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THE NEW STATE AID ENFORCEMENT NOTICE

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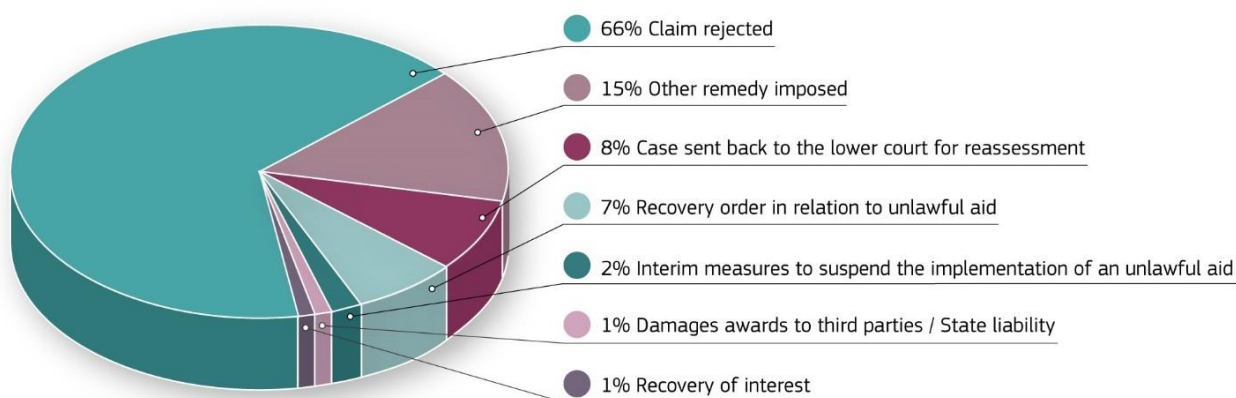
On 23 July 2021, the European Commission has adopted a new notice on the enforcement of EU State aid rules by national courts¹ (the “**New Enforcement Notice**”).

The New Enforcement Notice aims at providing:

- ❖ Concrete guidance on the enforcement of State aid rules at national level focusing on cases where private parties seek remedies for the unlawful implementation of aid (“private enforcement”);
- ❖ Clarifications on general principles applicable, also based on updated EU case law;
- ❖ Clarifications on the respective roles of the Commission and of the national courts (NCs);
- ❖ Guidance on the use of the cooperation tools between the NCs and the Commission.

The New Notice takes stock of the results of a Study on the enforcement of State aid rules and decisions by national courts² showing that remedies in State aid-related cases are still very uncommon.

Chart on the percentage of remedies awarded by national courts in cases of private enforcement of State aid rules at EU level in the period between 2007 and 2018



Data extracted from the Study on the enforcement of State aid rules and decisions by national courts³ figures 25, page. 77

¹ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2021.305.01.0001.01.ENG

² <https://state-aid-caselex-accept.mybit.nl/>

³ Ibidem.

Since Article 108(3) TFEU has direct effect, interested parties can rely on it before national courts, claiming a breach of the **standstill obligation**. National courts have a key role in safeguarding their rights, as they can, unlike the Commission:

- ❖ Order the suspension or recovery of **unlawful aid** regardless of its compatibility with the internal market;
- ❖ Use a wide range of **interim measures** under national law;
- ❖ **Award damages** to third parties, and notably competitors of the aid beneficiary.

The Standstill Obligation: Under Article 108(3) TFEU Member States must, first, notify the Commission of any new aid measure or alterations to existing aid and, second, not put into effect such measure until the Commission has assessed its compatibility with the internal market. The implementation of new aid in breach of the standstill obligation makes the aid "unlawful".

Recovery: removal of the aid by means of recovery is the logical consequence of its unlawfulness. When unlawful aid has been paid to the beneficiary, national courts must, in principle, order its full repayment, including 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 ('illegality interest').

Damage claims: Third parties - and notably competitors of the beneficiaries - can sue national authorities directly under Article 108(3) TFEU, to ask for compensation of any loss suffered due to the unlawful grant of the aid, regardless of the existence of a Commission decision declaring the aid incompatible. They can also sue the beneficiaries under national rules on tort liability.

