from any interested party pursuant to Article 12 of the Procedural Regulation.

### **6.2. Infringement proceedings**

- (141) Pursuant to Article 258 TFEU, if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it may launch an infringement procedure. The purpose of the procedure is to end the infringement. The Commission may refer the matter to the Court of Justice following a pre-litigation phase where it delivers a reasoned opinion after a formal exchange of views with the Member State concerned.
- (142) When national courts do not draw the appropriate consequences from the breach of Article 108(3) TFEU, they infringe their obligations under the Treaties. This may be the case where national courts do not prevent an unlawful measure from being implemented or do not order its recovery<sup>159</sup>.

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<sup>155</sup> Judgment of the Court of Justice of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, ECLI:EU:C:2006:644, paragraph 38; Judgment of the Court of Justice of 21 November 2013, *Deutsche Lufthansa*, C-284/12, ECLI:EU:C:2013:755, paragraph 28.

<sup>156</sup> Judgment of the Court of Justice of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 66; Judgment of the Court of Justice of 5 March 2019, *Eesti Pagar*, C-349/17, ECLI:EU:C:2019:172, paragraph 110.

<sup>157</sup> Whether the national court delivers its ruling in the context of interlocutory proceedings or substantive procedures is irrelevant, as in both cases the ruling may be liable to affect the aid measure, even if only temporarily.

<sup>158</sup> Judgment of the Court of Justice of 26 October 2016, *DEI and Commission v Alouminion tis Ellados*, C-590/14 P, ECLI:EU:C:2016:797, paragraphs 107 and 108.

<sup>159</sup> Judgment of the Court of Justice of 21 November 1991, *Fédération nationale du commerce extérieur des produits alimentaires and Others v France*, C-354/90, ECLI:EU:C:1991:440, paragraph 12; Judgment of the Court of Justice of 11 July 1996, *SFEI and Others*, C-39/94, ECLI:EU:C:1996:285, paragraph 70.

- (143) Failure by national courts to safeguard the rights of individuals in violation of their obligations stemming from Article 108(3) TFEU may also give **rise** to liability on the part of the Member State. The Court of Justice has held that Member States are liable for damage resulting from infringements of European Union law, including infringements stemming from a decision of a national court adjudicating at last instance<sup>160 161</sup>.

## **7. FINAL PROVISIONS**

- (144) This Notice replaces the 2009 Enforcement Notice.
- (145) This Notice aims to provide guidance to national courts in the application of the State aid rules. It does not bind the national courts or affect their independence.
- (146) The Commission may review this Notice on the basis of modifications of the applicable European Union rules or future important developments in the case law.

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<sup>160</sup> Judgment of the Court of Justice of 30 September 2003, *Köbler*, C-224/01, ECLI:EU:C:2003:513, paragraph 50.

<sup>161</sup> If the Commission considers that the Member State has failed to fulfil the obligations established in a judgment pursuant to Article 258(2) TFEU, the Commission may bring the matter to the Court of Justice pursuant to Article 260(2) TFEU, after giving the Member State concerned the opportunity to submit its observations.