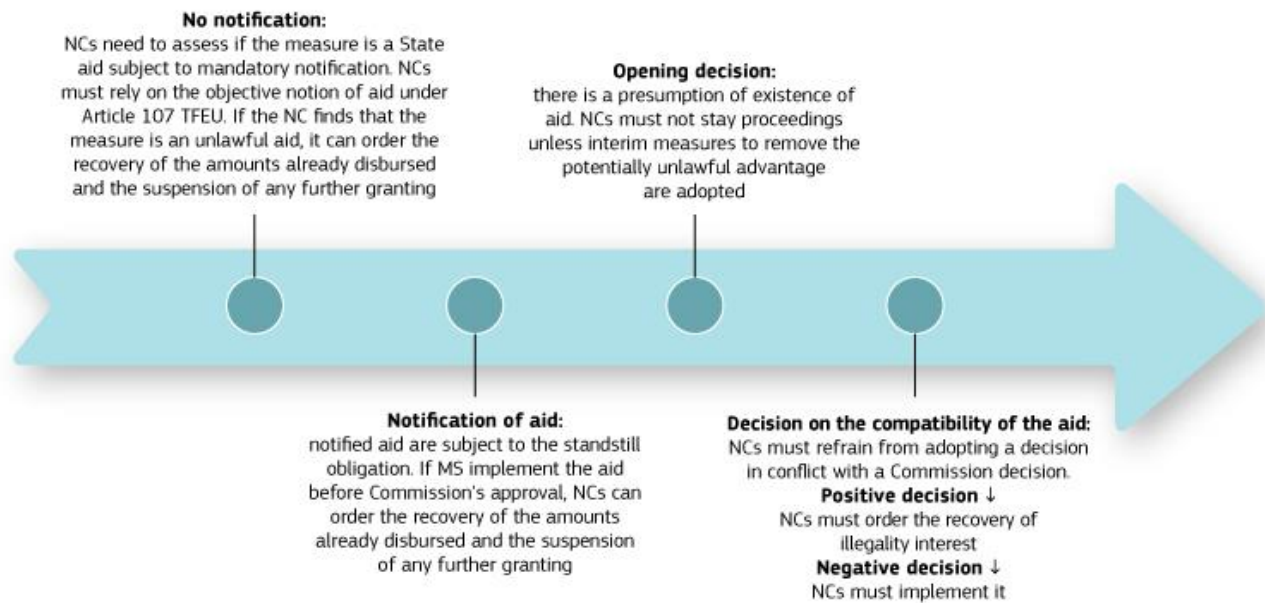
To fulfill their role, national courts share with the Commission the competence to ascertain the existence of State aid within the meaning of Article 107 (1) TFEU. Moreover, they have the important task of checking whether measures represent existing aid (i.e. aid already approved by the Commission or granted before the Member State accession to the EU) or meet all the conditions for being exempted from notification (**such as those laid down in the De Minimis or the General Block Exemption Regulation**).

Block Exemptions: Through the General Block Exemption Regulation ('GBER') and other block exemptions, the Commission exercises its approval power ex ante, as schemes and ad hoc aid complying with certain general and specific conditions are considered compatible with the internal market. Block exemptions are the legal basis for the great majority of aid granted in the EU. National courts can play an important role in adopting remedies against unlawful aid that is granted under a block exemption regulation without complying with all its conditions.

The assessment of the compatibility of State aid with the internal market, i.e. the possible application of the exceptions provided in Article 107(2) and (3) TFEU to the general prohibition of State aid, is an **exclusive competence of the Commission**. The Commission's power to ultimately approve or prohibit an aid measure can create some constraints in the national courts' interpretation of the notion of aid and consequent enforcement of Article 108 (3) TFEU.

Parallel National Courts and Commission proceedings: even in the absence of a final Commission decision, the role of national courts is to prevent any potentially unlawful implementation of State aid. In case of pending Commission investigation or in case of doubts as to existence of an unlawful aid, national courts cannot simply stay the proceedings until the adoption of the final Commission decision, but must adopt appropriate measures to avoid that the potential aid remains available to the beneficiary.

Chart on the possible interplay between national courts and Commission proceedings:

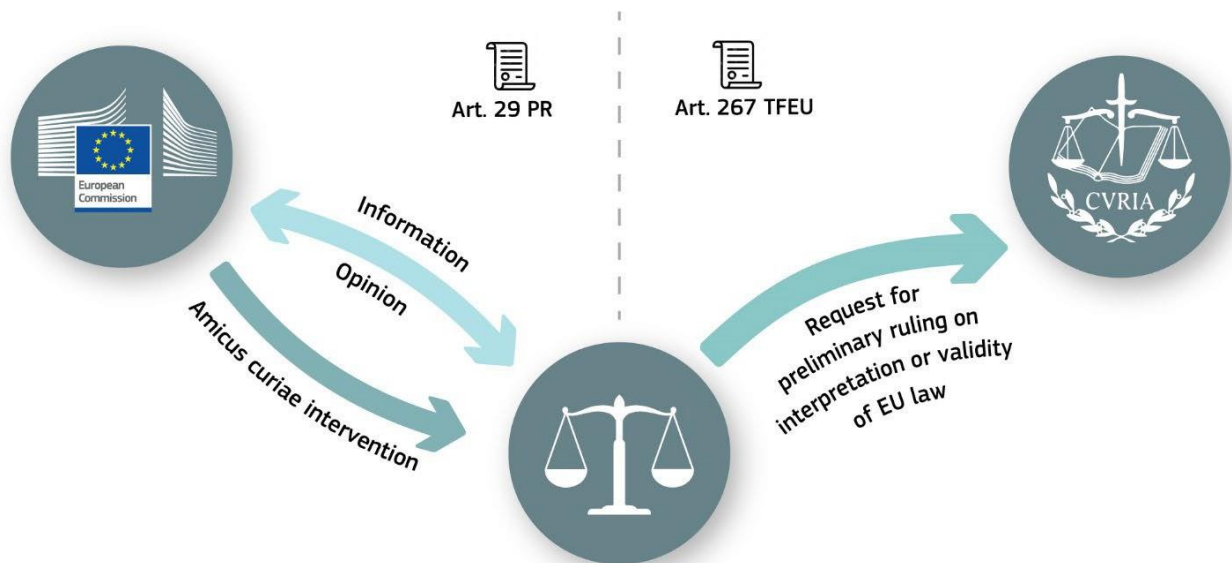


Practical case example: Let's imagine that a national court receives a complaint by an undertaking excluded in a competitive tender alleging that its national authorities are implementing a State aid in breach of Article 108(3) TFEU. The first question the national court has to answer is whether the measure at stake is State aid, pursuant to the objective notion of article 107 (1) TFEU. If so, it has to exclude that it represents existing or exempted aid to establish that is subject to the standstill obligation. If so, the national court has to decide which measure it shall adopt to ensure the full effectivity of the standstill obligation: depending on the specific circumstances of the case, it can order the suspension of the payment to the beneficiary or order the recovery.

The national court has to check if there is an investigation on the measure pending before the Commission as the extent of its competence could depend on that. Given the Commission's preliminary finding in the decision opening the investigation, and the exclusive competence to assess the compatibility of the aid with the internal market, the national court will not be able to rule out the existence of aid, and will have to order the recovery of the amounts already disbursed and the suspension of any further granting. Interim measures may be the most suited instrument in order to safeguard both the interests of the parties concerned and the effectiveness of the Commission's investigation, for instance, the order to deposit of the contested amounts on blocked account, which does not definitively dispossess the beneficiary and prevents potential illegality interests from further accruing after the deposit.

What can a national court do in case of doubts arising during a national judicial proceeding?

National Courts have different tools at their disposal:



- ❖ They can ask **information** on, *inter alia*:
 - ◆ Whether a procedure regarding a State aid measure is pending before the Commission;
 - ◆ whether a Member State has duly notified a certain aid measure in accordance with Article 108(3) TFEU;
 - ◆ Whether the Commission has initiated a formal investigation; and
 - ◆ Whether the Commission has already adopted a decision.
 - ◆ The Commission endeavours to provide national courts with the requested information **within 1 month**.

- ❖ They can request for a Commission **opinion** on, *inter alia*:
 - ◆ Whether a certain measure has aid elements within the meaning of Article 107(1) TFEU and, if so, request guidance on how to quantify the amount of the aid;
 - ◆ Whether a certain aid measure fulfils a requirement of a block exemption regulation or a requirement of a *de minimis* regulation.
 - ◆ The Commission endeavours to provide national courts with the requested information **within 4 months**.

- ❖ They can/must trigger a reference under Article 267 TFEU to the Court of Justice for a preliminary ruling on the interpretation or validity of a Commission decision, or more generally on the interpretation of the elements of the notion of aid.

The Commission can submit **amicus curiae observations** on its own initiative, in national cases of particular relevance for State aid law. N.B.: National courts and parties to national court proceedings can ask the Commission to intervene, but this decision remains within the Commission's discretion. Commission's opinions and *amicus curiae* interventions are NOT binding on national courts.

Commission opinions and observations are available on the Commission's website⁴.

⁴ https://ec.europa.eu/competition-policy/state-aid/national-courts_en

For more effective cooperation and communication with national courts, the Commission has established a **single contact point** to which national courts or parties can address their requests:

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For a more detailed overview of the New Enforcement Notice, you can consult our **Enforcement Policy Brief** via the QR code ↓



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